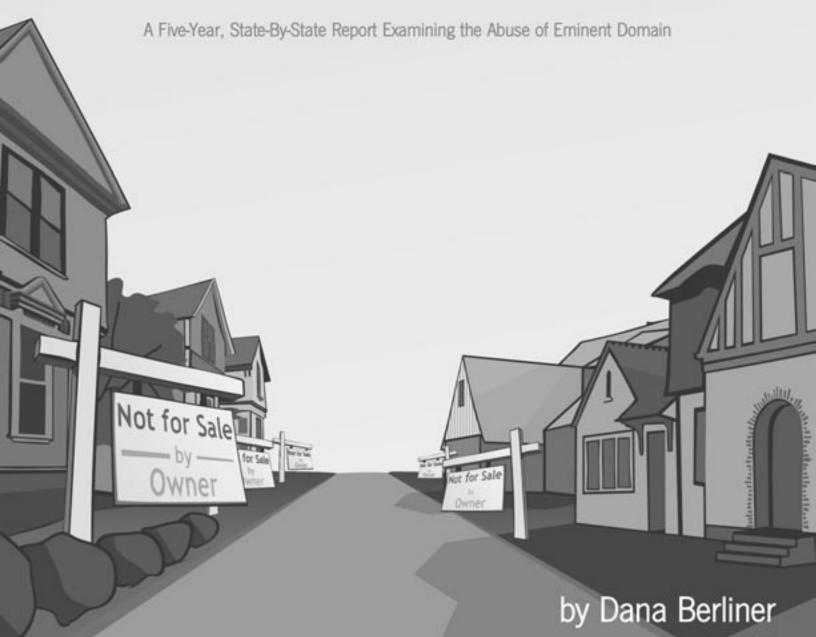
# Public Power, Private Gain



April 2003

#### Foreword by Douglas W. Kmiec

"Government is instituted to protect property of every sort," wrote Madison, and for this reason, "that alone is a just government, which impartially secures to every man, whatever is his own." This precept of justice was embodied in the Fifth Amendment's protection of private property, where by constitutional text, property can be taken only for public use and upon the payment of just compensation. For reasons that are more regrettable than rational, the courts have greatly relaxed the public use requirement. Inevitably, this invites the taking or eminent domain power to be misused—either by inefficient or corrupt application or both.

The extent of this abuse is widespread, but until recently, largely unaddressed—in part because isolated landowners confronted with costly and cumbersome condemnation procedures seldom have the legal or political wherewithal to stand against the winds of power. The public advocacy and litigation defense of the Institute for Justice is changing this by standing with landowners singled out for disfavor. Whether family, farmer, or small merchant, these owners wish only for what Madison said our Constitution guarantees—the protection of property.

This comprehensive report, prepared by the Institute for Justice and senior attorney Dana Berliner, carefully catalogues the extent of the problem of eminent domain abuse. It illustrates how municipal good intention, often for urban redevelopment or economic promise, can be unfairly built upon the rightful ownership of others. When projects are carried out heavy-handedly and unnecessarily, not through voluntary transaction, but coercion, the protection of property is eroded and our bedrock freedom to decide upon our own course is worn away.



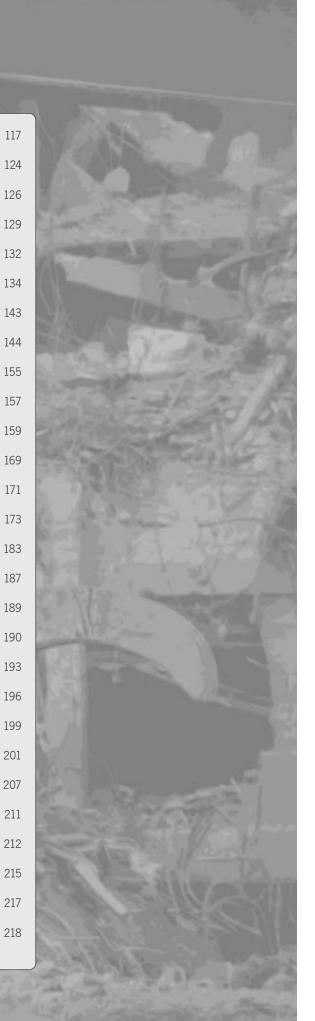
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"...nor shall private property be taken for public use without just compensation." —U.S. Constitution, Amendment V.

## Public Power, Private Gain

by Dana Berliner

## THE DESPOTIC POWER

As early as 1795, the U.S. Supreme Court described the power of eminent domain—where the government takes someone's property for a "public use"—as "the despotic power." Eminent domain has the potential to destroy lives and livelihoods by uprooting people from their homes and businesspeople from their shops. With eminent domain, the government can force a couple in their 80s to move from their home of 50 years. Eminent domain is the power to evict a small family business, even if that means the business will never reopen.

The danger of such an extreme power led the authors of the U.S. Constitution and state constitutions to limit the power of eminent domain in two ways. First, the government had to pay "just compensation." And second, even with just compensation, the government could take property only for "public use." To most people, the meaning of "public use" is fairly obvious—things like highways, bridges, prisons, and courts.

No one—at least no one besides lawyers and bureaucrats—would think "public use" means a casino, condominiums or a private office building. Yet these days, that's exactly how state and local governments use eminent domain—as part of corporate welfare incentive packages and deals for more politically favored businesses. This is the first report ever to document and quantify the uses and threats of eminent domain for private parties. We have compiled this information from published accounts and court papers covering the five-year period from January 1, 1998 through December 31, 2002. The results are chilling.



## Eminent Domain for Private Benefit, Nationwide

• 10,282+ filed or threatened condemnations for private parties

- 3,722+ properties with condemnations filed for the benefit of private parties
- 6,560+ properties threatened with condemnation for private parties
- 4,032+ properties currently living under threat of private use condemnation
- 41 states with reports of actual or threatened condemnations for private parties
- 9 states with no reports of either actual or threatened private use condemnations

## THE TIP OF THE ICEBERG

The information in this report represents only a fraction of the number of cases where private property has been condemned for another private party. There is no official database of condemnation for private parties. Many, if not most, private condemnations go entirely unreported in public sources and thus could not be identified for this report. To give some sense of how few private condemnations are reported, the Connecticut courts recorded 543 redevelopment condemnations from 1998 through 2002. That's 17.5 times more than the 31 we found reported in newspapers. Connecticut is the only state that records those numbers, and it may not be representative, but there are obviously many more condemnations for private use than even this report contains. This report contains every instance of actual or threatened condemnation for private parties between 1998 through 2002 that we know about—over 10,000 in total. But even that number represents only the tip of the iceberg.

## HOW THE STATES COMPARE

In terms of sheer numbers of condemnations for private parties, California, Kansas, Michigan, Maryland and Ohio lead the pack for most private use condemnations filed. Pennsylvania, Florida and New Jersey also have high numbers of threatened condemnations for the benefit of private parties. Detroit takes first place as the worst city in terms of condemning property for private parties, while Riviera Beach, Florida, San Jose, California, and Philadelphia have placed the greatest number of private owners under threat of condemnation for private parties. With the assistance of a state agency, New York City has become the site of some of the most egregious condemnations for private use. Some states stand out. From a legal standpoint, New York, Missouri and Kansas are the worst states to live in for owners who hope to avoid condemnation for private parties, while Idaho, Montana, New Mexico, South Dakota and Wyoming appear to be the best. Those states, as well as Alaska, Delaware, Georgia, New Hampshire and Washington, D.C. have no reported uses of eminent domain for private parties. Certain other states, like Arkansas, Illinois, Kentucky, South Carolina and Washington also appear to have a legal climate disfavoring private condemnations, but enforcement is either spotty or unknown.

## A FEW EXAMPLES OF THE ABUSE OF EMINENT DOMAIN FOR PRIVATE PARTIES

#### In the past five years, governments have:

- Evicted four elderly siblings in Bristol, Connecticut, from their home of the last 60 years for an industrial park;
- Destroyed a black middle-class neighborhood in Atlantic City (including the home of a woman who lived on a street named after her father) in order to build a tunnel to a casino;
- Removed a woman in her 80s from her home of 55 years for the claimed purpose of expanding a sewer plant, but Bremerton, Washington actually gave her former home to an auto dealership;
- Condemned 10 homes for a shopping center and parking lot in Hurst, Texas and forced them to move while the spouses in two of the homes were dying of cancer;
- Condemned a family's home in Florida so that the manager of a planned new golf course could live in it;
- Designated a neighborhood of colonial homes in Lakewood, Ohio blighted because their yards were too small and they lacked two-car attached garages. The City's redevelopment plans call for upscale condominiums and retail;
- Condemned small businesses for The New York Times and the New York Stock Exchange;
- Threatened to condemn a Walgreens in Cincinnati to build a Nordstrom; condemned a CVS to relocate the Walgreens; and condemned several small businesses to relocate the CVS. The Nordstrom was never built and became a parking lot;
- Begun condemning a bus company in Edison Township, New Jersey, for a Walgreens. The Township's consultant said the bus company was "unproductive and stagnant," but actually it transports the local schoolchildren;
- Planned to force the relocation of 500 low-income seniors in Aurora, Colorado, over the next 10 years;
- Condemned property in Boston to help the owner get rid of its tenants and condemned property in Knoxville, Tennessee to help the tenants get rid of their landlord;
- Labeled as blighted one-tenth of the geographical area of San Jose, occupied by one-third of its citizens, making all homes and businesses within the area susceptible to condemnation.

## THE TIDE IS TURNING

Eminent domain for private use happens all over the country, and local governments and developers regularly force residents and businesses out by threatening eminent domain. But the news isn't all bad. Courts, ordinary citizens, and even, occasionally, politicians are starting to say "enough is enough" and to prevent the use of eminent domain for private parties.

Most private use condemnations never make it to court. For many years, courts simply rubber-stamped any use of eminent domain. In recent years, however, courts have ruled against the government in a sizable minority of the cases where owners do challenge the condemnation. Courts rejected condemnations for private use or overturned blight designations (which authorize condemnations) permitting such condemnations a total of 37 out of 91 times (40 percent) between 1998 and 2002.<sup>1</sup>

Grassroots activism has defeated a number of projects, each of which would have forced the relocation of many homes and/or businesses. Voters rejected eminent domain projects three times at the polls and in at least 18 other instances, demonstrations and public pressure caused either the government or the developer to reject the use of eminent domain.

State politicians proposed 17 bills to increase protections for people threatened by eminent domain. Although they managed to pass only six, the number proposed bodes well for the future. Local politicians even voted to limit their own eminent domain power eight times.

This report documents the widespread abuse of eminent domain, not for anything resembling a "public use," but for private benefit and private profit. Eminent domain takes a terrible toll on its victims. It should be used only in the direct of public necessities and never for private ends.

<sup>1</sup> This number includes all judicial rejections of takings for private use, including those on statutory grounds. The trend toward greater judicial scrutiny of private takings means that courts are applying statutes more strictly than before. The total number includes only the most recent result of any given case, not separate numbers for the trial and appellate decisions. Decisions with mixed results were not included.

## INTRODUCTION

## Understanding Eminent Domain in the Real World

#### "...nor shall private property be taken for public use without just compensation." —U.S. Constitution, Amendment V.

Those are the words of the U.S. Constitution, and every state has a similar restriction. Property can be taken for public use, but not for private use. However, as this report documents, state and local governments believe they can condemn anything for any purpose, no matter how blatantly private.

## Private Use Now Means Public Use

The "public use" requirement of the Constitution almost met its demise during the latter half of the twentieth century. The U.S. Supreme Court in 1954 changed the requirement of "public use" to one of "public purpose." It allowed condemnations to accomplish slum clearance, even if the property ended up in the hands of private parties. State and local governments took this as a green light. First they condemned slums, then blighted areas, then not very blighted areas, and now, perfectly fine areas. Their initial purposes were quasi-public, like public housing, but have now expanded to include any residential or business development that happens to appeal to local bureaucrats who are hungry for dollars. For decades courts simply rubber-stamped all condemnations. That automatic deference has begun to change as courts grow more skeptical about government's blatant abuse of power.

The result of the years without judicial supervision, however, has been a feeding frenzy. Developers pick out the choicest spots in town, then get the cities to condemn them, regardless of who happens to live or work there. The incentives all point in the wrong direction. Cities love eminent domain because they can offer other people's property in order to lure or reward favored developers. Developers love eminent domain because they don't have to bother with negotiating for property. They can pick anywhere they want, rather than anywhere they can buy. And the compensation they have to pay is usually less than if they bought the property on the open market. Private companies now routinely demand incentive packages that include promises of large areas of land—land that must be cleared of any homes and businesses that happen to be in the way.

Under this regime, large businesses are always favored over mom-and-pop establishments, national chains over local businesses and upscale condominiums over middle-class single-family homes. And, of course, government-chosen projects are favored over ones developed independently.

## THE EMINENT DOMAIN PROCESS AND THE ORDINARY CITIZEN

For many people, the first time they hear the term "eminent domain" is when they hear that someone is planning a shopping mall or condominium project and the location being talked about sounds suspiciously like their home. Local bureaucrats begin to praise the upcoming project. They talk about thousands of jobs and increased tax revenues. And they say things like, "we plan to work together in partnership with the community." Eminent domain will be used only "if necessary" and "as a last resort."

Sometimes there are public meetings before a redevelopment agency and/or city council. These hearings can be for approval of the project or for designation of the area as "blighted." Blight designations make it easy to condemn property and transfer it to private developers. People are often astonished that the government would call their property blighted, because the ordinary person pictures blight as rats and buildings that are falling down. Instead, cities can declare anything blighted that wasn't built in the last few years. Modern characteristics of "blight" include too-small side yards, "diverse ownership" (different people own properties next to each other), "inadequate planning," and lack of a two-car attached garage. Cities will even declare areas to be blighted that have no current blight but might be blighted in the future.

Owners attend these public hearings, beg, and are usually ignored by the government planners, who have made up their minds and reached preliminary agreements with developers long before the hearing started.

Occasionally, and more frequently in recent years, the public outcry against using eminent domain for private parties will actually make an impression on the city leaders who thought the project was a done deal. This report describes a number of instances where people succeeded in fending off government attempts to grab their land.

Once the project is authorized, someone begins contacting property owners and trying to purchase the properties. At this point, some people are willing to sell. Some people feel like they will move for the right price. And some people do not want to move at all.

If someone says that her home or business is not for sale, she is told that if she does not sell, the property will be taken by eminent domain. Then the owner must face a choice—whether to accept the loss of her beloved home, business or neighborhood and try to strike the best arrangement she can or whether to stand her ground and fight.

If the owner refuses to sell, the government (or, in a few states, a private party) files a condemnation lawsuit against the person. In many states, governments are authorized to "quick-take" property. Under quick-take, if the government deposits its estimate of compensation with the court, it can take immediate title to the property and get possession immediately or within

a few months. That means the property is immediately bulldozed, leaving the owner to fight in court about whether the now-empty lot that remains was legally condemned.

Increasingly in recent years, courts actually hold that the government has gone too far and cannot take the home or business it is trying to seize through eminent domain. YOU MAY BE REQUIRED TO MOVE WITHIN 90 DAYS AFTER YOU RECEIVE THIS NOTICE. If you remain in possession of the property after that time, CRDA may be able to have you and your belongings removed by the sheriff.

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## THE THREAT OF EMINENT DOMAIN

Even an eventual victory in preventing condemnation of property for a private party takes its toll, because it forces someone to live for years with the threat of having his property unjustly taken away. It seems obvious, but living under the threat of being condemned is terribly frightening and stressful. It places life on hold. No homeowner will spend time fixing their home or remodeling; no business owner will expand. And for someone who does not want to move, this limbo is punctuated by frenzied activity whenever there is another city council meeting, another vote or a new plan. Living under the dangling sword of eminent domain prevents people from getting on with their lives, and the threat of eminent domain can continue for many years.

The effect of this—and usually the intended effect—is that people will sell "voluntarily." They may not have planned to move; they may not want to move, but they may not be able to continue in limbo forever. Unless they have substantial funds, they will have trouble affording a lawyer to fight the condemnation if it ever happens. Most condemnees will not have enough money to afford such a battle, particularly if they face the possibility of substantial expenditures to relocate if they lose. So most people bow to what they believe is inevitable anyway.

Nearly all eminent domain cases are settled because people simply cannot afford, or do not have the energy, to keep going. But even these threats represent the exercise of eminent domain just as much as the condemnations filed. A deal struck voluntarily is quite different than a deal struck with someone who says, "hand it over, or we'll take it by force." In many ways, the number of threatened uses of eminent domain for private parties tells more than the number that were actually filed.

## BUT THEY'RE COMPENSATED. WHY ISN'T THAT ENOUGH?

Many people wonder why others complain about eminent domain—whether for public or private use—when they receive compensation. Of course, different people have different reasons. For homeowners, the number one reason is family history and all the irreplaceable memories that go with a long-time home. Someone who has spent her whole life in her house may not want to move, regardless of the price. There is no way to replace the attachment to a homestead that has been in a family for generations. Also, long-term residents in an area often have friends and family nearby. Eminent domain means destroying neighborhoods as well as individual homes. Finally, another reason homeowners resist condemnation is that the government won't give owners enough money to buy a comparable home. The fair market value of an older three-bedroom house may only buy a small apartment in the current real estate market.

6

Not for Sale

Owner

Businesses have similar reasons for wanting to stay put. Sometimes the business has been in the family for years. Other times, the business

depends on a particular location. Still other times, the business is of a type that is impossible, or prohibitively expensive, to move. Compensation for businesses is often even worse than that for homeowners. Just compensation does not pay for all of the improvements or fittings one has made to property; it does not pay for the loss of business or business goodwill; it does not pay for the time the business is closed; it pays a little for relocation, but it does not pay for the cost of establishing the business elsewhere. Thus, many condemned businesses cannot reopen after condemnation.

All of these are practical reasons that someone may not want their home or business taken, even with compensation. But there is another, larger, reason. The American Dream is to work hard, buy a home, start a business and be in control of one's own destiny. Eminent domain means threatening, bullying or outright forcing people to give up what they have worked for their whole lives. Losing a beloved family home or a family business is bad enough when their property is taken for a highway or a police station, but it's heartbreaking to be kicked out so some other private person can make a profit.

## DON'T THESE PROJECTS BRING JOBS AND TAXES?

For all of these projects, city leaders must assert some sort of public benefit, and the number one claim is that the project will bring jobs and tax dollars. On a practical level, some projects may bring tax dollars and jobs; others are utter disasters. More importantly, if the promise of greater jobs or profits is enough to take someone's property, then almost no one is safe. Practically any home in the United States would generate more tax dollars as a Costco. Small businesses provide fewer jobs than an industrial park. And houses of worship produce no tax dollars and few jobs. The implications of the jobs/taxes mantra is that everyone's home, everyone's business is up for grabs. Citizens just have to hope that no one gets a bright idea to build an office block where their homes and businesses stand. Using jobs and taxes as a justification for eminent domain gives bureaucrats (and developers) unlimited power to seize property.

Condemning property for jobs and taxes has dangerous practical implications, but it is also deeply immoral. The idea that one person will be forced to sacrifice their peace and happiness so that some one else can benefit is repugnant to our society and the core principles that led to our founding. It cannot be tolerated.

For the first time, this report collects instances of the abuse of eminent domain for private parties across the country. It includes all of these stories—the approval of blight designations, the authorization of condemnations, the people who give up and try to cut a deal, and the people who fight to the bitter end. It also includes the recent successes where courts or activists have prevented the condemnation of homes and businesses for other private parties.

## How to Use this Report

The report is organized by **state**. Each state begins with an **overview** and a **summary of the data** we were able to glean from that state.

Using only the situations described in the report for each state, we also summarize the number of condemnations for private use or benefit. We break those down into "filed," "threatened," "total" and "development projects with private benefit condemnations."

"Filed" condemnations indicates the number of times that the government (or private parties) filed actions in court to acquire private property for the benefit of a private party. These condemnation lawsuits may result in forced evictions, settlements or even victories for the property owner. These different results have been combined because this report seeks to document the abuse of eminent domain by government. The government's action—filing a lawsuit to take someone's property for another private party—is the same whatever the outcome. Also, in many situations, the ultimate outcome is not known.

"Threatened" condemnations indicates the number of properties that the government has indicated that it may obtain through eminent domain for the benefit of private parties. It includes authorizations of condemnation, verbal or written threats to condemn and redevelopment plans that call for removing someone's property. We have also included situations where condemnation is proposed and the individual must go to the city and lobby to keep his property. These different types of threats have been combined because they all show the government using the power of eminent domain to intimidate owners out of their homes and businesses in order to benefit private parties. And in each of these situations, the reasonable person would have reason to fear.

**"Total" condemnations** benefiting private parties tell how many homes, businesses, and other properties have been affected by the government's abuse of the power of eminent domain, whether the government took the property, the owner submitted and sold, or the properties are still under threat.

"Development projects with private benefit condemnations" indicates the number of projects that account for the filed and threatened condemnations. For example, a single project might threaten 30 properties, so we report that number separately.

Only 24 states collect any information on the number of condemnation cases filed each year. For those states that do record that information, we have included the total number of condemnations for the five- year period this report covers (or for the years for which we could obtain information). These **"state records of condemnations for all purposes"** include private use condemnations, but also include condemnations for roads and government buildings, as well as, in some cases, condemnations for failure to pay taxes or building code violations. There is no way to separate the situations that involve private use condemnations, except in Connecticut, which we discuss at greater length. We include the source of the information, which is usually the administrative office of the courts.

For each state, the report provides a brief discussion of recent **legislative activity** relating to public use or the authority to take property for private parties. It then details each **private use condemnation situation we know about**. The situations in this report are collected primarily from news reporting that appears on Lexis/Nexis. Also included are situations we learned about through direct contact from attorneys, community members, and condemnees who have sent in local news articles, court documents and unpublished opinions. The documentary sources of the information are cited in footnotes. Information about whether a person has settled or a case is on appeal usually comes from the property owners or their attorneys. We also note the cases in which the Institute for Justice has participated.

Throughout the report, we have included **sidebars** highlighting national trends or describing noteworthy situations. Finally, eminent domain can involve a lot of legal jargon, so we have included a **glossary** at the end of this report.

#### CHANGES AND ADDITIONS

The information in this report comes from newspaper articles, court decisions and court documents. Because there is no official data available on the use of eminent domain for private parties, there are undoubtedly many takings for private use that have not been included. Additionally, there may be conclusions to some of the situations in the report that did not appear in the news or appeared only in local papers. If you have information and documentation about additional situations or more information on situations already included, please send this information to us at Castle Coalition, Eminent Domain Report Updates, 1717 Pennsylvania Ave., NW, Suite 200, Washington, D.C. 20006, or at updates@CastleCoalition.org. If we get significant new information, we will update the online version of this report. This report covers developments between January 1, 1998 and December 31, 2002. You may also send information about developments after December 31, 2002, and this information can then be included in a future report covering additional years. To view the most updated online version of this report, see http://www.CastleCoalition.org/report.

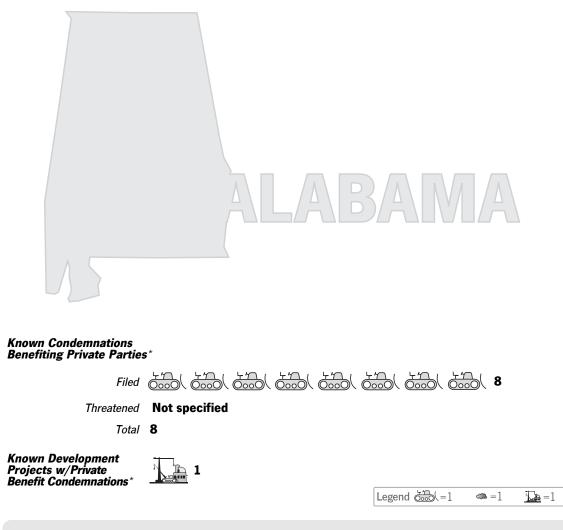
## THE INSTITUTE FOR JUSTICE AND THE CASTLE COALITION

The Institute for Justice is a nonprofit, public interest law firm located in Washington, DC (**www.ij.org**). We advance a rule of law under which individuals can control their own destinies as free and responsible members of society. One of our major areas of litigation is opposing the abuse of eminent domain for private parties. We represent people facing condemnation for other private parties and also file "amicus" or friend of the court briefs in such cases. We argue that taking property for private parties is unconstitutional, that the government may not give private developers the power of eminent domain, and that government's claims to public purpose often mask the true private–and thus illegal–purpose of the condemnation. We note in the report whenever we have been involved in the situation described.

The Castle Coalition is an organization formed by the Institute for Justice (**www.castlecoalition.org**). It was created after watching and helping several groups of grassroots activists who successfully fought off attempts to take their property for other private parties. We also became aware of the sheer number of threats of private condemnations and the need for all of these local groups to connect and share information. The Castle Coalition provides a central bank of information and helps activists connect with each other in fighting the abuse of eminent domain.

#### ACKNOWLEDGMENTS

Every single staff member at the Institute for Justice helped with this report, as did many law clerks and interns. Many property owners across the country helped by sending both information and photographs. In particular, I would like to thank Isaac Reese, who designed this report, and give special thanks to Robert Wiles, who has worked with tireless dedication on every aspect of this project.



### OVERVIEW

Alabama has mostly refrained from abusing the power of eminent domain in recent years. Indeed, there are no news reports of such condemnations in Alabama. When Alabama successfully lured a new Hyundai plant to open in the state, it did so by offering Hyundai a piece of land the State already owned, rather than by resorting to the condemnation of private property.<sup>1</sup> One Alabama city did condemn land for public parking to support nearby private businesses, but the condemnations were thrown out in court. The Alabama legislature considered but failed to pass a bill to make it more difficult to condemn land for private use. At least so far, however, the legislature's reticence in passing the bill does not seem to mean that there are private condemnations in the works. Hopefully, Alabama will continue its positive track record.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened.

<sup>1</sup> Patrick Howington, "Hyundai Picks Alabama Over Kentucky; Patton Said Difficulty Acquiring One Piece of Land in Hardin County Impeding the State's Bid for the \$1 Billion Auto Plant," *The Courier-Journal* (Louisville, Ky.), Apr. 2, 2002, at 1A.

### The Alabama legislature considered but failed to pass a bill to make it more difficult to condemn land for private use.

## LEGISLATIVE ACTIONS

The Alabama state legislature recently considered a bill that would specify the burdens of proof in various types of eminent domain challenges by landowners, including where property is being condemned for other private parties. House Bill 656, which was introduced in March 2002 but died before getting beyond the House Judiciary Committee, explicitly set forth that "[I]f the condemnor is a private entity... the condemnor shall be required to demonstrate by clear and convincing evidence the need to take the property."<sup>2</sup>

## Private Use Condemnations

#### Mountain Brook

Claiming that it wanted to tackle a parking shortage in the Mountain Brook Village commercial district of the City of Mountain Brook, the Mountain Brook City Council hired a parking consultant. The consultant's report found no parking shortage, but recommended a new parking garage for the district anyway. Based on the consultant's report, the City Council adopted a resolution to condemn two commercial tracts, the Mountain Brook Mall property and five other storefront properties, to make way for the unnecessary parking garage. In total, the targeted properties contained eight businesses. After the owners refused to sell, the City filed a condemnation suit on June 21, 2001 seeking to take the properties "for public use as a municipal parking facility and ordinary uses associated therewith."<sup>3</sup> The City's complaint failed to name any of the tenants who operated businesses on those properties as condemnees, even though it knew their identities and Council members frequently patronized those stores. Some of the unnamed tenants had made improvements to their properties (giving them a property interest in the condemnation), and yet they received no notice prior to the City's action. Another fact not stated in either the parking report or the complaint is that the parking consultant had a ten percent ownership interest in another shop located within the targeted area (his sister owned the rest) that was considered for condemnation but not selected.

At trial, the judge ruled that the City had grossly abused its discretion in condemning the properties by (1) failing to specify exactly what land was needed to construct the parking facility; (2) excluding the tenants from the lawsuit despite their potential entitlement to just compensation for improvements they made to the properties; and (3) basing its decision on the consultant's report although the consultant failed to disclose his potential conflicts of interest.<sup>4</sup>

<sup>&</sup>lt;sup>3</sup> See *City of Mountain Brook v. Domit*, No. 175074, slip op. at 4 (Jefferson County, Ala. Probate Ofc. Jan. 14, 2002). <sup>4</sup> Id. at 10-11.



<sup>&</sup>lt;sup>2</sup> H.B. 656, 2002 Sess. (Ala. 2002).

Public Power, Private Gain



State Record of Condemnations Filed, for all purposes:<sup>+</sup> 67

## 0 v e r v i e w

Our searches reveal no reports of eminent domain for private parties in Alaska in the past five years and few condemnations for any purpose. This past year, the Alaska legislature considered three bills relating to eminent domain, two of which would have given greater protection to property owners. All three failed. One bill would have required that property be condemned only for a "reasonably foreseeable" future public use and the other would have required that there be a "good faith" effort to purchase before condemning. Constitutional doctrine across the country generally says that property may be condemned only for a reasonably foreseeable public use. However, it is certainly helpful to put that requirement into a statute. It protects owners from having their property condemned for investment or land speculation or just because some entity thinks the land will be of use sometime. Good faith negotiations are a requirement in nearly every state, so that bill would have simply brought Alaska up to common practice around the country.

<sup>†</sup>Clerk of the Alaska Supreme Court (includes condemnations for traditional public uses).

## LEGISLATIVE ACTIONS

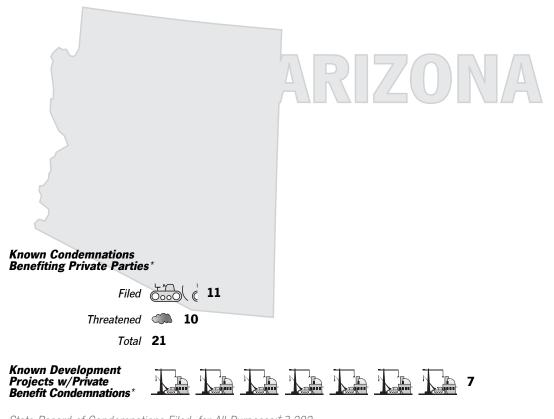
The Alaska legislature has recently had several items regarding eminent domain on its agenda. House Bill 500, introduced on February 27, 2002, would have limited the use of eminent domain for the advance acquisition of property for future public use to situations where "the future public use is a reasonably fore-seeable use that has been identified in a development plan prepared, published, and made available to the public."<sup>5</sup> While the need for a reasonably foreseeable future public use can be treated as a constitutional issue, it is helpful to also have a statute. Sometimes, government will seek to condemn land for investment or speculation. Sometimes it will try to condemn because it has a vague plan in mind 15 years down the line. These are not appropriate reasons to take someone's property, and this bill would have prevented such abuse. H.B. 500 made its way through several committees of the Alaska House before it died at the end of the 2001-2002 legislative session.

Senate Bill 278 passed the Senate on April 24, 2002, but failed to make it out of the House Finance Committee. S.B. 278 would have given property owners a basic protection from eminent domain abuse by requiring that condemning authorities make a "good faith effort" to purchase property before taking it through eminent domain.<sup>6</sup> Such statutes are common throughout the country, and, indeed, it is highly unusual for a state to lack one. The statute would have required that the government actually try to purchase property before condemning it. That should be self-evident, but apparently the Alaska legislature thinks it is acceptable to condemn someone's land without even trying to talk to them first.

## ...searches reveal no reports of eminent domain for private parties in Alaska in the past five years...

<sup>5</sup> H.B. 500, 22nd Sess. (Alaska 2002).
 <sup>6</sup> S.B. 278, 22nd Sess. (Alaska 2002).





State Record of Condemnations Filed, for All Purposes: † 3,202

## OVERVIEW

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'**L**=1

Arizona has an unfortunate record of grandiose development plans that devastate neighborhoods and then fail miserably. This fondness for eminent domain is reflected in the high number of condemnation cases filed—more than 3,200 in only five years. Even politicians have begun to suggest limits on eminent domain, and disgusted voters have been making their voices heard. The Arizona House of Representatives passed a bill seeking to cut back on the authority of local redevelopment agencies to seize property in order to transfer it to private business, but the bill died in the Senate. The voters of Scottsdale were more successful: they recently rejected another proposed boondoggle and convinced the City Council to remove a blight designation that had held the sword of eminent domain over downtown Scottsdale for years. The Arizona Supreme Court has never ruled on whether condemnations for the benefit of private parties can withstand constitutional scrutiny, but at least one such case is currently working its way up through the Arizona courts.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened. \*Research & Statistics Unit of the Arizona Administrative Office of the Courts (includes condemnations for traditional public uses).



## LEGISLATIVE ACTIONS

The Arizona House of Representatives passed a bill that sought to limit the practice of government condemnations for private development after a change in 1997 made such condemnations easier. Arizona cities were once required to declare an area "slum and blighted" before they could condemn land for private development. But the state's eminent domain law was changed in 1997 so that communities could pursue wider redevelopment objectives than merely slum clearance. Also, residents in areas with blight designations wanted a less pejorative label for their communities. Under the new, less rigid standard, properties in an area could be condemned if the area had an "inadequate street layout," or lack of diversity of ownership, or even if the area "arrest[ed] the sound growth of a municipality."<sup>7</sup>

Some Arizona politicians, however, are pushing for a return to the stricter "slum and blighted" standard. In January 2002 Representative Eddie Farnsworth introduced HB 2487 in the Arizona House, which in addition to restoring the original standard, would also force cities to remedy any such blight within five years, and prohibit them from disposing of the property for a ten-year period after the designation.<sup>8</sup> On April 1, 2002, HB 2487 passed the House, but became mired in the Senate, where opponents killed the measure. Senator Harry Mitchell, former mayor of Tempe, headed the Government Committee and saw to it that the bill died before leaving the Senate.<sup>9</sup> **Update**: Rep. Farnsworth introduced the same bill in the 2003 legislative session.

## SCOTTSDALE BUSINESS OWNERS SUCCEED IN GETTING REDEVELOPMENT DESIGNATION LIFTED

Scottsdale business owners who were fed up with trying to run successful businesses under the City's downtown redevelopment designation recently convinced the Scottsdale City Council to lift the onerous designation that has plagued the business community there since 1997. The owners have argued since its inception that the Downtown Redevelopment Area, a 330-acre zone encompassing 906 parcels of downtown land, failed to achieve its stated goal of bringing in outside development. Moreover, it discouraged current owners from improving their properties. A redevelopment designation makes it much easier to condemn property in that area and is widely, and correctly, perceived as a sign that owners may be forced out. Nearly 100 downtown business owners submitted a petition to the City Council asking that the City remove the redevelopment designation. Through their coordinated grass-roots campaign, the owners were able to convince the City Council that the designation was hurting otherwise successful businesses by forcing them to operate under the constant looming threat of eminent domain. At its meeting on September 9, 2002, the City Council responded to their concerns by voting unanimously to lift the redevelopment designation from the entire downtown area.<sup>10</sup> The Institute for Justice Arizona Chapter testified at the council meeting in favor of removing the blight designation.

These activists now hope to convince the City Council to remove the redevelopment designation from Scottsdale's 90-acre Waterfront Redevelopment Area. The designation has been in effect since 1994, but like its downtown counterpart has failed to spark major investment. The City has an agreement with Starwood Western Capital that makes Starwood the exclusive developer of the waterfront area until October 2003, at which time the City can remove the designation.<sup>11</sup>

<sup>7</sup> See Ariz. Rev. Stat. § 36-1471 (14) (2001).

<sup>8</sup> See H.B. 2487, 45th Sess. (Ariz. 2002).

<sup>9</sup> Robert Robb, "It's Time to Condemn Abuse of Authority," The Arizona Republic, Apr. 10, 2002.

<sup>10</sup> Peter Corbett, "Redevelopment Designation Lifted," The Arizona Republic, Sept. 10, 2002, at 4B.

<sup>11</sup> Peter Corbett, "Stores Fight Scottsdale Redevelopment Label," The Arizona Republic, Aug. 20, 2002, at 5B.



## Private Use Condemnations

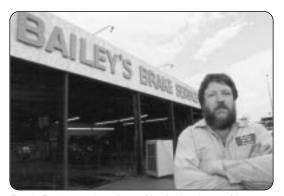
#### Chandler

Jack In The Box operates a restaurant on a prime corner in downtown Chandler. The City wants to get rid of the fast-food joint because it doesn't fit the City's "new image," and because its land is the missing piece for a planned privately owned residential/retail development at the gateway to downtown Chandler. The City Council passed a new zoning law that outlawed Jack's drive-thru window. The City says it can now condemn the restaurant for violating zoning laws. Jack In The Box is willing to remove the drive-thru, but Chandler isn't interested. The restaurant has vowed to fight any future condemnation.<sup>12</sup>

In 1998, Mesa unveiled a downtown redevelopment project that called for gutting Bailey's Brake Service to make way for an Ace Hardware Store franchise owned by one of Mesa's most powerful families.

#### Mesa

Randy Bailey owns Bailey's Brake Service in Mesa, a successful small business opened by his father in 1970. The shop is located on the corner of a busy downtown intersection. In 1998, Mesa unveiled a downtown redevelopment project that called for gutting Bailey's Brake Service to make way for an Ace Hardware Store franchise owned by one of Mesa's most powerful families. The City decided the area was "in need of redevelopment" because it lacked sufficient housing. The hardware store project, however, removed nine homes while creating none. The City then filed condemnations against Bailey, one home, a Mexican restaurant, MAACO, Tom Buck's Auto, the Lunch Box Cafe and Eskimo Air. Meanwhile, the hardware store owner testified at trial that the new store would double his profits. Represented by the Institute for Justice, Bailey challenged the condemnation of his



Randy Bailey stands in front of his brake shop in Mesa, AZ. The City of Mesa has condemned Bailey's Brake Service with the intention of transferring the property to Ace Hardware.

business, but the Maricopa Superior Court ruled in favor of the City.<sup>13</sup> Bailey appealed, and the Arizona Court of Appeals heard the case on May 29, 2000. The Superior Court stayed the effect of its decision so that Bailey's Brake Service can remain open while the parties wait for a decision from the Appellate Court.

#### Mesa

City officials are trying to figure out what to do with 30 acres of land that sit vacant thanks to a failed redevelopment project that began in 1992. Known to the City as "Redevelopment Site 17," the tract once contained 63 homes, which the City condemned and purchased at a cost of \$6 million. A group of Canadian developers planned to build Mesa Verde, an entertainment village featuring a time-share resort, water park and ice-skating rink. Once the homes were taken by the City, however, financing for the project fell through.<sup>14</sup>

<sup>12</sup> Jonathan Sidener, "'Loyal' Fast-Food Eatery Ready to Battle Chandler," Arizona Republic, Sept. 30, 2002, at 1B.
 <sup>13</sup> *City of Mesa v. Bailey*, No. CV 2001-090422 (Maricopa Sup. Ct. April 29, 2002); see also CV2001-090421 (Feb. 26, 2001); CV2001-092917 (Dec. 17, 2001); CV2001-092666 (Dec. 17, 2001); CV2001-092904 (Dec. 14, 2001); CV2001-092825 (Dec. 6, 2001); CV2001-092664 (Nov. 16, 2001).

<sup>14</sup> Paul Green, "Eminent Domain: Mesa Flexes a Tyrannous Muscle," *East Valley Tribune*, Sept. 2, 2001; Robert Robb, "Count on City-Driven Project to Fail," *The Arizona Republic*, Sept. 21, 2001.

#### Phoenix

In 1998, the City of Phoenix condemned a grocery store and several other small businesses on the corner of 24th Street and Broadway, intending to transfer the land to a private developer. Though none of the businesses were blighted, the City justified the takings under Arizona's liberal redevelopment statute by declaring that the area was "overrun with crime."<sup>15</sup> Rather than taking steps to lower crime in the area, the City chose instead to punish innocent businesses. However, the condemnations did nothing to improve the area. As of 2002, the City still has not been able to find a developer willing to buy the property, so it sits vacant.<sup>16</sup>

#### Phoenix

In 2001, Phoenix condemned the Hi Dreams pipe and tobacco accessories shop because the City wanted the property to be used by a business it found more desirable. However, the City has not been able to find a developer to buy the property, so it sits vacant.<sup>17</sup>

#### Scottsdale

In a September 1999 special election, Scottsdale voters rejected the \$654 million "Canals of Scottsdale" plan, which would have used state and local tax dollars to turn 27 acres of the downtown business district into a public-private "cultural" district. The sprawling development would have included such private uses as restaurants, a ritzy hotel, luxury condominiums, a multiplex cinema and high-end shopping. Had the voters not intervened, the City would have used eminent domain to acquire the property needed to complete the project.<sup>18</sup>

#### Scottsdale

The Coach House is Scottsdale's oldest tavern, and has been in operation since 1928. When the City decided that it wanted to lure a private developer to construct a new "gateway" strip mall, it created a redevelopment zone that included the Coach House. Jim Brower, whose family had owned the land and operated the tavern for three generations, decided to fight back. Brower and his attorneys organized a grass-roots campaign to demand that the Scottsdale City Council re-vote the issue and remove the Coach House from the redevelopment zone. After being inundated with thousands of angry letters from the community, the City Council agreed to hold a hearing, which was attended by 700 supporters of the Coach House. Brower succeeded in convincing the City Council to grant the Coach House an exception, forcing the developer to build around the tavern.<sup>19</sup>

#### Tempe

Kenneth and Mary Ann Pillow have lived in their lovely white home on a cul-de-sac in Tempe for 45 years. When asked about his home, Kenneth Pillow says, "I love my place and I'd like to stay there." However, the Pillows' home is located within the Apache Boulevard Redevelopment Area, which the City established in 1996 with the power of eminent domain. Tempe officials want to remake the Pillows' neighborhood with new privately owned homes, even though existing homes like the Pillows' are not run-down. In October 2002, the City condemned the Pillows' home, and a local judge scheduled a hearing on the matter for April 2003.<sup>20</sup>

<sup>15</sup> *City of Phoenix v. Wong*, No. CV1998-021350 (Maricopa County Super. Ct. Aug. 14, 2000); see also Pat Kossan, "Phoenix Weighs Next Move on Crime-Plagued Corner: Condemning Site Remains an Option," *The Arizona Republic*, Nov. 28, 1997.

<sup>16</sup> Jordan Rose, "New Land Condemnation Laws Abuse Citizens," Tuscon Citizen, Aug. 29, 2002, at 7B.

<sup>17</sup> See *City of Phoenix v. Soza*, No. CV2001-000068 (Maricopa Super. Ct. May 14, 2002); see also "24th St. Broadway Development Touted," *The Arizona Republic*, Oct. 18, 1995.

<sup>18</sup> "Land Takings Must End," *The Arizona Republic*, Aug. 2, 2000.

<sup>19</sup> See Jordan R. Rose, *Eminent Domain Abuse in Arizona: The Growing Threat to Private Property*, Goldwater Institute Arizona Issue Analysis 174 (Aug. 16, 2002), *available at* the Goldwater Institute website, http://www.goldwaterinstitute.org/pdf/materials/134.pdf.

<sup>20</sup> Alia Beard Rau, "Tempe Land Plan Leaves Pair in Limbo," The Arizona Republic, Jan. 16, 2003, at 1B.



|   | ARKANSAS                            |
|---|-------------------------------------|
| Known Condemnations<br>Benefiting Private Parties                 | *                                   |
| Filed   |                                     |
| Threatened  | ୁମ୍ ଲି ସ୍ମାର ସ୍ମାର ସ୍ମାର 40         |
| Total   | 41                                  |
| Known Development<br>Projects w/Private<br>Benefit Condemnations* |                                     |
| State Record of Condemnatic                                       | ons Filed, for All Purposes:† 1,692 |

## 0 V E R V I E W

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With the exception of one semi-private condemnation in 1999, Arkansas seems to have stayed away from condemnations that benefit private parties. City officials in Little Rock hinted they would condemn several homes for a private development project, but when owners refused to sell, the City wisely chose not to move forward with eminent domain. Arkansas courts report a somewhat high number of condemnations given the size of the state, nearly 1,700 in five years, but these include condemnations for roads and public utilities. Overall, then, Arkansas has largely respected the rights of its citizens and refrained from condemning property for private use.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened. \*Arkansas Administrative Office of the Court (includes condemnations for traditional public uses).

## Private Use Condemnations

#### Little Rock

In July 1999, Little Rock, Arkansas condemned a warehouse building owned by Eugene Pfeifer for the new William J. Clinton Presidential Library. In a rather complicated transaction, Little Rock will pay for the property using revenue bonds.<sup>21</sup> The library itself will be built using private donations raised by a nonprofit group, the William J. Clinton Presidential Foundation. The Foundation will own the building, but the federal government will operate the library.<sup>22</sup>

Pfeifer challenged the condemnation, arguing that the condemnation of his property lacked a public purpose, because the City's plan clearly showed that the private foundation would own the library. He also argued that it was not necessary to condemn his property, as the plan did not specify how large the library would be or where it would be located. After an initial favorable lower court ruling<sup>23</sup> and several years of litigation, the Arkansas Supreme Court ruled on November 1, 2001 that the public library would serve a valid public purpose.<sup>24</sup>

## ...when owners refused to sell, the City wisely chose not to move forward with eminent domain.

#### Little Rock

A developer is planning a 10-acre upscale retail center in the midtown section of Little Rock. Since the development was first proposed in 1999, the project has ballooned to five times its original size, and now comprises 40 lots that had been controlled by 19 different owners. Most of the owners sold their properties, but four homeowners refuse to negotiate, because they don't want to move out of their homes. The midtown retail project has the backing of Little Rock City leaders, and the City Manager sent letters to the owners stating that the City would use "any and all powers at its disposal" to make the project move forward. Lou Schickel, a rival local developer who strongly believes that the City should keep to itself and leave all development up to the private sector, was fed up with the City's thinly veiled threats to use eminent domain for the private benefit of the midtown developer, so in October 2001 he purchased one of the homes in the middle of the center's proposed site. He and the other homeowners vowed to fight any attempt by the City to take their homes through eminent domain. In the meantime, a smiling Lou Schickel said of his new property, "It's not a bad rental house investment."

Almost two years later, no condemnations have occurred. Schickel signed a tenant to a long-term lease for his home, and the City has not tried to make good on its threats to use eminent domain.<sup>25</sup> This is a great example of how a little resolve can go a long way in keeping money-hungry government bureaucrats at bay. So often the forces behind private use eminent domain know that even though their actions trample on the rights of property owners, the government will win simply because the owners don't have the will or the resources to put up a fight.

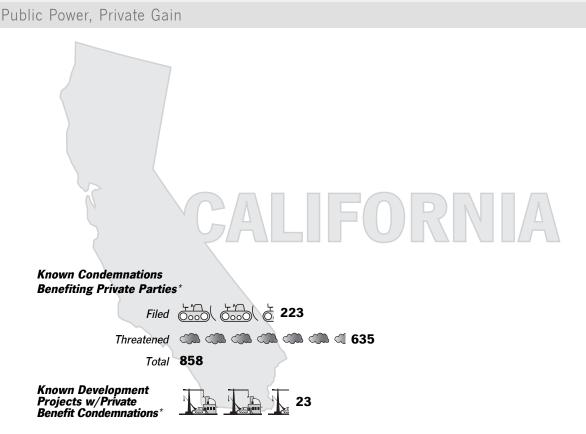
<sup>22</sup> Danny Shameer, "Landowners Get Outline of Library Plans," Arkansas Democrat-Gazette, Dec. 13, 1997, at B1.

<sup>23</sup> Elisa Crouch, "Pfeifer Lawsuit Over Library Site Must Go to Trial," *Arkansas Democrat-Gazette*, May 5, 2000, at B1.
 <sup>24</sup> Pfeifer v. City of Little Rock, 57 S.W. 3d 714, 723-27 (Ark. 2001); see also Elisa Crouch, "Justices Let LR Take Land for Clinton Library," *Arkansas Democrat-Gazette*, Nov. 2, 2001, at A1.

<sup>25</sup> C.S. Murphy, "Midtown Retail Vision Grows—Around Foe; Critic Buys House in Middle of LR Site," *Arkansas Democrat-Gazette*, Sept. 19, 2002, at A1.



<sup>&</sup>lt;sup>21</sup> Elisa Crouch, "LR Wants Landowner's Suit Killed; City Says 'Antipathy' to Clinton Motivates Eminent Domain Challenge," *Arkansas Democrat-Gazette*, Feb. 9, 2000, at B2.



State Record of Condemnations Filed, for All Purposes:<sup>†</sup> 5,583

Legend (100) = 100 = 100 (100) = 100

## OVERVIEW

California is one of the most active states in condemning properties for the benefit of other private parties. Between 1998 and 2002, news reports indicate 23 different projects involving condemnation for private use in California. As part of these projects, cities and redevelopment agencies have condemned at least 223 individual properties for the benefit of private parties and have threatened at least another 635. California's court records show 5,583 condemnations, including those for public bodies. It is not possible to count the number of properties that have been designated as blighted and therefore subject to condemnation. This report discusses only a fraction of the total redevelopment designations—only the ones that have been the subject of court challenges. These projects alone involved designating more than 125,000 acres of property as blighted and therefore subject to condemnation. In recent years, California courts have begun to rein in redevelopment agencies, chastising them for labeling areas blighted when they are not. Two federal courts have blocked condemnations for Costco stores because, the courts held, the condemnations lacked a public use. At the same time, a comprehensive study shows that California is wasting millions of dollars on redevelopment projects, with only minimal benefits to show for it. However, for the moment, redevelopment agencies are ignoring the changing climate, eagerly designating huge swaths of their cities and seeking condemnations for private developers across the state. It may take a few more court losses or greater political pressure before they begin to exercise some restraint.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened. \*California Administrative Office of the Courts (includes condemnations for traditional public uses).

## LEGISLATIVE ACTIONS

A bill that would have prohibited California public entities from condemning tax-exempt property used exclusively for religious worship recently died in the state legislature after languishing in the Judiciary Committee for a year. Assembly Bill 247, sponsored by Assemblyman Ken Maddox, was introduced on the floor in February 2001 in response to a situation in Cypress where the City tried to stop the Cottonwood Christian Center from building a church at a prime location by condemning the group's land for a Costco retail development. The bill never came to a vote.<sup>26</sup>

## PROPERTY OWNER LAWSUITS SEEKING TO OVERTURN LOCAL REDEVELOPMENT PLANS

In California, before a city can condemn land and then transfer it to another private party, it must approve a local redevelopment plan and designate the area as blighted.<sup>27</sup> After these two steps, eminent domain can be used against any and all properties within the area. Owners who do not want to be condemned in the future often challenge the redevelopment plans in what is called in California a "validation action." This action can challenge the lack of evidence of "urbanization," blight or other aspects of the approval process.<sup>28</sup> Under the state Community Redevelopment Law (CRL), the area must be predominantly urbanized and have substantial physical and economic blight in order to be properly designated.<sup>29</sup> Between 1998 and 2002, a number of owners successfully challenged redevelopment plans and thus successfully protected themselves against future condemnation for the benefit of private developers. Because there have been so many legal challenges to blight designations in California in the past five years, these situations are described in this separate section.

#### Diamond Bar

The affluent suburban City of Diamond Bar established a redevelopment agency to finance local development projects and improve traffic problems, even though commercial uses occupied only two percent of its land area. In 1995, the City Council approved a major 30-year redevelopment plan involving 1,300 acres of land, based on its findings that the project area suffers from blight that is "so prevalent and so substantial that it causes a reduction of, and lack of, proper utilization of the area to such an extent that it constitutes a serious physical and economic burden to the community."<sup>30</sup> However, the findings contained no specific instances of either physical or economic blight in the city. Several property owners whose land was targeted by the Diamond Bar redevelopment plan sued the City to have the redevelopment plan overturned. In a terse opinion, the trial court determined that substantial evidence supported the City's blight designation. However, the California Appellate Court reversed, noting that it viewed the plaintiffs' videotapes of the area in their entirety and "did not perceive anything remotely resembling blight. The videotapes depicted modern, well-maintained retail and office structures, amidst ample landscaping and open space in a partially rustic setting."<sup>31</sup>

<sup>30</sup> Beach-Courchesne v. City of Diamond Bar, 95 Cal. Rptr. 2d 265, 269 (Cal. App.), rev. denied, 2000 Cal. LEXIS 6388 (Cal. 2000).

<sup>&</sup>lt;sup>31</sup> *Id.* at 270, n. 4.



<sup>&</sup>lt;sup>26</sup> See A.B. 247, 2001-02 Sess. (Cal. 2001).

<sup>&</sup>lt;sup>27</sup> See Cal. Health & Safety Code § 33000 et seq. (Deering 2001).

<sup>&</sup>lt;sup>28</sup> Cal. Civ. Proc. Code §§ 860-70 (Deering 2003).

<sup>&</sup>lt;sup>29</sup> See Cal. Health & Safety Code §§ 33030, 33031, 33320.1 (Deering 2001).

#### Mammoth Lakes

In 1996, the Town of Mammoth Lakes and its local redevelopment agency adopted a 30-year redevelopment plan consisting of three separated areas of land totaling 1,100 acres. The redevelopment plan specifically authorized the town to undertake a laundry list of 72 different projects, including a new town hall, performing arts center, aquatic center, various airport renovations, new parking lots, commercial developments and approximately 400 new privately owned housing units. Another provision of the redevelopment plan proposed condemning various parcels of property to assist in developing new commercial and tourist-oriented uses.

An organization called Friends of Mammoth, along with three local property owners, filed lawsuits challenging the Town's plan. The plaintiffs alleged that the redevelopment area was "predominantly urbanized," as required by the Community Development Law. The trial court ruled in favor of the Town, but in July 2000 the Third Appellate District issued a stinging reversal in which it stated that "[t]he facts of this case exemplify the misuse of redevelopment power the Legislature sought to curb."<sup>32</sup> Among its findings, the appeals court determined that the Town improperly sought to include in the plan large swaths of undeveloped land it had approved for extensive private development, with the threat of eminent domain attached. Also, the Town did not bother to determine what percentage of the targeted land was currently developed for urban use; it merely labeled it all urban (including a golf course known for its rustic, unspoiled natural landscape).33

#### Murrieta

In 1994, the Murrieta City Council adopted a redevelopment plan, pursuant to the state Community Redevelopment Law, encompassing 3,588 acres at the juncture of Interstates 15 and 215. Riverside County filed suit to challenge the City's plan on the grounds that no substantial evidence existed to support the City's finding that the targeted area is a blighted, predominantly urbanized area. The trial court agreed with

 <sup>32</sup> Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency, 98 Cal. Rptr. 2d 334, 355 (Cal. App. 2000).
 <sup>33</sup> Id.

### Legal Challenge Looms Over San Jose's Strong Neighborhoods Initiative

In June 2002, the San Jose City Council enacted the "Strong Neighborhoods Initiative," a massive redevelopment plan aimed at increasing retail development throughout the city. The plan includes 20 different neighborhoods, spread out over an area encompassing 180 square miles, including one-tenth of the city's geographic area and one-third of its population. Under the Initiative, the San Jose Redevelopment Agency, armed with the power of eminent domain, can condemn any property in the redevelopment area and hand it over to private developers. The City will spend an astounding \$120 million to buy or condemn properties, build infrastructure, and renovate supposedly dilapidated buildings.<sup>1</sup> The plan has the potential to affect 300,000 residents.<sup>2</sup>

Many local activists have opposed the blight designation or at least the inclusion of eminent domain in the project, forming citizen groups and speaking out against the project.<sup>3</sup> The Burbank neighborhood submitted a petition with 700 signatures asking to be let out of the plan area, but the City Council included them anyway.<sup>4</sup> Residents of the Naglee Park area also voted to be taken out of the plan, but that may or may not happen sometime in 2003.<sup>5</sup> Eminent domain was the sticking point, and the City added supposed safeguards, like using eminent domain as a "last resort," but that's a meaningless protection. All it means is that someone will try to buy the property before condemnation proceedings start. The City could have chosen not to authorize eminent domain, thus alleviating everyone's fears. They authorized it.

One San Jose property owner within the supposedly blighted area has taken the City to court. Elaine Evans, who owns two buildings and a vacant lot in downtown San Jose, filed a lawsuit on August 21, 2002 to invalidate the Strong Neighborhoods Initiative. Although she has no problem with the City working to redevelop troubled areas in the city; she objects to the City's use of flimsy criteria to reach a blight determination affecting properties like hers that are in no way substandard. Under the state's Community Redevelopment Law, for an area to be blighted, problems must be "so prevalent and substantial" that they cannot be remedied by private business or regular government workings.<sup>6</sup> According to Evans' lawyer, "there are very specific findings that have to be made [to call an area blighted]. The redevelopment agency didn't even come close."<sup>7</sup> Evans' suit identifies a number of problems with the blight designation, including the fact that the City failed to identify a single building that was actually unsafe or unfit for habitation, and the City used conditions like overgrown yards and broken sidewalks to label an area blighted. She also questions the notion that the area is economically stagnant when property values have increased 30 percent since 1996.<sup>8</sup>

This challenge to the Strong Neighborhoods Initiative is still in its early stages. However, based on recent successful challenges to similar redevelopment laws in Mammoth Lakes and Upland, in which California courts overturned blight designations that failed to meet the CRL's criteria, Elaine Evans believes that she has a good chance of defeating the redevelopment plan. By doing so, she hopes to prevent her buildings from being taken in the future for private developers.<sup>9</sup>

<sup>1</sup> Janice Rombeck, "City Eases Fears, OKs Renewal Project; S.J. Residents Wary of Eminent Domain," *San Jose Mercury News*, June 12, 2002, at B1.
<sup>2</sup> Janice Rombeck, "Neighborhoods Seek Safeguards," *San Jose Mercury News*, May 23, 2002, at B1.
<sup>3</sup> "City Makes Offer on Tropicana as Owners Launch Legal Fight," *Silicon Valley/San Jose Business Journal*, Oct. 11, 2002, at 1.

<sup>4</sup> Janice Rombeck, "Neighborhoods Seek Safeguards," *San Jose Mercury News*, May 23, 2002, at B1.

<sup>5</sup> Janice Rombeck, "Vote Against Redevelopment Raises Questions," *San Jose Mercury News*, Oct. 21, 2002, at B1.

<sup>6</sup> Cal. Health & Safety Code § 33030 (b) (1) (Deering 2001).

<sup>7</sup> Kate Folmar, "S.J. Sued Over Blight Designations," San Jose Mercury News, Sept. 5, 2002, at A1.
<sup>8</sup> Mike Zapler & Janice Rombeck, "Challenge to Criteria for San Jose Blight Plan," San Jose Mercury News, July 26, 2002, at A1; Kate Folmar, "S.J. Sued Over Blight Designations," San Jose Mercury News, Sept. 5, 2002, at A1.

<sup>9</sup> Id.

the County and invalidated the Murrieta redevelopment plan. The Fourth Appellate District upheld the trial court's ruling, finding in July 1998 that "after sifting through the general commentary that comprises much of the redevelopment report, we discover there is little substantive material to be gleaned. Although the report speaks in the statutory language used to define blight, the report offers little concrete evidence of actual conditions of blight." Among other problems, the City classified rural residential land as urban and called the area blighted although less than five percent of its structures were unsafe.<sup>34</sup>

#### Riverside County

In July 1999, the Riverside County Board of Supervisors passed an ordinance approving a 2,860acre redevelopment plan encompassing the neighborhoods of Lakeland Village and Wildomar. The area consists mostly of a hodgepodge of quaint 1920s bungalows, mobile homes, upscale lakefront homes and some businesses. However, the County determined that the area was "blighted" and in need of subsidized improvement. The goal of redevelopment, according to the Board of Supervisors, would be to provide low-interest loans and grants for homeowners and small business owners to make needed improvements to their property. Many residents of the neighborhood took offense at the County's blight designation, though, and feared that the redevelopment plan would merely open the door to large retail establishments that might someday gobble up their property and force them out of their homes. So the residents banded together to challenge the County's redevelopment plan in court.35

The Riverside County Superior Court granted summary judgment in favor of the County, and refused to grant the residents an injunction to stop the redevelopment plan. In March 2002, however, a California appeals court overturned the earlier decision. It noted that

<sup>34</sup> *County of Riverside v. City of Murrieta*, 76 Cal. Rptr. 2d 606, 612 (Cal. App. 1998).

<sup>35</sup> Vanessa Colon, "Appeals Panel Rules in Favor of Residents; The Court Says the County Didn't Show that Lakeland Village and Wildomar Were Blighted," *The Press-Enterprise (Riverside, CA)*, Mar. 15, 2002, at B3.



according to the evidence the County submitted on appeal, a large amount of the land it called urbanized was actually vacant. The appeals court sent the case back to the trial court for a final determination.<sup>36</sup>

#### San Francisco

In October 2000, San Francisco approved an expansion of the Yerba Buena Center Redevelopment Plan to include a massive redevelopment project for the site of the former Emporium department store in downtown San Francisco. The 120-foot tall Emporium Building was originally built in 1896 and withstood the 1906 earthquake. The department store operated there from 1908 until 1996, when it closed because of declining business. Federated Department Stores, Inc., the current owner of the vacant building, tried to restore it, but structural and code deficiencies made the building not feasible for new retail use. Federated convinced the City to add the Emporium Building into the Yerba Buena redevelopment area, so that it could qualify for government financial assistance in restoring the building. In August 2000, the local redevelopment agency determined that the site was physically and economically blighted under the state Community Redevelopment Law, paving the way for the City's approval of the amended redevelopment area. A local citizens' organization and five individual residents of San Francisco filed a writ petition to invalidate the project, arguing that the redevelopment plan amendment was inconsistent with the San Francisco General Plan requiring a blight determination prior to altering or adding redevelopment zones. The local superior court denied the petition, and in September 2002 the First Appellate District affirmed the trial court's decision.<sup>37</sup> Citing the Emporium Building's many structural deficiencies and building code violations, the appellate court determined that the building meets the "substantial evidence" requirement for blight designation.<sup>38</sup> This decision allows Federated to petition the state and local governments for assistance in redeveloping the Emporium building, with the taxpayers' picking up the tab.

#### Sonoma County

In July 2000, Sonoma County adopted a redevelopment plan encompassing 1,830 acres of land along the Russian River, which passes through Guerneville, Rio Nido, Monte Rio, and several other small unincorporated communities. The area was once a popular tourist destination, but its popularity had been declining in recent decades, so the County pursued a redevelopment strategy that included the use of eminent domain to force the transfer of targeted private properties to other private parties. The County based its decision to establish the redevelopment zone on a blight study that determined the area to be "predominantly urbanized,"<sup>39</sup> and that found alleged instances of physical blight that rendered the area "a serious physical and economic burden on the community" as required by the state Community Redevelopment Law.<sup>40</sup> The Russian River Community Forum sought to overturn the redevelopment plan by challenging the County's findings of predominant urbanization and physical blight, but in October 2001 the county court denied the Forum's request and validated the County's action in adopting the redevelopment plan. The Forum appealed, but in December 2002 the First Appellate District upheld the lower court's ruling.<sup>41</sup>

<sup>36</sup> See *Lakeland Village/Wildomar Taxpayer Assn. v. County of Riverside*, No. 332217, 2002 Cal. App. Unpub. LEXIS 2459 (Riverside Cnty, Cal. Super. Ct. Mar. 29, 2002).

<sup>37</sup> See *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco*, 125 Cal. Rptr. 2d 745, 784 (Cal. App. 2002).

<sup>38</sup> *Id.* at 777-79.

<sup>39</sup> Cal. Health & Safety Code § 33030 (Deering 2001).

<sup>40</sup> *Id.* at § 33031.

<sup>41</sup> See *Russian River Community Forum v. Sonoma County*, No. A097145, 2002 Cal. App. Unpub. LEXIS 11228, at \*1 (Cal. App. Dec. 4, 2002).

On the issue of urbanization, the appeals court distinguished Sonoma County's plan from others that have recently been overturned by California courts on the basis of deficient urbanization findings (in Mammoth Lakes, Murrieta and Upland). The court determined that the Sonoma plan was based on a legitimate finding of 80 percent urbanization,<sup>42</sup> as required by the CRL<sup>43</sup> With regard to the County's alleged evidence of physical blight, the appeals court held that County's redevelopment plan contained adequate findings of "the widespread existence of severely deteriorated buildings, gravely deficient lot parcels, and extremely low assessed property valuations."<sup>44</sup>

## The city had treated faded paint and sagging screens as factors showing blight.

#### Upland

In June 1999 the Upland City Council amended an existing Town Center redevelopment plan by deleting 77 contiguous acres from the redevelopment area. It then approved a new redevelopment plan, designated as "Project 7," containing both the 77-acre parcel and 15 additional noncontiguous parcels. William Graber, owner of the 77 acres, and San Bernardino County filed separate validation actions to challenge the ordinances. Their contention was that the City failed to meet the state Community Redevelopment Law's statutory requirements because less than 80 percent of the area was urbanized, certain non-blighted property had been improperly included in the project area, and the City lacked sufficient evidence to support its blight designation. The trial court agreed with the challengers and invalidated the City Council's ordinances. On appeal, the Fourth Appellate District upheld the trial court decision and agreed that the "blight" designation was based only on vague, superficial surveys that could not demonstrate "substantial evidence" of blight. The city had treated faded paint and sagging screens as factors showing blight.<sup>45</sup>

## Private Use Condemnations

#### Chula Vista

The Rados brothers owned a 3.2-acre piece of land located within a redevelopment zone established 30 years ago in Chula Vista. They had committed to razing the old buildings on the property, thus eliminating any blight. However, in the interim the B.F. Goodrich Aerospace Aerostructures Group (BFG) sought help from the City's redevelopment agency, hoping to use the Rados brothers' land as a parking lot for its adjacent manufacturing plant. Under an agreement between BFG and the City, BFG would pay \$3 million for the land and use it for parking for six years, during which time BFG would undertake additional development of its adjacent land. If after six years BFG had not developed the property, the agency could reacquire the land for \$1,052,409. In July 1999, the City condemned the property, and the Radoses challenged the taking.

<sup>43</sup> Cal. Health & Safety Code § 33320.1 (b).

<sup>44</sup> *Russian River Community Forum v. Sonoma County*, No. A097145, 2002 Cal. App. Unpub. LEXIS 11228, at \*25 (Cal. App. Dec. 4, 2002).

<sup>45</sup> Graber v. City of Upland, 121 Cal. Rptr. 2d 649, 661 (Cal. App. 2002).



<sup>&</sup>lt;sup>42</sup> *Id.* at \*12.

At trial, the brothers argued that the City lacked either a public use or a necessity for the taking. Additionally, they pointed out that since they already had plans to demolish the existing structures on the property, any "blight" that had existed would already be eliminated. The trial court agreed and dismissed the action. However, on appeal the Fourth Appellate District reversed the lower court's ruling, holding that unblighted property may be taken for redevelopment to facilitate areawide redevelopment, and that the provision allowing the City to buy back the land from BFG after six years would serve as a safeguard to ensure that the land was put to public use.<sup>46</sup>

#### Claremont

The Claremont City Council, acting as a redevelopment agency, is planning to use eminent domain to bring about the expansion of the City's borders to accommodate a mix of new residential units, retail shops and a hotel. The area is already popular, with high occupancy rates and many successful small and medium-sized shops. However, existing business owners are upset that the City appears resolved to shut them down by slapping the current shopping district with the "blight" label, while attempting to attract large and competing retail chains to anchor the City's expansion. According to the owner of a veterinary hospital that would be demolished under the plan, "The City is trying to pick and choose businesses for the village rather than let the free market decide." The Claremont City Manager claims that the City must improve its retail facilities or risk losing its competitive edge to other shopping destinations. In late 2001, the City was still in the process of formulating its plan for going forward.<sup>47</sup>

#### Corona

In April 2000, the Corona City Council unanimously approved an agreement with a private developer that would pave the way for construction of Corona Main Place, a proposed 3-story office complex. As part of the deal, the City would attempt to buy four parcels surrounding land the developer already owned, then sell those parcels to the developer for \$1. In addition, the developer would receive \$1 million in tax rebates from the Corona Redevelopment Agency over 12 years. The four parcels were occupied by a Yum Yum Donuts franchise, El Rancho Tortilleria y Market, a single-family residence and a triplex. The City agreed that if it could not buy the parcels from the current owners, it would take the land through eminent domain. The odd thing about this proposal is that in 1998 the Redevelopment

<sup>46</sup> See *Redevelopment Agency of Chula Vista v. Rados Bros.*, 115 Cal. Rptr. 2d 234 (Cal. App. 2001).

<sup>47</sup> Joseph Ascenzi, "Building upon a Success Story: Claremont Officials Say it Takes an Expanded Village," *The Business Press/California*, Nov. 19, 2001, at 1.

## California Study Exposes the Myth that the "Public" Benefits from TIF Redevelopment

Throughout the country, local governments try to artificially spur redevelopment by using taxpayer-funded subsidies to lure large developers to the area. A favorite method of subsidized redevelopment is the use of tax-increment-financing (TIF), whereby redevelopment agencies pay to develop land, then keep any additional tax revenues in the project area. The "public" ostensibly benefits because of the additional sales tax revenue generated by the development and by the elimination of underutilized land. The developer, for its part, can avoid property taxes and sometimes even paying for the land, simply by agreeing to operate the development for a set period of time.

The prevailing argument in favor of TIF redevelopment is that it brings redevelopment to places where developers will not build, because the area is rundown or otherwise not profitable. However, in addition to the questionable logic behind subsidizing unprofitable development (there is usually a valid economic reason why certain land is not developed), recent data has done much to debunk the myth that government subsidies work as intended. In 1998, the Public Policy Institute of California (PPIC) published the most comprehensive study to date on the fiscal impact of such developments, concluding that TIF subsidies are neither necessary nor even desirable for achieving sound redevelopment.<sup>1</sup>

The PPIC study compared areas in California with TIF-based redevelopments to other similar areas within the same city that did not utilize TIF financ-

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ing. When the growth rate of the areas with TIF projects was compared to the areas without TIF projects (in terms of per capita income, population size, geographical area and "blight" conditions), the study found that the TIF projects were producing only minimal gains in terms of actual economic growth, but resulted in substantially higher allocations of tax revenue directed toward local redevelopment authorities.<sup>2</sup> To achieve those minimally higher rates of growth in TIF areas, cities spent two dollars for every dollar gained.<sup>3</sup> About eight percent of all property taxes collected in California. or \$1.5 billion annually, ends up in redevelopment agency coffers.<sup>4</sup> Moreover, the PPIC concluded that the problem of "no oversight authority to police redevelopment agencies" is a main source of concern regarding the potential waste of public money on TIF projects.5 Thus, redevelopment agency budgets, not cities, are the main beneficiaries of TIF projects.

<sup>1</sup> See Michael Dardia, Subsidizing Redevelopment in California, Public Policy Institute of California (1998), available at http://www.ppic.org/publications/PPIC108/PPIC108.pdf/index.h tml.

<sup>2</sup> *Id.* at 64-66.

<sup>3</sup> *Id.* at 66 (Figure 5.5). <sup>4</sup> *Id.* 

<sup>5</sup> *Id.* at 27.

<sup>6</sup> For more information on eminent domain abuse in California, Municipal Officials for Redevelopment Reform (MORR) has published several editions of its study entitled *Redevelopment: The Unknown Government*. The 1998 edition of this report can be obtained from the MORR website at http://www.redevelopment.com/norby /index.html. Contact MORR to obtain the latest edition (published Sept. 2002). Agency owned these same parcels of land, having purchased them from the state Department of Transportation for \$932,000. However, the Agency then sold the parcels for that same price to their current owner, whose plan to build an office building on the site subsequently fell through.<sup>48</sup>

In the summer of 2001, the owners of the four parcels submitted and sold their properties to the City, for a combined \$2.1 million.<sup>49</sup> Based on the City's actions, they had no choice. Yum Yum Donuts, a venerable local tradition, has since relocated, and its original location has been demolished to make way for the redevelopment.<sup>50</sup>

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#### Corte Madera

The Paradise Shopping Center is an aging commercial property in Corte Madera. In 2000, Waterford Associates, a private developer, presented the Town with a redevelopment proposal to renovate the shopping center and add an assisted-living facility for senior citizens on a portion of the property. The plan also included a specialty grocery store. The owner of World Gym, one of the few thriving Paradise business tenants, balked at the idea of surrendering parking spaces for construction of the assisted-living facility and for the new grocery store's customers. The opposition of World Gym, which owned a parking easement across from the shopping center's parking lot, threatened to kill the entire project. World Gym suggested instead that the developer acquire a nearby tract of vacant land. Naila Yasin, who owned this parcel, refused an offer from Waterford to purchase the property. So the developer asked the Town to condemn the property, with the developer paying a substantial portion of acquisition costs. The Town Council agreed to condemn 5,575 square feet of

<sup>48</sup> Claire Vitucci, "Corona Agrees to Office Project: The Deal Calls for the City to Acquire Four Parcels Surrounding the Site on South Main Street," *The Press-Enterprise (Riverside, CA)*, Apr. 20, 2000, at B1.

<sup>49</sup> Adriana Chavira & Jerry Soifer, "Tradition to Crumble with Shop: An Office Building Will Replace Corona's Closed Yum Yum Donuts," *The Press-Enterprise (Riverside, CA)*, June 28, 2001, at B1.

<sup>50</sup> "Clearing the Way," *The Press-Enterprise (Riverside, CA)*, Aug. 14, 2001, at B3.



Yasin's property and an access easement across another portion of the property. Yasin fought the condemnation, rejecting the Town's finding that public interest and necessity required the acquisition on behalf of a private party. At trial, the court held in favor of the Town, awarding Yasin \$95,000 in compensation for the property. Yasin continued to fight the taking, but in July 2002 a California appeals court affirmed the lower court's decision.<sup>51</sup>

#### Cowan Heights

In California and other states, water companies and other privately owned utility companies have the power to condemn land in order to provide a utility service to the public. Recently, however, a California water company tried to use its power of eminent domain in order to sell the property access it condemned to another private party. The Southern California Water Company condemned an easement over land owned by Amrit and Hasu Patel in order to sell that access to private cell phone companies. The Patels sued the water company after they learned that it had entered into leases with Nextel Communications Co. and Cox Communications Co. that allowed the communications companies unfettered use of a driveway on the Patels' lot to reach the water company's adjacent property. The trial court found that these encroachments were mere trespasses onto the Patel land. However, the Fourth Appellate District held that the real issue in the case was whether a public utility has the power to take private property for a private purpose, such as making money, that is unrelated to the actual service the utility provides the public.<sup>52</sup> After acknowledging that economic development is sometimes a legitimate reason to allow condemnations, the court declared "there comes a point at which a court must confront a trend, and yell halt... Providing water is a public use; enriching the coffers of a water company is not."<sup>53</sup>

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#### Cypress

The City of Cypress has been trying to use the threat of eminent domain to wrest control over development of a prime piece of local real estate from the religious group that owns it. For years, the Cottonwood Christian Center tried to turn its 18-acre tract into a new \$50-million place of worship. However, the land is adjacent to the Los Alamitos Race Track, a large horse racing and off-track-betting facility. The City would prefer to see a Costco-based retail development in that location. Costco produces tax revenue; churches do not. Thus, according to Cypress, it is in the public interest to take the property for Costco.

After the church first acquired the site, it followed standard city procedures for obtaining the necessary permits to build the new facility. However, at every pass the City used whatever excuses it could find to delay or deny approval for the project, including the dubious explanation that the church's application forms were continually "incomplete." Meanwhile, the Cypress City Council established a redevelopment zone encompassing the site, and imposed a two-year moratorium on new developments within the zone. City officials made no

<sup>51</sup> See Town of Corte Madera v. Yasin, No. CV 991355, slip op. at 10 (Marin County, Cal. Super. Ct. July 25, 2002).
 <sup>52</sup> Patel v. Southern California Water Co., 119 Cal. Rptr. 2d 119, 120 (Cal. App. 2002).
 <sup>53</sup> Id. at 122.

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effort to explain the moratorium, other than as a means to control the future use of the Cottonwood site. A political uproar erupted, in which the City portrayed the church as a sinister entity trying to deprive Cypress of its right to convenient shopping while creating the "blight" and "public nuisance" of a religious center.<sup>54</sup>

On May 28, 2002, the City Council voted unanimously to condemn Cottonwood's land. The Cottonwood Christian Center sought an injunction in federal court to prevent the condemnation from going forward.<sup>55</sup> The injunction was granted on August 6, 2002.<sup>56</sup> Cypress appealed. **Update:** In February 2003, Cottonwood agreed to swap its land for another site nearby.<sup>57</sup>

#### East Palo Alto

In February 2000, East Palo Alto condemned 83 properties through eminent domain, as part of its plan to redevelop "Whiskey Gulch," the town's primary commercial district. The private developer behind the project, University Circle Partners, paid for the businesses' relocation and related costs, and has plans to develop a 22-acre, \$170 million office/hotel/retail complex on the site.<sup>58</sup> As of early 2002, three office buildings have been built on the site, and by the end of the year ground will be broken on a 200-room Four Seasons Hotel.<sup>59</sup>

Among the businesses displaced by the development were a hardware store, a wig shop, a hair salon and several liquor stores, many of which had been located in Whiskey Gulch for decades. When faced with the prospect of finding scarce new commercial space in a market where rents were usually twice what they paid in Whiskey Gulch, some businesses simply closed their doors.<sup>60</sup> However, one enterprising barber shop owner came up with a unique solution to the problem of his skyrocketing rent: he used the money paid to him by the developer to purchase a Winnebago, in which he has established a successful mobile hair cuttery.<sup>61</sup>

#### Garden Grove

Over the past five years, Garden Grove has gone on an eminent domain rampage as it tries to turn Harbor Boulevard into a hotel corridor. In 1998, the City condemned several properties so that a private developer could build a Hampton Inn. The project primarily displaced lower income residents and visitors. It destroyed three low-cost hotels, a mobile-home park occupied by fixed-income senior citizens, and the Sage Park Apartments, which consisted of 96 units that rented mainly to maids and busboys employed by the razed hotels.<sup>62</sup>

<sup>54</sup> Steven Greenhut, "Freedom at Issue; Church vs. State; Cottonwood Christian Center Battles Cypress for the Right to Build on its Own Property," *The Orange County Register*, Jan. 27, 2002.

<sup>55</sup> Paige Austin, "Cypress Invokes Eminent Domain to Seize Church Land; Development: Cottonwood Center Will Seek an Injunction to Stop the Forced \$14.6 Million Sale Meant to Make Way for a Costco Center," *The Orange County Register*, May 29, 2002.

<sup>56</sup> See Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

<sup>57</sup> "Cypress City Council Approves Land Swap Ending Dispute with Church," *AP Wire*, Feb. 25, 2003.

<sup>58</sup> Thaai Walker, "Closed for Business; Redevelopment in East Palo Alto Displaces 83 Stores," San Jose Mercury News, Feb. 21, 2000, at 1B.
 <sup>59</sup> Karen Alexander, "Jobs, Congestion at Issue; As Economic Development Slowly Comes to East Palo Alto, There is

Still Controversy When a Big-Box Store Wants to Take Root," *Los Angeles Times*, Jan. 14, 2002, at Cal. Metro 5. <sup>60</sup> Thaai Walker, "Closed for Business; Redevelopment in East Palo Alto Displaces 83 Stores," *San Jose Mercury News*, Feb. 21, 2000 at 1B.

<sup>61</sup> K. Oanh Ha, "Forced to Move, Shop is in Winnebago," *San Jose Mercury News*, Jan. 18, 2002, at 1C.
 <sup>62</sup> Nick Schou, "More Freebies for the Rich," *OC Weekly*, June 29, 2001, at News 12.



#### Garden Grove

In July 2001, the Garden Grove City Council approved two new hotel projects along Harbor Boulevard, with at least \$4.2 million in public financial assistance, for McWhinney/Stonebridge Corp., a Colorado-based development group that previously received tens of millions of dollars in assistance for building other hotels in Garden Grove. For one of these new hotel developments, the City has threatened to condemn 11 homes and 14 businesses unless the targeted owners agree to sell at the City's prices. The City has already bought three other homes standing in the way of the hotel, and now is using heavy-handed tactics to force the other owners out. Assistant City Manager Matt Fertal takes an especially dim view of the right of property owners along Harbor to use the free market to determine what price developers should pay to take their land from them. According to Fertal, "[Owners] think that just because they're on Harbor and hotels are coming, that it increases the value of their property, but it doesn't. Commercial [developers] only care about the cost of the dirt on the land. We're offering to pay for the structure at the appraised value and the land."63 In other words, the rightful owners don't deserve to profit from their investment; instead, any profit will go to the City's favored corporate developers. And for the people who actually want to keep their homes or businesses, at least one city leader couldn't care less.

#### Garden Grove

Until outraged local residents mobilized in opposition, Garden Grove officials were pushing hard to implement yet another redevelopment plan. This one would have turned 264 acres of land in this densely populated city into a theme park. Garden Grove has recently undertaken a number of objection-able redevelopment schemes utilizing eminent domain (see above) that have made the City one of the most land-grabbing in the nation. During a period of less than one year between 2000 and 2001 alone, the City paid out nearly \$3 million to property owners who sued the City over its condemnation tactics. The theme park proposal, however, had even the most ardent pro-development locals scratching their heads. More than 470 homes, as well as 300 mobile homes and dozens of apartments, were slated for condemnation. But following September 11, 2001, the tourist industry has been in a nationwide slump, making the construction of another theme park in theme park-heavy northern Orange County an extremely risky proposition for potential investors.<sup>64</sup>

Seven hundred angry residents packed a public hearing on the matter, expressing near-unanimous opposition to the idea of their homes being taken in favor of a third-rate Disneyland. Apparently this outcry resonated with the City Council, which at its July 2002 meeting voted unanimously in favor of a

<sup>63</sup> Katherine Nguyen, "Selling—If the Price Is Right; Cities—As Garden Grove Seeks Property on Harbor for New Hotels, Some Owners Feel Exploited by Offers Based on Land Value," *The Orange County Register*, July 25, 2002.

<sup>64</sup> "Garden Grove Bulldozers," *The Orange County Register*, Apr. 16, 2002.

## Huntington Beach Finds that Redevelopment Is Best Achieved Without Eminent Domain

The City of Huntington Beach has had a poor history with regard to eminent domain abuse. In the 1980s, this bluecollar beach community undertook a series of redevelopment projects that dramatically changed large parts of a city that had once been composed mostly of small beach bungalows, oil fields, tract homes and funky surf shops. Those buildings that had once defined Huntington Beach's character were gradually replaced by sterile high-rises made of stucco, as City officials tried to lure big developers with lavish public subsidies and condemnations that shut down the local businesses that once gave the city its unique character. However, many of these redevelopments failed. Other cities such as Newport Beach that did not establish redevelopment zones grew economically at rates that far outpaced Huntington Beach.<sup>1</sup>

When the City proposed an idea in the late 1990s to condemn the Huntington Beach Mall and turn it over to private developers, discount retailers Montgomery Ward and Burlington Coat Factory, which owned stores at the mall, promised to fight any attempt to take their property and hand it over

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to someone else. Ultimately, the Huntington Beach City Council voted against using eminent domain to force the retailers out of the mall.<sup>2</sup> So the City decided to approach redevelopment by including the discount retailers rather than replacing them. It did not take long for a developer to produce a winning proposal to reinvigorate the mall into a Mediterranean-themed shopping center, without using eminent domain. The result was a development plan that was consistent with Huntington Beach's flavor.<sup>3</sup> Construction on Bella Terra, the long-awaited complex, began in summer 2002, and will include Burlington Coat Factory (Montgomery Ward has since gone bankrupt), as well as a large movie theater, restaurants and stores. This was all accomplished without taking a single property through eminent domain.<sup>4</sup>

<sup>1</sup> Jim Hinch, "In Surf City, Rebuilding Strategy Has Fans, Critics," The Orange County Register, Nov. 24, 2001. <sup>2</sup> "Property Rights Victories," The Orange County Register, Nov. 26, 2000. <sup>3</sup> Jim Hinch, "Mall Project Seen as a Winner; Development-Huntington Hopes to Reverse a History of Plans Falling Through," The Orange County *Register*, Mar. 8, 2002. <sup>4</sup> Curt Seeden, "The Huntington Beach Mall Is Officially on its Way to Becoming Bella Terra, the Long-Awaited Mediterranean-Themed Shopping Center," The Orange County Register, July 18, 2002.

less sweeping redevelopment plan than the theme park proposal it had once championed. The approved plan will still allow the City eventually to condemn 47 acres for redevelopment.<sup>65</sup>

### Garden Grove

In 1990, the Goia family paid \$778,000 for a parcel of land, on which they invested an additional \$100,000 to open a small auto repair shop. Seven years later, the City Council condemned the Goias' business to make way for a 72-home upscale residential development. Adding insult to injury, the trial judge set the Goias' "just compensation" at a mere \$640,000, less even than what they paid for it. The family challenged, and in 1998 a jury said the City's compensation was not sufficient, and awarded the Goais \$1.07 million. After three years of litigation, another jury in November 2000 awarded the Goias an additional \$620,000 in attorney fees.<sup>66</sup>

### Imperial Beach

The Imperial Beach City Council voted 4-0 on September 20, 2000 to use eminent domain to condemn a long-established Mexican food restaurant and give the land to the Sterling Development Corp., a private developer who plans to transform the existing shopping center on the site. This was the first time the City Council had voted to condemn part of an existing development to make way for new development of a similar kind, but City officials say they are eager to explore more such redevelopment opportunities in the future. While many of the businesses located in the shopping center were able to stay put, the developer removed the restaurant in order to build a large Sav-On Drug store on the site.<sup>67</sup>

#### Lancaster

In July 2000, the City of Lancaster attempted to use eminent domain to force a 99 Cents Only, another discount store, out of its Valley Central Shopping Center store location, so that a Costco discount store next door in the shopping center could expand its warehouse. Although Costco could have expanded in another direction, the store insisted that its expansion had to be onto the 99 Cents Only site. Costco even threatened to leave town if the City would not meet its demand that 99 Cents Only be condemned.<sup>68</sup> After the City began eminent domain proceedings, 99 Cents Only filed suit to block the condemnation.<sup>69</sup>

<sup>68</sup> Andrew Blankstein, "Store Could Be Ousted to Make Room for Costco; Lancaster Officials Consider Use of Eminent Domain to Force 99 Cents Only Out of Center and Let Warehouse Expand," *Los Angeles Times*, June 18, 2000, at B1.
 <sup>69</sup> "99 Cents Store Sues City Over Eviction," *Los Angeles Times*, July 25, 2000, at B4.

<sup>&</sup>lt;sup>65</sup> Katherine Nguyen, "City Won't Raze Homes; Redevelopment—Garden Grove Vows Not to Touch 470 Homes in Bid for Tourist Dollars," *The Orange County Register*, July 3, 2002.

 <sup>&</sup>lt;sup>66</sup> "Property Rights Victories," *The Orange County Register*, Nov. 26, 2000.
 <sup>67</sup> Janine Zuniga, "Imperial Beach Council OKs Redevelopment Plan," *The San Diego Union-Tribune*, Sept. 22, 2000, at B1.

In the end, this condemnation for the benefit of one of two rival discount stores proved too much for the court: On June 25, 2001, the federal district court held that the condemnation was not for public use and that any claimed public purpose was just a pretext for the real purpose of transferring the land to Costco.<sup>70</sup> According to the court, "the very reason that Lancaster decided to condemn 99 Cents' leasehold interest was to appease Costco. Such conduct amounts to an unconstitutional taking for purely private purposes."<sup>71</sup>

The City decided to press on with an appeal even though it claims that it no longer has plans to take the property.<sup>72</sup> The Institute for Justice filed an amicus brief in support of the 99 Cents store. **Update:** In March 2003, the U.S. Court of Appeals for the Ninth Circuit held that the case had become moot when the City began building Costco another store.<sup>73</sup>

#### Modesto

In June 2002, Stanislaus County supervisors voted unanimously to condemn a strip of land for an access road to Diablo Grande, a privately owned residential and resort community slated for construction nearby. The County has acquired most of the land for the 3.4-mile road, but reached an impasse over the northern-most 1.2-mile parcel. The public road would belong to the County, but the resort's developer is covering the land acquisition costs. Included in the targeted land are 18.5 acres for the road corridor, 27.9 acres for temporary use during construction and 6.7 acres for a wetland preserve. The County has so far offered only \$38,000 for the land. Much of the land is used for cattle pastures, a use which would be significantly disrupted by the presence of the road and its concomitant traffic. Current owners of the land include a partnership, a trust, and several individuals in Santa Cruz and Santa Clara counties, all of whom oppose the taking on the ground that the road serves to benefit another private property owner, rather than the public.<sup>74</sup> Another cause for concern is the fact that much of the taken land is needed only temporarily, which means that the county could sell it later for other private development.

#### North Hollywood

Developer Jerome Snyder has plans for building a 1.2 million square foot, \$160 million project that will include 500 apartments, 242 artist's lofts, an office complex, a supermarket, retail stores, parking lots and a community center. As part of the plan, Snyder has pledged to build approximately 100 low-income apartments. This huge project is contingent upon the developer's receipt of City subsidies and the use of eminent domain by the North Hollywood Community Redevelopment Agency.<sup>75</sup> As of October 2002, the Snyder project is still in the development phase,<sup>76</sup> but some private use condemnations have already been made for the redevelopment of North Hollywood. For instance, eminent domain was used to acquire a brake shop, a gas station and a small apartment building to make way for Carl's Jr. and El Pollo Loco fast food outlets.<sup>77</sup>

<sup>70</sup> See *99 Cents Only Stores v. Lancaster Redevelopment Agency*, No. CV 00-07572, 2001 U.S. Dist. LEXIS 9894 (C.D. Cal. June 25, 2001).

<sup>71</sup> *Id.* at \*15-16.

<sup>72</sup> Karen Maeshiro, "99 Cents Ruling Faces City Appeal," *The Daily News of Los Angeles*, July 18, 2001, at AV1.
 <sup>73</sup> 99 Cents Only v. Lancaster Redevelopment Agency, No. 01-56338, 2003 U.S. App. LEXIS 4197 (9th Cir. Mar. 7, 2003).

<sup>74</sup> John Holland, "Road to Planned Resort OK'd; Stanislaus Supervisors Condemn Strip Leading to Diablo Grande," *The Modesto Bee*, June 12, 2002, at B2.

<sup>75</sup> Beth Barrett, "Future Vision in NoHo; It Takes a Village to Recapture Area," *The Daily News of Los Angeles*, June 1, 2001, at N1.
 <sup>76</sup> Beth Barrett, "Land Use Hot Issue in Valley; Secession Backers Believe with Breakup Comes Control," *The Daily News of Los Angeles*, Oct. 23, 2002, at N1.

<sup>77</sup> Municipal Officials for Redevelopment Reform, *Redevelopment: The Unknown Government*, July 2001, at 29.



### Oxnard

In June 2002, the Oxnard City Council began condemnation proceedings on 1.4 acres of vacant land wanted for the proposed \$750-million RiverPark, a privately owned residential/commercial development. The three parcels comprising the targeted area lie within the bounds of the Historic Enhancement and Revitalization of Oxnard (HERO) redevelopment area, which allows Oxnard to use eminent domain to transfer land to developers. The City previously tried to negotiate with the owner of the three parcels, but talks were fruitless, although the City separately purchased an adjacent fourth parcel after reaching agreement with that parcel's owner. The proposed RiverPark project, which is slated for completion by 2012, will supposedly someday have as many as 2,805 residential units, for which a total of 15 properties may eventually be condemned.

Oxnard resident Ventura Fernandez, who is the chairman of the local Inter-Neighborhood Council Forum, attended the meeting at which the City Council passed its resolution allowing the condemnations to go forward. Ferndandez told City officials that eminent domain is a dangerous tool, whose only purpose in this case is "to make the developer rich." He believes that RiverPark could be built without the City having to condemn land for the project, but the City is so eager to serve the interests of the developer that it is willing to take other peoples' land.<sup>78</sup>

### San Bernardino

The City of San Bernardino used eminent domain in 2002 to acquire about 24.5 acres of land near the former Norton Air Force Base for a Sam's Club warehouse store. The targeted land consisted of 34 properties, mostly single-family homes and also a motel and several other small businesses.<sup>79</sup> The local redevelopment agency came to terms with 11 of the 34 property owners, but many others rejected the City's offers because they believed the City deliberately offered less than the land was worth. <sup>80</sup> Eventually, the City approved the use of eminent domain to force out the remaining owners.<sup>81</sup>

#### San Diego

In an effort to cash in on San Diego's plan to build a new baseball stadium in the East Village area of that city's downtown, Centre Development Corp., the local redevelopment authority, has undertaken a project to develop the 26-square block area surrounding the new stadium. The East Village was once a warehouse district occupied by entrepreneurs and "urban pioneers," until the City decided in 2000 to condemn all the properties. In total, 67 East Village businesses and 20 residents are being displaced. According to Leslie Wade, executive director of the East Village Association, a group that represented businesses in the ball-park/redevelopment district, the entire condemnation process was painful for area landowners. She says that "people got 60-day notices to pick up their businesses and part with their property." While some businesses were happy with the City's buyout offers, many others have had trouble succeeding in their new locations. A few have left San Diego altogether, in search of a more hospitable business climate.<sup>82</sup> These displaced property owners and entrepreneurs were instrumental in revitalizing the urban core of San Diego,

<sup>81</sup> Adam Eventov, "Sam's Club Up for Key Approval," *The Press-Enterprise (Riverside, CA)*, June 25, 2002, at D6.
 <sup>82</sup> Frank Green, "Fair or Foul? Many Former East Village Merchants Still Feeling Effects of Displacement by Ballpark Project," *The San Diego Union-Tribune*, Mar. 10, 2002, at H1.



 <sup>&</sup>lt;sup>78</sup> Raul Hernandez, "Oxnard to Use Eminent Domain to Get Land," *Ventura County Star*, June 6, 2002, at B2.
 <sup>79</sup> "IVDA Could Take Land to Make Way for Project," The Business Press/California, Dec. 17, 2001, at 10.
 <sup>80</sup> Adam Eventov, "Landowners Call City Offers Too Low; A Residential Area is Being Acquired for a Major Retail Center," *The Press-Enterprise (Riverside, CA)*, Jan. 24, 2002, at B3.

only to have the City reward them by taking their property, destroying their businesses, and turning their land over to favored developers and chain retail stores.

### San Jose

One of San Jose's many redevelopment projects is a planned downtown 10.5-acre mixed-use retail and residential development that will include 1 million square feet for residential use with 350,000 square feet for retail use. The project is expected to cost between \$750 million and \$1 billion to complete.83 The development's initial phase called for the City to condemn a 1.4-acre parking lot owned by Al Schlarmann and then give the land to the project's developer, the CIM Group. When the City first announced its plan to redevelop the lot, Schlarmann sued, claiming that he held the development rights to the parking lot under a 1997 legal settlement with the San Jose Redevelopment Agency. The agency responded in April 2002 by filing a lawsuit to condemn the development rights. A Santa Clara County Superior Court judge ruled in July 2002 that the agency may use eminent domain to take Schlarmann's parking lot. In other words, even a written promise from the government won't protect someone from eminent domain. The City's redevelopment plans call for it to condemn four additional downtown properties.84

### San Jose

The San Jose Redevelopment Agency also proposed in May 2001 that approximately 40 parcels of land be converted into high-density housing. While six of the parcels are vacant and nine are owned by the City, the others contain privately owned houses, warehouses,

 <sup>83</sup> "Developer Seeking 'Critical' Properties," *Silicon Valley/ San Jose Business Journal*, Apr. 13, 2001, at 1.
 <sup>84</sup> Rodney Foo, "Redevelopment Agency Wins Right to Key Property; Court Rules S.J. Can Use Eminent Domain," *San Jose Mercury News*, July 23, 2002, at B1.



Jose Mendoza, one of the Tropicana merchants, protests in San Jose, CA. Photo by Ben Garza.



Design for renovation or Tropicana Shopping Center, approved and permitted in 1995, at the sole cost and initiative of the owners. The redelopment agency staff called the above design "a Taco Bell look," and insisted on a redesign. The redesign process included completion of the "Story Road Revitalization Agreement" and a more Mediterranean look for the completed buildings. Total Time Elapsed–3 years.

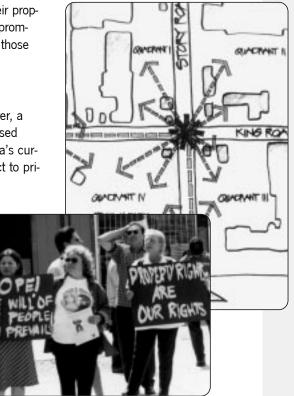


churches and parking lots. Under the proposal, property owners could either present their own housing plans to the City, or join forces with a developer. In addition, developers could present housing proposals using other peoples' property. If the City liked a developer's plan, it would ask the developer to work out a plan with the current owner.<sup>85</sup> However, faced with opposition from residents and business owners who feared being forced from their property, San Jose officials in August 2001 backed off the initial plan and promised to only consider redeveloping either parcels owned by the City or those whose owners are willing to sell to the City.<sup>86</sup>

### San Jose

City leaders have decided to redevelop the Tropicana Shopping Center, a popular Latino-themed shopping plaza in East San Jose. The proposed \$50 million plan would use eminent domain to acquire the Tropicana's current buildings, then raze some of them and transfer the 26-acre tract to pri-

vate developers who would build a new, upscale version of the Tropicana. San Jose's plan came as a surprise to Dennis Fong, the Tropicana's main owner, who has been in the middle of his own \$9 million dollar renovation.<sup>87</sup> Fong was upset to learn that the City's redevelopment plan includes his property, as if condemnation were a fait accompli. He opposes the City's effort to take his property, especially in light of the fact that he is improving it for less than the City plans to pay and without using condemnation. Additionally, an upscale, watereddown version of the shopping center might ruin the authentic flavor and ethnic charm of the plaza it replaces.<sup>88</sup> The dozens of Hispanic merchants that rent space in the Tropicana also oppose the condemnation. Right now, they have great locations at reasonable rents. Foreground: protests at the Tropicana Shopping Center in San Jose, CA. Background: Sketch from the "Story Road Revitalization Strategy," completed in 1997 by the Redevelopment Agency of the City of San Jose



<sup>85</sup> Edwin Garcia, "Remaking Downtown San Jose; City Targets 40 Properties for Development as Housing, Landowners Who Refuse Plan Could Be Forced to Sell Sites," *San Jose Mercury News*, May 12, 2001, at 1A.
<sup>86</sup> Edwin Garcia, "San Jose Softens Plan for New Housing....," *San Jose Mercury News*, Aug. 29, 2001, at 1B.
<sup>87</sup> Edwin Garcia, "Shopping Center Caught in Middle with S.J. Agency; Tropicana Owner Proceeds with Remodeling Even Though Redevelopers May Tear It Down," *San Jose Mercury News*, Mar. 15, 2002, at B1.
<sup>88</sup> Kate Folmar, "S.J. Approves Plan to Move Mall Merchants; Council Tries to Meet Objections," *San Jose Mercury News*, Oct. 23, 2002, at B1.



Under the City's plan, they will have to move for years during renovation and then move back. And the rents will be much higher, so many of the merchants will only be able to afford space in the new Tropicana with the help of government subsidies.<sup>89</sup>

On June 25, 2002, the San Jose City Council voted to go forward with its Tropicana redevelopment plan.<sup>90</sup> Five months later, the City Council authorized the condemnation of the Tropicana, a move which Fong and three other owners have been fighting in court.<sup>91</sup> In the midst of the ongoing controversy, someone from city hall sent an anonymous email message insulting both Fong and several of the merchants who have opposed the plan, suggesting that they earn their money illegally.<sup>92</sup> Several lawsuits will no doubt be progressing during 2003.

#### San Leandro

As part of a redevelopment plan aimed at increasing tax revenue, in 1996 San Leandro passed a law creating special zoning regulations for an "auto row" on Marina Boulevard. Three years later, the City tried to condemn 76 parcels of land so that it could hand the property over to private developers seeking to build car dealerships, but public outcry erupted and prevented the takings from happening. Eventually, the City initiated eminent domain proceedings to acquire three parcels. Those parcels were owned by two longtime local used car dealers, who had planned to build used car lots within the auto row, and who believed that their desired use met the spirit of the City's zoning regulations. The City, on the other hand, insisted that only new car dealerships would be suitable for the auto row, so it took the land and sold it to developers willing to build the preferred type of car lots.<sup>93</sup>

### Yorba Linda

The Yorba Linda Planning Commission has been quietly buying property in the Old Towne area, hoping it can undertake a major downtown redevelopment plan that will include 300 affordable-housing units, a 70,000 square-foot retail center, a large parking structure, a museum and a pedestrian bridge over Imperial Highway. Part of the effort entails preserving or moving some historic structures in the area, while some cur-

<sup>89</sup> Kate Folmar & Mike Zapler, "\$50 Million Plan for Shopping Center in East S.J. Unveiled," *San Jose Mercury News*, June 18, 2002, at A1.

<sup>90</sup> Kate Folmar, "Council Backs Rebuilding of East S.J. Retail Centers;

Redevelopment Plan Passes by 8-2 Vote Despite Protests," *San Jose Mercury News*, June 26, 2002, at A1.

<sup>91</sup> Kate Folmar, "S.J. Votes to Acquire Tropicana; Shopping Center Owners Vow Legal Battle," *San Jose Mercury News*, Nov. 20, 2002.

<sup>92</sup> Kate Folmar, "San Jose City Hall Email Message Creates Latest Tropicana Controversy," *San Jose Mercury News*, Oct. 11, 2002.

<sup>93</sup> Chip Johnson, "Auto Row Troubles in San Leandro, Dealers Don't Deserve Special Consideration" San Francisco Chronicle, Jan. 25, 2001, at A13.

## Local Homeowners Rally to Defeat City's Attempt to Repeal Eminent Domain Ban

About 275 acres of land in the town of Placentia are situated within a redevelopment area. Since 1983 the City has had a ban on the use of eminent domain for taking residential properties for acquisition by other private parties. However, in July 2002 that prohibition expired, and the City Council considered eliminating the ban altogether. At the next council meeting, more than 100 angry residents packed City Hall to voice their opposition. After hearing 90 minutes of speeches from outraged homeowners in the targeted area, the City Council voted unanimously to extend the eminent domain ban for another 12 years.<sup>1</sup>

<sup>1</sup> Patrick Vuong, "Ban Extended on Eminent Domain Use," *The Orange County Register*, Aug. 22, 2002. rent businesses might be forced to sell to the City, or have their land taken through eminent domain proceedings, to accommodate the private developer behind the project.<sup>94</sup> Alex Mikkelson, longtime owner of an auto repair shop that will have to relocate under the plan, asked the Planning Commission to consider including his shop in the mix of businesses planned for the development. Though Mikkelson received support from some on the Commission, the developer, Downtown/Main Street Visions, said that an automotive shop is not the type of business Yorba Linda wants to attract to its new downtown. As Ron Cano, president of Downtown/Main Street Visions, says of Mikkelson's desire to reap the benefit of redevelopment on his own property, ''Satisfying everyone's needs would be detrimental to the area."<sup>95</sup>

<sup>94</sup> Jerry Hicks, "Yorba Linda's Old Town: New Visibility in Store," *Los Angeles Times*, Jan. 14, 2002, at B3.
<sup>95</sup> Zaheera Wahid, "Panel Reviews Plan to Extend Old Towne Space, Hours," *The Orange County Register*, Jan. 24, 2002 (emphasis added).



| GOLORADO   |  |
|--|--|
| Known Condemnations<br>Benefiting Private Parties*                                       |  |
| Filed $$ $$ $$ <b>23</b>   |  |
| Threatened රැඩි රැඩි රැඩි රැඩි රැඩි රැඩි රැඩි රැඩි                                       |  |
| Total 137  |  |
| Known Development<br>Projects w/Private<br>Benefit Condemnations* 7<br>Legend (=10 =10 ) |  |
|  |  |

## OVERVIEW

Colorado falls somewhere in the middle on the scale of eminent domain abuse. Colorado cities rarely if ever engage in the typical transfer from one owner to a specific private party. Instead, local municipalities try to cloak their condemnation in a mantle of semi-public use, like an arts center or a shopping center/town hall combination. Still, Colorado cities seem willing to use eminent domain to benefit private parties; they just exercise more caution when doing so. At the same time, and partly in reaction to this trend, the Colorado legislature cut back on the ability of municipalities to designate areas as blighted and therefore subject to condemnation. At least two cases are slowly wending their way up through the courts, so the next few years may be decisive ones for Colorado home and business owners.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened.

## LEGISLATIVE ACTIONS

In 1999, the Colorado state legislature amended the state Urban Renewal Law in a way that significantly strengthened the rights of property owners within areas targeted for "blight" designation. The amendment requires that a municipality determine that a property satisfies four out of 12 different blighting factors before it may declare an area subject to urban renewal and condemnation. The previous law required that only one blighting factor be met.<sup>96</sup> State Representative Andy McElheny first proposed the new, more restrictive blight standards after reading about a case in which a Denver suburb threatened to condemn O'Meara Ford so that it could transfer the property to another private enterprise (see below).<sup>97</sup>

# Private Use Condemnations

#### Arvada

The Arvada Urban Renewal Authority designated the Water Tower area as blighted and approved a plan for upscale residential development. According to one of the citizens protesting the plan, the area contained 220 rental units and 32 homes, with approximately 500 to 600 residents. The head of the agency stated in February 2000 that it would attempt to purchase the properties, but it would condemn if anyone asked for too much money.<sup>98</sup> (Presumably it would also condemn if someone refused to move for any amount of money). Although news reports do not indicate how many homes Arvada actually condemned, a letter to the editor a few months later comments on the fact that houses were condemned and demolition had begun.<sup>99</sup>

Arvada had also been conducting a land use study about the possibility for development just beyond its borders. When it asked for citizen input, the citizens of the Berkeley Village mobile home park realized their homes had been listed as a possible development area for Arvada. As the president of the Berkeley Neighborhood Association explained, residents had been watching the Water Tower project "getting ready to condemn homes by right of eminent domain – and we figured if they can do it there, they'll do it here as well." Anxious residents began calling Arvada, and after the calls started, Arvada issued a letter reassuring the Berkeley residents that it would not annex them.<sup>100</sup>

#### Aurora

The City of Aurora is developing Aurora City Center, a new civic and commercial center that will rise where the Florence Gardens neighborhood once stood. The centerpiece of City Center will be a 600,000-square foot, pedestrian-oriented shopping center anchored by Super Target and Barnes & Noble. Aurora will also use some of the space for a new city hall and other municipal offices. In order to consolidate the 67 acres needed for the new development, the City created an urban renewal district encompassing all of Florence Gardens, and declared that it would use condemnation "if necessary" to force area landowners to sell to Miller Weingarten, the private developer involved in the project.<sup>101</sup> This impacted 20 properties, mostly vacant lots.<sup>102</sup> As of the last report, the owners were unhappy that the City was taking their property for

<sup>96</sup> Colo. Rev. Stat. § 31-25-103(2) (1999).

<sup>100</sup> Gary Gerhardt, "Berkeley Village Won't be Annexed," *Rocky Mountain News*, March 20, 2000, at 24A.
 <sup>101</sup> Dina Berta, "Aurora Negotiating for Retail Center; Developer Envisions Shopping, Restaurants North of Mall in Vacant Urban Renewal District," *Rocky Mountain News*, Mar. 4, 2000, at 2B.

<sup>102</sup> John Rebchook, "Developer a Leader of New Urbanism; Miller Weingarten Takes a Low-Profile Approach to High-Profile Projects," *Rocky Mountain News*, Mar. 18, 2001, at 1G.



 <sup>&</sup>lt;sup>97</sup> Rob Gurwit, "Land Grab," *Governing*, Jan. 2001, at 26; see also "Government as Land-Grabber," *The American Enterprise*, June 2001, at 57.
 <sup>98</sup> Gary Gerhardt, "Residents Seek More Input in Arvada Renewal Plan," *Rocky Mountain News*, Feb. 3, 2000, at 29A.
 <sup>99</sup> Letters Page, *Rocky Mountain News*, May 18, 2000, at 55A.

another private party and also unhappy with the offers made by the developer to purchase the property.<sup>103</sup> The project has now gone forward,<sup>104</sup> but news reports do not indicate whether property was condemned or the owners agreed to sell under threat of condemnation.

### Aurora

In December 2002, the Aurora City Council approved a measure that will force almost 60 "undesirable and nonconforming" businesses in the neighborhood surrounding the Fitzsimons medical campus to redevelop their property to uses compatible with other redevelopment projects springing up around the multimillion-dollar biomedical research science park. Among the businesses impacted by the new law are hotels, gas stations, liquor stores, mobile home parks and apartment buildings. If business owners within the targeted area do not bring their properties into conformance with the City Council's desired uses within 10 years, the City could take them without compensation. This procedure, known as "amortization," is the City's chosen method of redeveloping the area, because the cash-strapped local government does not have the money to condemn the properties outright and pay the owners' fair market value and relocation expenses. Many owners are outraged that amortization will burden them with all the costs of converting their properties, with no compensation at all from the City.<sup>105</sup> For example, Cathy Lundy, who owns Luster Car Wash, just spent hundreds of thousands of dollars rebuilding and improving her business in May 1998. She says that under the City's plan she cannot possibly recoup that investment within the 10-year time limit. Also, says Lundy, "There is no way we can become conforming; a car wash is a car wash."106

Lundy, along with the owners of nine single-family homes in the targeted area, managed to secure an exemption from the City Council that allows them to keep their properties without having to bring them into conformance with the City's plans. Other owners, however, were not so lucky. Paul Thompson must change his apartment building and kick out the 50 low-income, disabled seniors who currently live there. An additional 450 elderly residents live in the four mobile home parks that must close with-

<sup>103</sup> Sean Kelly, "Property Owners Angry at Aurora; Offers Called Unfair for Town Center Land," *Denver Post*, Aug. 1, 2001, at B2.

<sup>104</sup> Rachel Brand, "Shops and Restaurants to Be Center Attraction; Complex at the Heart of Aurora Has Been 20 Years in Making," *Rocky Mountain News*, Sept. 19, 2002, at 2B.

<sup>105</sup> Sheba R. Wheeler, "Renewal Divides Aurora, Residents; Owners Near Fitz Get 10 Years to Conform," *Denver Post*, Dec. 4, 2002, at B1.

<sup>106</sup> Mike Patty, "Plan: 10 Years to Shape Up; Businesses Around Fitzsimons Argue Zoning Law Is Unfair," *Rocky Mountain News*, Jan. 7, 2003, at 14A.

## Recent Colorado Court Decisions Limit the Rights of Counties and Individuals to Challenge Municipal Urban Renewal Plans

In the past few years, several actions have been brought by Colorado taxpayers seeking to overturn urban renewal plans passed by municipalities in that state. The Boards of Commissioners from both Boulder and Adams counties, along with an individual taxpayer, challenged an urban renewal plan that the City of Broomfield had approved after determining that the targeted area was blighted. They tried to sue under the Colorado Taxpayers' Bill of Rights,<sup>1</sup> arguing that because the Broomfield plan involved a reallocation of property taxes, it amounted to a tax policy change and thus should have been put to a vote of the electorate.<sup>2</sup> The Boulder commissioners also alleged that the plan was invalid because Broomfield violated the state Urban Renewal Act by failing to adequately include the County in an advisory role during the process of formulating the plan.<sup>3</sup> The Colorado Court of Appeals ruled in November 1999 that both suing parties lacked standing to challenge the Broomfield plan. The individual taxpayer had not asserted a legally compensable injury, because the plan provided for proportional adjustments of the amount paid to the renewal agency in the event of

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a general reassessment of taxable property valuations, and thus did not deprive counties of their property tax revenue.<sup>4</sup> The Boards of Commissioners lacked standing, according to the court, because the Taxpayers' Bill of Rights does not allow counties to sue on behalf of individual taxpayers.<sup>5</sup>

An individual taxpayer also brought a similar action against an urban renewal plan adopted by the City of Golden. In February 2002, the Colorado Court of Appeals denied the taxpayer's claim on the grounds that she suffered no injury to any cognizable personal legal interest. Similar to the situation in the challenge to Broomfield's plan, the tax allocation set forth in the Golden urban renewal plan does not invoke an individual's right to seek redress under the state Taxpayers' Bill of Rights, nor does Colorado law allow individual taxpayers to challenge urban renewal plans as interested parties.<sup>6</sup>

From these two cases, it is clear that Colorado courts will allow challenges to municipal urban renewal plans by people who own property within the area but not by individual taxpayers.

 <sup>1</sup> Colo. Const. Art. X § 20.
 <sup>2</sup> Board of Commissioners of Boulder County v. City of Broomfield, 7 P.3d 1033, 1035 (Colo. App. 1999).
 <sup>3</sup> Id. at 1036-37.
 <sup>4</sup> Id. at 1036.
 <sup>5</sup> Id. at 1037.
 <sup>6</sup> Olson v. City of Golden, 53 P.3d 747 (Colo. App.), cert. denied (III. Sept 3, 2002). in 10 years. Some of these unfortunate owners have organized an effort to gather the 4,000 signatures needed to force the City Council to either repeal the amortization measure or refer it to a public vote in a special election. Others have retained lawyers and are looking into possible lawsuits against the City.<sup>107</sup>

### Denver

On June 25, 2001, the Denver City Council voted 8-3 to condemn a parcel of land to make way for a public-private parking garage, retail and condominium project near the city's art museum. The parcel's owner had built a low-rise restaurant structure on the parcel in 1997, which was then leased to Ilios Foods for 10 years with a 10-year renewal option. D. Diamond, the owner of Ilios Foods, says she would never have moved in or developed her restaurant had she known of the City's plan to condemn the property. Also, she says she signed the lease on the property without realizing that it contained a clause providing for cancellation of the lease upon condemnation. In the meantime, Ilios Foods has spent \$650,000 on fixtures and other improvements to the property.<sup>108</sup>

The City offered to let the restaurant stay where it is for two years, rentfree, and then relocate. However, Diamond turned down the offer and instead filed suit against both the City and her landlord. The damages lawsuit was still pending in June 2002. In the meantime, Ilios Foods closed its doors in December 2001.<sup>109</sup>

### Lakewood

The City of Lakewood is working with Continuum Lakewood Development Co., a private developer, to transform the old Villa Italia Mall into a massive retail/office/housing complex that, when completed, will supposedly serve as Lakewood's new downtown. Continuum acquired the land in 1999 and the mall buildings in 2000, but several stores, including a profitable Foley's department store, still had leases in the buildings. In 2001, the City condemned Foley's lease of the land under the building Foley's owned and the leases of the 20 other remaining stores.<sup>110</sup>

However, May Department Stores Co., the parent company of Foley's, has been locked in a bitter fight with the Lakewood Reinvestment Authority over the manner in which Foley's was evicted. In negotiations over a lease that would have allowed Foley's to remain a part of the Villa Italia redevelopment, the developer asked Foley's to accept a colossal

<sup>107</sup> Sheba R. Wheeler, "Fitzsimons-Area Businesses Eye City Vote on Rezoning;
Firms Say Aurora Decision Unfair," *Denver Post*, Jan. 12, 2003, at B3.
<sup>108</sup> "City Hall 1, Ilios 0," *Denver Post*, June 29, 2001, at B6.
<sup>109</sup> Kyle Wagner, "The Bite; Closed Call," *Denver Westword*, Jan. 10, 2002.
<sup>110</sup> John Rebchook, "Lakewood Evicts Foley's from Old Villa Italia Mall," *Rocky Mountain News*, Feb. 1, 2002, at 5B.



rent hike. Foley's agreed to double its rent and pay a percentage of sales, but balked at the idea of paying 600 percent more to use a building it already owns.<sup>111</sup>

The situation has spawned multiple lawsuits. May and another tenant sued Continuum in federal court, alleging that Continuum had breached its lease and also was improperly directing the condemnation process as a private party.<sup>112</sup> Foley's lost in the trial court and the case is currently on appeal to the U.S. Court of Appeals for the Tenth Circuit. Meanwhile, in the condemnation action filed by the City, the City sought immediate possession of the property, so it would not have to wait until the end of the litigation. Foley's and other stores challenged the condemnation but lost in the trial court.<sup>113</sup> The Colorado Supreme Court refused to review the case.<sup>114</sup> The condemned stores will no doubt be replaced by other stores.

Colorado's oldest car dealership, O'Meara Ford in the Denver suburb of Northglenn, narrowly escaped the threat of condemnation after the Northglenn Urban Renewal Authority decided in 1998 that it wanted to take the dealership as part of a private developer's big-box ambitions.

#### Northglenn

Colorado's oldest car dealership, O'Meara Ford in the Denver suburb of Northglenn, narrowly escaped the threat of condemnation after the Northglenn Urban Renewal Authority decided in 1998 that it wanted to take the dealership as part of a private developer's big-box ambitions for redeveloping the former Northglenn Mall into a new retail center. The dealership, part of an auto row that includes 10 other new-car dealerships on West 104th Avenue, was not a failing or dilapidated business. In fact, O'Meara Ford was highly successful, and at the time Brian O'Meara learned of the City's plan to oust the business his grandfather founded in 1913, the dealership was in the middle of planning a \$3-million expansion project that was to include a new showroom, state-of-the-art furnishings, 50 service bays, a children's play area and special kiosks where customers could browse different options before making a purchase. However, the City wanted O'Meara Ford out of the way because, unlike other merchandise and services, auto sales generate no tax revenue for the City in which the dealership is located; all auto sales taxes are collected by the county in which the buyer lives.<sup>115</sup>

Over the next two years, O'Meara Ford managed to stave off condemnation, in part by threatening a prolonged legal challenge. The situation attracted the attention of State Representative Andy McElheny (R-Colorado Springs), who in response drafted a bill that significantly limits Colorado cities' power to use eminent domain for redevelopment purposes (see above).<sup>116</sup>

<sup>111</sup> Aldo Svaldi, "Lakewood Eviction Draws Foley's Protest," *Denver Post*, Feb. 21, 2002, at E3.

<sup>112</sup> John Rebchook, "May Files Lawsuit Against Villa Italia Developers," *Rocky Mountain News*, July 28, 2001, at 5C.
 <sup>113</sup> *Lakewood Reinvestment Authority v. Continuum Lakewood Investment Co.*, No. 01CV1482 (Jefferson County Dist. Ct. Sept. 7, 2001).

<sup>114</sup> Lakewood Reinvestment Authority v. Continuum Lakewood Investment Co., No. 01 SA 291 (Colo. Sept. 19, 2001).
 <sup>115</sup> Richard Williamson, "O'Meara Facing Fight on 104th; City, Car Dealer at Odds on Redevelopment Plan," *Rocky Mountain News*, Dec. 8, 1998, at 1B.

<sup>116</sup> John Rebchook, "Power of Eminent Domain 'Designed to Be Abused'," Rocky Mountain News, Nov. 12, 2000, at 7G.



In the end, O'Meara Ford was able to avoid being condemned. Under the new, more restrictive blight law, Northglenn officials knew they could not get away with taking the dealership. Additionally, the slowing economy made the O'Meara property too expensive for the Northglenn Mall developer's budget. In August 2001, the dealership began a renovation that was even larger than the one it had been planning at the time it came under threat of condemnation. The \$12.5-million expansion tripled the size of the showroom and adds 50 percent more employees to the dealership's payroll<sup>117</sup>—just what anyone would call urban blight.

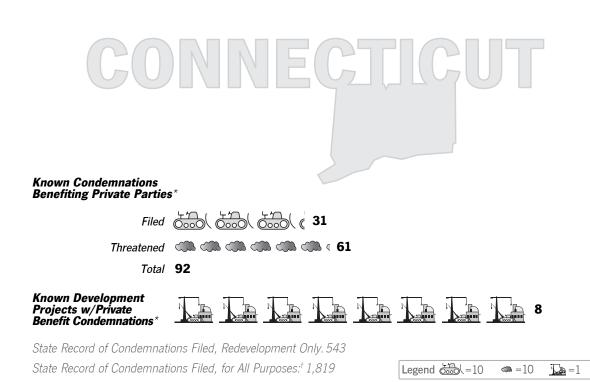
### Pitkin County

As part of a project to widen State Highway 82, Pitkin County and the Colorado Department of Transportation (DOT) jointly petitioned for condemnation of 23.38 acres of land adjacent to the highway and Buttermilk Ski Area, a private, for-profit development. The parcel consists of vacant land, 13 acres of which had been leased by owner Craig Stapleton to Aspen Skiing Co. for use as Buttermilk's overflow parking lot. Although the land is not zoned for this use, the County had granted Stapleton permission to use it for parking because of the ski area's inadequate parking facilities. The County and DOT agreed that the DOT would pay for the land, then turn over to the County all excess property not directly associated with the highway expansion. A draft of this agreement stipulated that the County would lease the portion previously used as a parking lot back to Aspen Skiing, but this provision has been removed.

Stapleton challenged the taking, alleging that the County failed to negotiate in good faith as a prerequisite to condemnation, and that the County's primary purpose was to serve the private parking and transportation needs of Buttermilk Ski Area. The County, on the other hand, claimed that its primary purpose was for a public intercept lot to serve general commuters and to preserve open space and wetlands, so that the highway expansion project would meet the requirements of the federal Clean Air Act. In June 2001, the Pitkin County District Court held that no alternate way existed for the County to comply with the law other than through the condemnation of Stapleton's land. Therefore, the alleged private use was subservient to the public purpose associated with the taking. The court turned Stapleton's land over to the County.<sup>118</sup> The case is now on appeal.

<sup>117</sup> Rachel Brand, "O'Meara Ford Renovation Tripling Size of Dealership; Company's Sales Strong Amid Nationwide Slump," *Rocky Mountain News*, Aug. 21, 2001, at 2B.
 <sup>118</sup> See *Department of Transportation v. Stapleton*, No. 00CV218 (Pitkin County Dist. Ct. June 18, 2001).





# OVERVIEW

Connecticut is going through a period of upheaval in its use of eminent domain. On the one hand, Connecticut cities have been eager to use eminent domain for the benefit of private business interests, engaging in both large- and small-scale condemnation projects. On the other hand, the Connecticut Supreme Court has shown increasing concern about eminent domain abuse. Although it had not considered an eminent domain case in more than 20 years, the Connecticut Supreme Court rebuffed one proposed condemnation project in 2001 and two condemnations in 2002. No doubt to the surprise of many redevelopment agencies, the Court held that redevelopment areas are not an agency's "perpetual fiefdom" and that "just because the property may be desirable to the defendants does not justify its taking by eminent domain." It's not clear if cities are getting the message. For example, Bridgeport continues to move forward on a number of condemnations, even though it received a firm rebuke from the Supreme Court in 2002. Old habits apparently die hard.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened.

<sup>†</sup>State of Connecticut Judicial Branch. The first number is redevelopment condemnations only, and the second number includes condemnations for traditional public uses.

# Private Use Condemnations

### Bridgeport

In a unanimous decision, the Connecticut Supreme Court recently ruled that the City of Bridgeport acted unreasonably in using eminent domain to seize property owned by the Pequonnock Yacht Club for a major waterfront redevelopment project along Steel Point, a 50-acre peninsula in Bridgeport Harbor. The 100-year-old club can return to normalcy after years spent fighting the condemnation.<sup>119</sup>

The City's behavior was actually quite typical. It selected a private developer to build an \$800 million grandiose and unlikely waterfront project, to include housing, offices, a hotel, conference center and retail. The Yacht Club, which had a thriving working-class membership and no desire to move, asked the City to allow it to remain. The City rebuffed the repeated requests, because it wanted to raze the area and then transfer it to its chosen private developer. Then, the project fell through, but the City had dug in its heels and refused to drop the condemnation. It was left in the position of condemning a perfectly viable, unblighted property with absolutely no idea of what it would do with the property once it was taken. The

Then, the project fell through, but the City had dug in its heels and refused to drop the condemnation. It was left in the position of condemning a perfectly viable, unblighted property with absolutely no idea of what it would do with the property once it was taken. The Connecticut Supreme Court was less than impressed.

Connecticut Supreme Court was less than impressed. Connecticut statutes allow cities to condemn property in blighted areas, but if a city wants to condemn an unblighted property, it can only do so if that property is essential to the project.<sup>120</sup> Connecticut municipalities had routinely ignored this requirement, but the Connecticut Supreme Court held that Bridgeport had made no attempt to show that the Yacht Club was essential to the project (indeed, it would have been impossible to make such a showing, since the project plan had fallen through).<sup>121</sup> The Court agreed with the trial court that "just because the property may be desirable to the defendants does not justify its taking by eminent domain."<sup>122</sup> The Institute for Justice filed an amicus brief at the Connecticut Supreme Court in support of the Yacht Club.

#### Bridgeport

In May 2002, the Bridgeport Economic Development Corp. (BEDC) condemned four homes and one investment property to make way for an industrial park on Seaview Avenue in Bridgeport. Under the BEDC plan, lots in the industrial park would be owned by private manufacturers and other businesses. The condemnations sought to displace Luis Del Rio, Ruth Joel, Natalie Skiba and Ollie Holmes, who each live with their

<sup>119</sup> Pequonnock Yacht Club, Inc. v. City of Bridgeport, 790 A.2d 1178, 1187 (Conn. 2002).
<sup>120</sup> Conn. Gen. Stat. § 8-125 (b) (2001).
<sup>121</sup> John Christoffersen, "State Supreme Court Rejects Bridgeport's Land Seizure for Development," AP Wire, Feb. 25, 2002.
<sup>122</sup> Pequonnock Yacht Club, Inc. v. City of Bridgeport, 790 A.2d at 1187.



families in the targeted homes. Additionally, Eduvijes Del Rio would lose an investment property he owns within the targeted area.<sup>123</sup> Each of the homes is tidy, and none are vacant or deteriorating. However, the City wants to force these people out anyway and convert the land to more lucrative industrial uses. All of the owners are challenging the condemnations, alleging (among other things) that the City violated the law by failing to follow the City Charter's eminent domain notice requirements, and by condemning their properties without a valid public use, and without even a blight determination, for the sole benefit of private businesses. As of December 31, 2002, the case is pending before the Superior Court in Fairfield County.

## Bristol

The Bugryns, four siblings in their 70's and 80's, owned two homes and a Christmas tree farm in Bristol, totaling 32 acres. They had lived on the property for most of their lives, in a home Frank Bugryn built with his own hands. This all changed when Bristol officials decided to condemn the Bugryns' land for an industrial park. The property was not blighted, but the City believed the property should be put to industrial use, where it would generate more taxes and jobs than the houses and trees did. The City originally planned the industrial park to allow a local metal business to expand. After that company relocated to another municipality, the City continued its condemnation efforts.<sup>124</sup> The Bugryns challenged the condemnation in court, but lost both in the trial court and before the Connecticut Appeals Court.<sup>125</sup> The Connecticut and U.S. Supreme Courts declined to review the case.<sup>126</sup> In September, 2002, the City began eviction proceedings to remove the family from their home of 60 years.<sup>127</sup> **Update:** In March 2003 the Bugryns lost their appeal of the eviction. They have been ordered to vacate their homes by July 2003.<sup>128</sup>

## East Hartford

In 2000, the redevelopment agency in East Hartford voted to take Nardi's Bakery and Deli by eminent domain as part of its plan to redevelop Main Street. Nardi's was a popular local eatery. The bakery had been in the family and in the same location for 93 years, but it stood in the way of the large redevelopment project, headed by Town Centre LLC.<sup>129</sup> Under the threat of impending eminent domain, Nardi's eventually agreed to sell its prime location for \$1.75 million. The building was razed.

The forced purchase and destruction of a viable business turned out to be a huge mistake for the City, financially as well as morally. Town Centre failed to produce an acceptable redevelopment plan to the redevelopment agency. And without any private developer in the picture, the Town was stuck with one very expensive bill. Two other businesses were condemned as part of the project, and the Town also underestimated the cost of those condemnations. Now, Nardi's is gone; the Town is in debt; and the land where Nardi's once stood lies empty.<sup>130</sup>

### Hartford

In 1990, the Hartford Redevelopment Agency (HRA) adopted a redevelopment plan that would allow the City to condemn privately owned land for redevelopment. The crux of the plan was that the HRA would consolidate

<sup>123</sup> See Plaintiffs' Complaint in *Del Rio v. Bridgeport Economic Development Corp.*, No. CV-02-0395692, at 1-6 (Fairfield County Super. Ct., filed Aug. 27, 2002).

<sup>124</sup> Jackie Majerus, "Bugryn Case Moot, City Argues," The Bristol Press, Oct. 17, 2001.

<sup>125</sup> Bugryn v. City of Bristol, 774 A.2d 1042, 1052 (Conn. App. 2001).

- <sup>126</sup> Bugryn v. City of Bristol, 776 A.2d 1143 (Conn. 2001), cert. denied, 122 S. Ct. 544 (2001).
- <sup>127</sup> Loretta Waldman, "City Moves to Evict Bugryn Siblings," The Hartford Courant, Sept. 16, 2002, at B3.

<sup>128</sup> Roberto Gonzalez, "Family Loses Fight to Stay; Court Rules Against Bugryns," *The Hartford Courant*, Mar. 12, 2002, at B3. <sup>129</sup> Christopher Keating, "Nardis Seeks More Time for Move," *The Hartford Courant*, Apr. 9, 2001, at B1.

<sup>130</sup> Carrie Budoff, "Project Faces Cost Overrun; Agency Asking for \$75,000," The Hartford Courant, Nov. 19, 2001, at B3.

parcels of property and then sell them to developers willing to rehabilitate them. The redevelopment area included two parcels, which local resident Frank Citino had purchased in 1985 with the intention of renovating the apartment building located there. The HRA told Citino that he could retain his land if he rehabilitated it. However, Citino's plans to renovate one of the parcels were rejected, and the agency eventually condemned it. Over time, the HRA acquired all of the land in the redevelopment area except Citino's second parcel. Eventually, Citino fully rehabilitated the building on that parcel, but by that point the HRA had cleared out all the residents of the buildings in the surrounding area, which were then boarded up and allowed by the City to deteriorate. Citino was able to rent out only two of the six apartments in the renovated building.

Citino sued the redevelopment agency, and the trial court ruled in his favor. On appeal, the Connecticut Court of Appeals affirmed the lower court decision, holding that the HRA's actions resulted in the de facto condemnation of

Citino's property. The appeals court applied a test to determine "whether the property no longer has any reasonable and proper use and whether the economic utilization of the land has been, for all practical purposes, destroyed." In doing so, the court found that the condemning authority's failure to implement its redevelopment plan in a reasonable amount of time, coupled with its permitting the overall deterioration of the surrounding area in the interim, amounted to a de facto condemnation. The HRA was ordered to pay Citino just compensation for the damage the agency caused to his property.<sup>131</sup> Meanwhile, the City's "redevelopment" project remained a complete failure, resulting only in deterioration and empty buildings.

### New London

The New London Development Corporation (NDLC), a private nonprofit organization, has been trying for more than three years to take the property of seven homeowners in the Fort Trumbull area of New London in order to construct privately owned office buildings and for other, unspecified uses, that will all serve to complement the new Pfizer global research facility nearby.<sup>132</sup> The Fort Trumbull neighborhood was once a close-knit community of approximately 80 homes and a few small



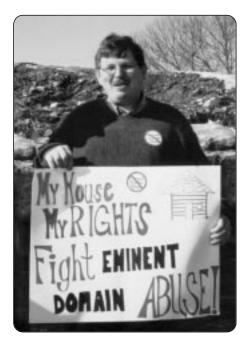
Tom Picinich had his property taken to create an expanded Pfizer gateway road and for some future, unknown development. Picinich protested against eminent domain on opening day of the new Pfizer Global Research headquarters...on the water right in front of Pfizer. May 2001. Sign reads: Pfizer, NLDC, STOP EMINENT DOMAIN STEALING!!!

<sup>131</sup> Citino v. Hartford Redevelopment Agency, 721 A.2d 1197, 1209-10 (Conn. App. 1998).
 <sup>132</sup> Laura Mansnerus, "Refusing to Let Go, Property Owners Test Eminent Domain's Limits," *The New York Times*, July 23, 2001, at B1.



businesses. Among the 21 properties slated for condemnation were the homes of the Derys and Cristofaros. Wilhelmina Dery is 84 years old and lives in the same house in which she was born. Her son, daughter-in-law and grandchildren live next door. By comparison, the Cristofaro family's mere 40-year tenure in their home seems short. This will be the second Cristofaro home condemned for a private redevelopment project. The first one was supposedly condemned for a seawall but in fact became part of an office complex.<sup>133</sup> When the family moved, they brought the trees they had planted next to their old home and have grown a beautiful garden around those trees at their Fort Trumbull home.<sup>134</sup> If they lose their home this time around, the Christofaros will once again have to uproot their beloved trees and move somewhere else.

Across from the Fort Trumbull residential community is an abandoned U.S. Naval research facility. Nobody objected to the replacement of the abandoned facility and nearby property with a luxury hotel (for visitors to Pfizer) and upscale housing (for Pfizer employees). They only objected when it became clear that the NLDC planned to replace their working-class, waterfront community with offices for businesses related to Pfizer. The NLDC added insult to injury by exempting the Italian Dramatic Club, a politically well-connected membership club, while razing every home around it.<sup>135</sup>



Michael Cristofaro protests the abuse of eminent domain by New London's redevelopment corporation and the City. The NLDC has been trying to condemn his family home.

Rather than doing the condemnations itself, the City of New London delegated its eminent domain power to the NLDC, a private corporation. As the former head of the NLDC, Claire Gaudiani, explained, "We all have to sacrifice." It seems she meant that the homeowners would sacrifice, while the private developer in the project would benefit. The homeowners filed suit, represented by the Institute for Justice, and the case went to trial in mid-2001.<sup>136</sup> Connecticut Superior Court Judge Thomas J. Corradino on March 13, 2002 held that seven of the plain-



Left: IJ Vice President for Communications John Kramer kept watch through the night to ensure the government didn't destroy a New London resident's home. Right: Matthew Derry speaks to reporters about the condemnation of his home for private use. Center: A private agency that's been given the government's power of eminent domain is trying to take Susette Kelo's home for private economic development.

<sup>133</sup> Kathleen Edgecomb, "Fort Residents: 'You Can't Call a Home a Home Here," *The Day (New London, Conn.)*, Dec. 21, 2000; David Herszenhorn, "Residents of New London Go to Court, Saying Project Puts Profit Before Homes," *New York Times*, Dec. 21, 2000, at B5.

<sup>134</sup> See Trial Testimony of Michael Cristofaro in *Kelo v. City of New London*, 2002 Conn. Super. LEXIS 789 (Mar. 13, 2002).
 <sup>135</sup> Izaskun E. Larraneta, "New London, Conn., Development Group Accused of Pushing Too Hard For Pfizer," *The Day* (*New London, Conn.*), Aug. 14, 2001.

<sup>136</sup> David Herszenhorn, "Residents of New London Go to Court, Saying Project Puts Profit Before Homes," *New York Times*, Dec. 21, 2000, at B5; Izaskun E. Larraneta, "Eminent Domain Trial Resumes Today," *The Day (New London, Conn.)*, Aug. 13, 2001.





Neild Oldham, co-chairman of the Coalition to Save Fort Trumbull, with Castle Coalition members and other opponents of eminent domain abuse, held a vigil in New London's Fort Trumbull neighborhood on the eve of oral argument before the Connecticut Supreme Court.

tiffs, who own 11 of the 15 homes, won their case outright and may keep their land. According to the court, the NLDC could not condemn land for unspecified uses. The other owners appealed and will retain possession of their homes during the appeal.<sup>137</sup> The Connecticut Supreme Court heard oral arguments on December 2, 2002,<sup>138</sup> and a decision is expected in 2003.

### Orange

The Connecticut Supreme Court ruled in 2001 that the Town of Orange had improperly designated a redevelopment area in order to condemn land on which the owner, AvalonBay Communities, Inc., planned to develop affordable housing.<sup>139</sup> The court found that the supposed redevelopment plan for the area was merely a pretext for the town's true purpose of preventing the construction of affordable housing in the area. The Town was claiming it needed the property to develop an industrial park. AvalonBay had purchased the 9.6-acre parcel in 1997 and filed the requisite applications with the Town to develop the property for residential use. The Town's zoning commission denied AvalonBay's application and then three weeks later declared a moratorium on all planned residential developments. While AvalonBay's appeal from the commission's ruling was pending, the Town's economic development commission began drafting a redevelopment plan that would turn 18 parcels of property, including the AvalonBay parcel, into a high-tech industrial park. The Town then approved the condemnation of AvalonBay's land, and AvalonBay sued to prevent the condemnation and invalidate the redevelopment plan.<sup>140</sup>

<sup>137</sup> Kelo v. City of New London, 2002 Conn. Super. LEXIS 789 (Mar. 13, 2002); see also Peter Downs, "Court Backs 7 Homeowners," *The Hartford Courant*, Mar. 14, 2002, at B11.

<sup>138</sup> Noreen Gillespie, "State Supreme Court Hears Arguments in Eminent Domain Case," *AP Wire*, December 3, 2002.
 <sup>139</sup> AvalonBay Communities, Inc. v. Town of Orange, 775 A.2d 284 (Conn. 2001).

<sup>140</sup> "Court May Enjoin Project Plan Developed in 'Bad Faith'," Land Use Law Report, Aug. 1, 2001, at 126.



After the Connecticut Supreme Court invalidated the plan, the condemnation was off the table.

### Stamford

In 1999, the Stamford Urban Redevelopment Commission (SURC) condemned 58-year-old Curley's Diner to clear the way for an 11-story building that would house retail stores and high-rent apartments. Many local residents voiced their support for the popular diner. Curley's owners decided to put up a fight.

In December 1999, the owners of Curley's brought suit against the SURC challenging, in part, the fact that the SURC condemned the property without having first obtained a finding of blight. In addition, Curley's owners alleged that the City's proposal to turn the site into expensive housing would violate a 1988 Stamford Board of Representatives guideline that any further development by the SURC should contain affordable housing as a primary component.<sup>141</sup>

When the case came before the Connecticut Supreme Court, the justices agreed with Curley's that the SURC's findings of blight had been inadequate. The City relied on a determination of blight from 1963! And the 1963 declaration did not even include Curley's. The City amended the plan in 1988 to include Curley's because the City wanted to do a new project that would compete with a mall that had been constructed in another part of Stamford in the 1980s. The City did not do a new blight study, however. Without ruling on the affordable housing issue, the Court granted Curley's a permanent injunction against the SURC's condemnation.<sup>142</sup> The Court held that a new finding of blight is required when new property is added to the project area or when the agency sought to conduct a new project, not originally contemplated. To hold otherwise, the Court found, "would confer on redevelopment agencies an unrestricted and unreviewable power to condemn properties for purposes not authorized by the enabling statute and to convert redevelopment areas into their perpetual fiefdoms."143

<sup>141</sup> Jack Cavanaugh, "Irate Customers Say Stamford Needs Their Old Diner, Not Another Tower," *The New York Times*, Dec. 16, 1999, at B15.

<sup>142</sup> Aposporos v. Urban Redevelopment Commission, 790 A.2d 1167, 1176 (Conn. 2002).
<sup>143</sup> *Id.* at 1175.

## Many Private Use Condemnations Go Unreported

Connecticut apparently is the only state that breaks the total condemnation numbers down in a meaningful way by separately reporting redevelopment condemnations. Redevelopment condemnations are almost always condemnations for private development, so it is a good proxy for private use condemnations.<sup>1</sup> For fiscal years 1998-2002, Connecticut reported that 543 out of a total of 1,819 condemnations were for redevelopment. Of those 543, only 31 appear in published reports or in court documents we received. In other words, at least in Connecticut, there were 17.5 private use condemnations that went unreported for every one that appeared in the newspaper.

Redevelopment designations make up 29 percent, or just over one-quarter of Connecticut's total condemnations. Only 23 states report any information on total condemnation case numbers. Taken together, those 23 states reported a total of 46,213 condemnations of all types between 1998 and 2002. One-quarter would be 11,553 just for those 23 states. Of course, some states may have no private use condemnations at all while others may have more than one-quarter. But Connecticut's numbers provide a small window showing that the numbers in this report really are just the tip of a very large iceberg.

#### **Connecticut Condemnations**

| Redevelopment             | 543   |
|---------------------------|-------|
| State Highway             | 1,189 |
| Other State and Municipal | 27    |
| Public Utilities          | 4     |
| All Other                 | 56    |
| Total                     | 1,819 |

<sup>1</sup> It is possible that some redevelopment condemnations could actually be for roads or public buildings, and it is also possible that a few private use condemnations are sprinkled in the "other" categories. Still, redevelopment condemnations are a likely approximation of Connecticut condemnations that benefit private parties.

CASTLE



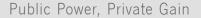
State Record of Condemnations Filed, for All Purposes:<sup>†</sup> 129

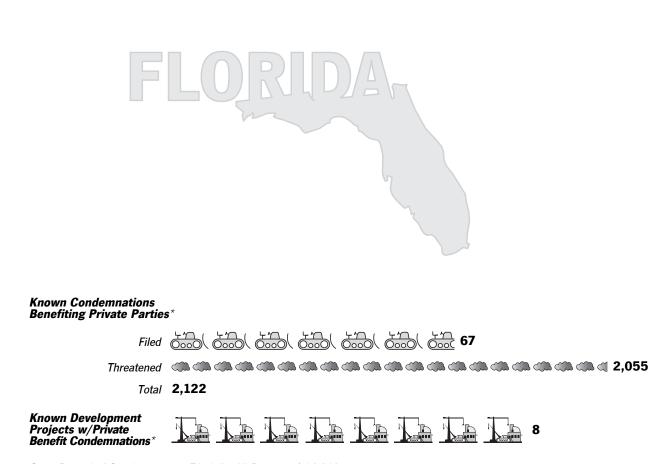
# OVERVIEW

Delaware apparently has not used eminent domain for private parties in the past five years. There are no news reports and no new legislation. Indeed, there have been very few condemnations of any type in Delaware between 1998 and 2002—barely more than 100. In 1986, the Delaware Supreme Court rejected an attempt to condemn land in order to retain the city newspaper, which wanted a new build-ing.<sup>144</sup> This decision may well have discouraged further similar attempts to take property for private developers. Whatever the reason, Delaware cities have refrained from using eminent domain for private parties and deserve the thanks of all their property owners.

<sup>1</sup>Delaware Superior Court, Prothonotary Office (includes condemnations for traditional public uses). Figures include New Castle and Sussex Counties only. Kent County is Delaware's only other county. <sup>144</sup> See *Wilmington Parking Authority v. Land with Improvements*, 521 A.2d 227, 233-35 (Del. 1986).







State Record of Condemnations Filed, for All Purposes:<sup>+</sup> 14,319

Legend  $\overleftarrow{}$  =10  $\Rightarrow$  =100  $\overleftarrow{}$  =1

## OVERVIEW

Florida cities are eager to use eminent domain as a redevelopment and even political tool. At the same time, many cities at least try to provide a fig leaf of public use justification even in large projects for private beneficiaries. At the same time, Florida's projects are some of the largest in the country. For example, the City of Riviera Beach has plans to displace more than 5,000 people as part of a massive project. Much of the project area will be transferred to private parties, but one part of the project will move a road, giving at least that portion of it a seemingly public use. The Riviera Beach project also highlights a national trend of cities taking waterfront and other prime real estate away from the rightful owners in order to give the property to more favored developers, so that those developers can reap the benefits of good location. American Beach also looks poised to destroy a flourishing African-American community to make way for higher-priced development.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened. \*Florida Supreme Court (includes condemnations for traditional public uses).

## LEGISLATIVE ACTIONS

Governor Jeb Bush recently signed into law a bill passed by the state legislature that significantly weakens the "blight" standards under the state's Community Redevelopment Act (CRA).<sup>145</sup> Since its initial passage in 1969, the CRA's definition of blight required not only the presence of one or more statutory factors, such as small lots, diverse ownership (many different owners in area) or narrow streets,<sup>146</sup> but also that the presence of those factors both "substantially impairs or arrests sound growth"<sup>147</sup> and constitutes "a menace to the public health, safety, morals, and welfare."<sup>148</sup> However, the legislature amended the CRA in 2002, removing those two protections and allowing municipalities to declare areas blighted solely on the basis that two or more of the statutory factors are present.<sup>149</sup>

The Riviera Beach project also highlights a national trend of cities taking waterfront and other prime real estate away from the rightful owners in order to give the property to more favored developers, so that those developers can reap the benefits of good location.

## Private Use Condemnations

#### American Beach

American Beach is Florida's most famous predominantly African-American beach. It was founded in 1935, and was a haven for blacks until integration began. Over the last few decades, however, upscale condominium developments, resorts and mansions have been encroaching on American Beach's picturesque sand dunes and small beach cottages, to the extent that the beach area has shrunk from 200 to 100 acres.<sup>150</sup> In December 2001, the Board of Commissioners in Nassau County voted to declare American Beach blighted, taking the first step in creating a community redevelopment agency that would have the power to condemn properties and sell them off to private developers.<sup>151</sup> Fearing that a blight designation will cost them their land, a group of American Beach property owners sued to have the designation overturned.<sup>152</sup> Update: The case is still pending as of April 1, 2003.

### Boynton Beach

As part of a plan to revitalize Boynton Beach's central neighborhoods, the City wants to take five properties and transfer them to private retail developers. The targeted properties consist of four businesses (Roberts Restaurant & Take Out, Ruby's Beauty Center, the Seacrest Farm Dairy Store and an E-Z Market conven-

<sup>145</sup> Community Redevelopment Act of 1969, Fla. Stat. § 163.330 (2001).
<sup>146</sup> *Id.* at § 163.360(2)(a).
<sup>147</sup> *Id.* at § 163.340(8)(a).
<sup>148</sup> *Id.* at § 163.360(8)(b)(3).
<sup>149</sup> H.B. 1341, 104th Sess. (Fla. 2002).
<sup>150</sup> Kelly Brewington, "Eyes on Seaside Prize; Historically Black American Beach Is Being Gobbled Up By White Developers," *Orlando Sentinel*, Aug. 2, 2002, at A1.
<sup>151</sup> Allison Schaefers, "American Beach 'Blighted'," *The Florida Times-Union*, Dec. 22, 2001, at P1.
<sup>152</sup> Allison Schaefers, "American Beach Group Seeks to Overturn Blighted Status," *The Florida Times-Union*, Feb. 13, 2002, at P4.



ience store) and a church (the Jesus House of Worship). In a December 2002 memo to the local redevelopment agency, Development Director Quintus Greene asked the board to begin appraisals of the five properties and make purchase offers to the owners. If the owners are unwilling to sell, the memo recommends taking the properties by eminent domain. It is likely that the agency will assent to the condemnations.<sup>153</sup>

### Daytona Beach

The Daytona Beach City Commission declared about 50 homes in the Seabreeze area blighted so that their property could be marketed for development. Even in the City's study, only about 10 percent of the homes appeared to be run-down. Declaring the area blighted of course brings with it the power of eminent domain and the ability to transfer the land to private developers. At least one property was condemned for a hotel under the original blight designation. Many of the homeowners were less than pleased at the prospect of being condemned. Georgiana Wirgman, in her 90s, has lived in her home for more than 50 years and does not want to move. Neither do two college professors, Mary and Richard Snow. Along with some of their neighbors, they brought a lawsuit challenging the blight designation.<sup>154</sup> The trial court will be hearing the evidence on blight.<sup>155</sup> As of December 31, 2002, the case is still ongoing in the trial court.

### Fort Lauderdale

Coolidge-South Markets Equities owns a 1.4-acre parcel of land adjacent to the City-owned RiverWalk park development. Coolidge-South and a developer are trying to build a 38-story residential building on the site, with a public access open promenade. The proposed use meets all local zoning requirements, and the City's own comprehensive plan even confirms the site's high-density use designation. However, local preservationists launched a petition drive claiming that a high-rise building might harm the historic Stranahan Building, which is located next door. The preservationists convinced the City that it should condemn the land to prevent the development. In June 2000, the City Commission passed a resolution condemning the land and stating that a park is necessary to "health, safety and morals" of the community, even though Fort Lauderdale already has more park space than called for in its general plan.

<sup>153</sup> Gariot Louima, "Boynton Officials Ready to Buy, Raze Businesses," *The Palm Beach Post*, Dec. 11, 2002, at 1B.

<sup>154</sup> Rich Mckay, "Residents Fight 'Blight' Label," Orlando Sentinel, Aug. 5, 2001, at K1.

<sup>155</sup> Rich Mckay, "Neighbors to Have Say on 'Blight' Decision," *Orlando Sentinel*, Jan. 4, 2002, at G1.

## Florida Town Votes Against Expanded Power to Condemn for Private Business

In 2002, the Hallandale City Commission voted down an ordinance that would have greatly expanded the City's power to condemn land for private business. Some years ago, Hallandale created a business redevelopment district to attract developers. Developers complained that they were sometimes able to purchase only a portion of the land needed to carry out a project. Under the proposed ordinance, the City would have automatically been allowed to use eminent domain whenever a developer owned 60 percent of the desired property. City officials voted against this measure because they decided that "creating a blanket ordinance for redevelopment purposes throughout the city might be too costly and risky."<sup>1</sup> As it stands, the City commission will have to determine whether to condemn property on a case-by-case basis.<sup>2</sup>

 <sup>1</sup> Kai T. Hill, "Hallandale Votes Against Taking Land for Renewal," *Sun-Sentinel (Fort Lauderdale, Fla.)*, Jan.
 16, 2002, at 5B.
 <sup>2</sup> Id. Coolidge-South sued to prevent the taking, whereupon a state circuit court judge ruled that the City's condemnation petition contained only conclusory statements of public purpose, but "no implicit finding of reasonable necessity," or any analysis of reasonable necessity.<sup>156</sup> At the summary judgment phase, the court denied the City's petition, stating that the City has an obligation to state a reason for negligibly increasing park space, when the City is already 30 percent above its preferred level.<sup>157</sup> While this case does not involve condemnation for ownership by a private party, it does involve condemnation at the behest of a private party and with a pretextual justification.

### Jacksonville Beach

The City of Jacksonville Beach wants an upscale, privately owned shopping and residential complex in South Jacksonville Beach. In 2000, the City's planning commission acquired 59 residential lots through eminent domain after a circuit judge ruled that the City had a "public purpose and reasonable necessity" for taking the property, namely the economic growth that the complex would bring to the city. Tony Rukab, who owns three lots within the targeted area, is fighting the plan. Rukab objects to the fact that his land is being taken to benefit a private developer, while he had been making his own plans to build a 7,500-square foot retail store on the property.<sup>158</sup> On February 26, 2002, the First District Court of Appeals in Tallahassee reversed the circuit judge's ruling, saying that before the City could condemn the 59 lots, it first had to prove that the public would benefit from the condemnations.<sup>159</sup> Upon rehearing the case, the lower court ruled that such a public benefit exists in this case, allowing the condemnations to go forward.<sup>160</sup> The case is currently on appeal.

#### Jacksonville

In April 2002, the Jacksonville Economic Development Commission awarded a \$210,000 grant over five years to the Marks Gray law firm, as an incentive for the firm to build a new headquarters building in the Riverside-Brooklyn area of Jacksonville. The redevelopment agreement provided that the City will use its eminent domain authority to acquire property located on the planned site for the law firm's headquarters.<sup>161</sup> The site was occupied by three single-family homes and one lot, which were condemned by the City.<sup>162</sup> One representative of the law firm commented, "I'm surprised the City lets people even live there," and suggested the whole area should be condemned. At least some of the residents of this historically black residential area disagree.<sup>163</sup>

#### Riviera Beach

In December 2001, the Riviera Beach City Council voted unanimously to approve a \$1.25-billion redevelopment plan with the authority to use eminent domain to condemn about 1,700 homes and apartments and displace 5,100 people.<sup>164</sup> About 300 businesses would also be forced to relocate. The City plans to take the properties and sell the land to commercial yachting, shipping and tourism interests. The plan would

<sup>156</sup> City of Fort Lauderdale v. Coolidge-South Markets Equities, L.P., No. 00-10449(09), slip op. at 7 (Fla. 17th Dist. Ct. Mar. 21, 2002).

<sup>157</sup> *Id.* at 13.

<sup>158</sup> Caren Burmeister, "Land Battle Goes On," *The Florida Times-Union*, Dec. 5, 2001, at L1.

<sup>159</sup> Rukab v. City of Jacksonville Beach, 811 So. 2d 727, 733 (Fla. App. 2002).

<sup>160</sup> Caren Burmeister, "Judge: City Can Take Land for Development; Center Gains Lots by Eminent Domain," *The Florida Times-Union*, Dec. 21, 2002, at L1.

<sup>161</sup> Earl Daniels, "JEDC OKs \$2.4 Million in Financial Incentives," *The Florida Times-Union*, Apr. 12, 2002, at D1.

<sup>162</sup> Earl Daniels, "Trapped in Path of Development," *The Florida Times-Union*, April 29, 2002, at FB12.

<sup>163</sup> Tiffany Lankes, "Redefining Brooklyn," *The Florida Times-Union*, August 19, 2002, at FB14.
 <sup>164</sup> Scott McCabe, "Residents Vow to Fight Riviera Plan," *The Palm Beach Post*, Dec. 17, 2001, at 1B.





Mr. Bell of Riviera Beach, FL learns that a slum and blight study has labeled his home "dilapidated." Photo by Kym O'Grady.

also move Route 1 and replace a city park with an enlarged harbor. If the development does occur, it will stand as one of the largest exercises of eminent domain in U.S. history.<sup>165</sup>

Many of the residents who stand to lose their homes if Riviera Beach goes through with its redevelopment plan are descendants of Bahamian conch fishing families and do not want to give up their homes.<sup>166</sup> For them, Riviera Beach is not only one of the last remaining pockets of affordable waterfront housing in Florida, but is also known as "Conchtown," the center of their unique culture. As many as 150 of the businesses that could be forced out are boat-related. One of these is Cracker Boy Boat Works, a boating service owned by Martin Murphy. His business has been thriving in Conchtown for decades, but probably would fail if he had to relocate anywhere else.<sup>167</sup>

David Lenhart is another Riviera Beach business owner whose fate is uncertain as a result of the City's redevelopment plans. Lenhart owns Max & Eddie's Cucina, a gourmet restaurant that he built from nothing into a successful Italian restaurant. He has pleaded with City officials to let him stay at his current location, but so far there is nothing in writing despite the City's pledge to make sure developers include current businesses in their plans. Lenhart, who spent three rough years establishing his restaurant, has a dim outlook on the future. "If I have to go somewhere else, that's like going to jail for three years. I've already done that."

<sup>165</sup> Thomas R. Collins, "Many Businesses Feeling Put Out By Riviera Plans," *The Palm Beach Post*, Jan. 6, 2003, at 1A.
<sup>166</sup> *Id.*; Scott McCabe, "Riviera Approves Waterfront Project," *The Palm Beach Post*, Dec. 20, 2001, at 1B.
<sup>167</sup> Jim Di Paola, "The Path to Progress," *CityLink Online (Broward County, Fla.)*, Jan. 30, 2002.





This Riviera Beach home's close proximity to the intracoastal waterway makes it a coveted piece of property. It has now been designated as blighted, and the City plans to take it for private redevelopment. Photo by Martha Babson.

The Riviera Beach redevelopment also threatens to disrupt the lives of many elderly people who live in the City's path. Dolly Cawley, a 94-year old widow, has lived in her house for 40 years. She has seen plenty of redevelopment schemes come and go, but this time her home may be among the first targeted by the City for condemnation. Cawley has no plans to leave, however, and intends to leave the house to her great-grandson. "It's in my living will," she said. "I go out of here dead."<sup>168</sup>

The City's redevelopment agenda is still unclear, although in December 2002, it claimed it would begin condemning homes and businesses in early 2003. It has already done appraisals and sent letters to some homeowners saying that they will be among the first to go. Renee and David Corie were in the process of renovating their house when they received the letter. They stopped. Many residents do not want to move and plan to fight. They have been organizing, speaking at City council meetings, and putting up signs.<sup>169</sup> The Castle Coalition has been working with the homeowners to help them organize their opposition to the condemnation of their homes.

### West Palm Beach

During the 1990s, Palm Beach County spent around \$30 million buying up houses in the Hillcrest neighborhood, because the area was in the direct flight path of Palm Beach International Airport. The County soon found itself saddled with 100 acres of vacant land that produced no tax revenue. So it decided to develop the area. Apparently believing there just weren't enough golf courses, the County decided to convert the area into a municipal golf course. However, the City of West Palm Beach objected to the County's planned

<sup>168</sup> Thomas R. Collins, "Many Businesses Feeling Put Out By Riviera Plans," *The Palm Beach Post*, Jan. 6, 2003, at 1A. <sup>169</sup> Thomas R. Collins, "Homeowners Foresee Pain in Riviera Rebirth," *The Palm Beach Post*, Dec. 7, 2002, at 1A.



use of the land, because the City owned a nearby golf course and did not want the competition. Since the City controlled the zoning of the area, it began an alternate effort to turn Hillcrest into an industrial park.<sup>170</sup>

Still, the County pushed forward with its golf course plans. In order to clear the land, the County would need to condemn the three remaining homes in Hillcrest. So it began eminent domain proceedings against the owners of the homes. John and Wendy Zamecnik, who owned one of them, were not happy that their dream house would be razed to make way for a golf course. They became even less pleased, however, to learn that the County had plans for their house other than demolition: it would be converted into living quarters for the golf course manager. "How can they take my home and give it to someone else to live in?" Wendy Zamecnik asked. "Isn't there something wrong with this?" So the Zamecniks decided to fight the County.

At trial, the County was able to convince a judge that there was a public necessity for the Zamecniks' home, even though Palm Beach County already has more golf courses per capita than any county east of the Mississippi River. On December 6, 1999, a judge ordered the Zamecniks out of their house by May 5, 2000.<sup>171</sup> The Zamecniks appealed the decision, but the appeals court agreed with the lower court ruling.<sup>172</sup> The case finally ended in January 2002 when a judge ordered the County to pay the Zamecniks \$132,420 for their home.<sup>173</sup>

<sup>172</sup> See *Zamecnik v. Palm Beach County*, 768 So. 2d 1217, 1218 (Fla. App. 2000).

<sup>173</sup> "Verdicts," *Broward Daily Business Review*, Feb. 7, 2002, at A11.

## There Goes the Neighborhood: Entire Neighborhoods Lost to Eminent Domain Abuse

Riviera Beach, Florida, plans to displace more than 5,000 residents for mostly private development. That is the largest private condemnation project in the country, but it is by no means the only one that targets an entire neighborhood. Daytona Beach, Florida, is planning to market an area of about 50 homes for private development, just as soon as it gets rid of all the residents. Hurst, Texas, forced out 127 homes for a shopping mall owned by the City's largest taxpayer. Wyandotte County, Kansas, removed 150 families for a racetrack. Garden Grove, California, removed hundreds of apartments and a senior citizens' mobile home park for an upscale hotel. The New London Development Corporation in Connecticut has been trying to wipe out the Fort Trumbull neighborhood in favor of office buildings and something else that no one's sure about. Although many of the 80 families agreed to move under threat of condemnation, seven families are continuing to fight the condemnations in court. Ohio seems especially fond of neighborhood-destroying projects. Toledo removed 83 homes for a car manufacturing facility. Norwood plans to raze 77 homes for a shopping mall; and Lakewood wants to take out 66 houses and five apartment buildings for the everpresent combination of retail, commercial, and upscale condominiums.

Sometimes residents are saved by sheer luck. Sunset Hills, Missouri, hoped to demolish 254 homes for an upscale retail and residential project. The developer had already bought half the homes, and the City was threatening to condemn the rest when it realized the developer did not have enough retailers to make the project worthwhile. Lakewood, Washington, hoped to expunge more than 200 families for an amusement park, but the developer backed out when it didn't get enough tax breaks in its incentive package. And sometimes resident outrage actually gets through to City bureaucrats. Garden Grove, California (which is fond of large projects) scuttled its plan to remove more than 700 homes for a theme park after more than 700 people showed up at a city council meeting to object.

Usually, however, City officials are more than willing to sacrifice their own citizens, particularly those of moderate income, for the promise of richer residents and larger retail.

Sources: All of these situations are described in this report under their respective cities.

<sup>&</sup>lt;sup>170</sup> Marc Caputo, "West Palm Beach, County at Odds over Hillcrest Land," *The Palm Beach Post*, July 20, 2000, at 1B.

<sup>&</sup>lt;sup>171</sup> Marc Caputo, "County to Seize Couple's Home So Golf Manager Can Have It," *The Palm Beach Post*, May 6, 2000, at 1A.



## OVERVIEW

Georgia is one of a handful of states with no reported instances of using eminent domain for private parties between 1998 and 2002. During that same time, Atlanta especially has seen significant growth in population and development.<sup>174</sup> The State's success without eminent domain shows that growth does not require taking property from one person to give it to another. Although Georgia has refrained from using eminent domain for private use, it has been the victim of it. One county in South Carolina is condemning property owned by the Georgia Department of Transportation.<sup>175</sup> This case is discussed in the South Carolina section of this report.

<sup>174</sup> Carter City Overviews: Atlanta (Carter World Wide Real Estate Services, 3d Quarter 2002).
<sup>175</sup> Tony Bartelme, "Judge Boosts Jasper County Terminal Plan," *The Post and Courier (Charleston, SC)*, April 4, 2002, at 1A.



| Public Power, Private Gain  |
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|   |
|   |
| Known Condemnations<br>Benefiting Private Parties*                  |
| Filed None known  |
| Threatened CA CA CA 5   |
| Total 5   |
| Known Development<br>Projects w/Private<br>Benefit Condemnations* 1 |
|   |

State Record of Condemnations Filed, for All Purposes:<sup>†</sup> 151

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# OVERVIEW

Hawaii was the site of the notorious Midkiff condemnations in 1984. Hawaii had unusual land ownership patterns stemming from its former monarchical political structure. Much of the land was owned by a few land trusts, and people then owned the residences on the land and held long-term leases to the land itself. The Hawaii legislature decided to break up this quasi-feudal system of ownership by condemning the underlying land and then transferring it to the long-term leaseholders.<sup>176</sup> In 1984, the U.S. Supreme Court upheld the condemnations.<sup>177</sup> Although the supposed purpose of the legislation was to promote owner-occupied housing and diversify land ownership,<sup>178</sup> the condemnations produced such a large windfall for the private beneficiaries that they could not resist cashing in. One of the main results of the condemnations was the widespread transfer of land to foreign investors.<sup>179</sup>

Lately, things have been relatively quiet on the condemnation front in Hawaii. There is only one major ongoing condemnation for a private party—this time, a resort hotel. Meanwhile, the Governor has been trying to restrict the eminent domain power so that it can no longer be used simply for private businesses. So far, however, the legislature has balked at placing limits on government power.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened.

<sup>†</sup>Hawaii State Judiciary's Administrative Office of the Courts (includes condemnations for traditional public uses).

<sup>176</sup> See Hawaii Land Reform Act of 1967, Haw. Rev. Stat. § 516 (1977).

177 See Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 245 (1984).

<sup>178</sup> *Id.* at 233.

<sup>179</sup> Gideon Kanner, "Do Gooders' Designs Twist Takings Clause," *The National Law Journal*, Jan. 8, 1996, at A19.



## LEGISLATIVE ACTIONS

In response to the Honolulu City Council's attempt to condemn four parcels of prime beachfront land in Waikiki for a hotel expansion in 2001 (see below), Governor Ben Cayetano introduced a bill before the state legislature to clarify the definition of "public purpose" for condemnation of private property. Under the state's current scheme, counties are left to decide for themselves what constitutes a valid public purpose. Senate Bill 2748, if it had passed, would have specified the circumstances in which eminent domain may be used. The bill spelled out in strong language that private property may not be taken from one private owner for the benefit of another private party, while leaving in place the limited exception from the *Midkiff* case for the leasehold conversion of condominium property. S.B. 2748 passed in the Hawaii Senate on March 5, 2002,<sup>180</sup> but it died in the House.

## Private Use Condemnations

### Honolulu

In a classic example of eminent domain abuse by a local government, the Honolulu City Council pressured five property owners to sell their beachfront land in Waikiki to Outrigger Hotels, for expansion of the hotel chain's Ohana Reef Lanai resort.<sup>181</sup> The proposed 7.9-acre expansion is part of the \$300-million Waikiki Beach Walk redevelopment project, which City leaders claim will attract more visitors to Waikiki and spur other development in the area. These same leaders apparently do not believe that Outrigger should have to negotiate for the land on the open market, so they have thrown their muscle behind the project.

## The City Council Chairman, Jon Yoshimura, explained that filing condemnation actions against the owners would "encourage the parties to negotiate." Getting sued is not what most people would call a friendly negotiating overture.

On February 20, 2002 the Honolulu City Council approved a resolution allowing it to condemn the properties.<sup>182</sup> The City Council Chairman, Jon Yoshimura, explained that filing condemnation actions against the owners would "encourage the parties to negotiate." Getting sued is not what most people would call a friendly negotiating overture. The owners objected that it was neither "necessary or appropriate for the City to condemn the properties and then turn around and sell them to Outrigger."<sup>183</sup>

<sup>181</sup> "Property Owners Oppose City Condemnation Plan," *AP Wire*, Nov. 13, 2001.

<sup>182</sup> "City Council Approves Outrigger Land Condemnation for Waikiki Expansion," AP Wire, Feb. 20, 2002.

<sup>183</sup> Bruce Dunford, "Governor Condemns Council's Condemnation for Outrigger Expansion," *AP Wire*, Feb. 1, 2002; "Property Owners Oppose City Condemnation Plan," *AP Wire*, Nov. 13, 2001.



"This isn't Russia or someplace like that where you can just take people's land. Where is the public interest, the public purpose? It's not like hotel developments are rare in this state."

Hawaii Governor Ben Cayetano publicly lashed out against the plan, saying that the City Council's actions are insensitive to fundamental American values. According to Gov. Cayetano, "This isn't Russia or someplace like that where you can just take people's land. Where is the public interest, the public purpose? It's not like hotel developments are rare in this state." The governor introduced an unsuccessful bill in the Hawaii legislature that would have prevented these types of private use takings from going forward by restricting counties' eminent domain powers.<sup>184</sup> Eventually, with the eminent domain actions pending, the owners reached settlements with the hotel chain.<sup>185</sup>

<sup>184</sup> Bruce Dunford, "Senate Committee's Bill Could Thwart Outrigger's Waikiki Expansion," *AP Wire*, Feb. 26, 2002;
Bruce Dunford, "Governor Condemns Council's Condemnation for Outrigger Expansion," *AP Wire*, Feb. 1, 2002.
<sup>185</sup> "Outrigger Reaches Agreement with Property Owners," *AP Wire*, Aug. 16, 2002.

With greater information for condemnees and little or no use of eminent domain for private development, Idaho ranks as one of the best states in the country for protecting owners from eminent domain abuse.

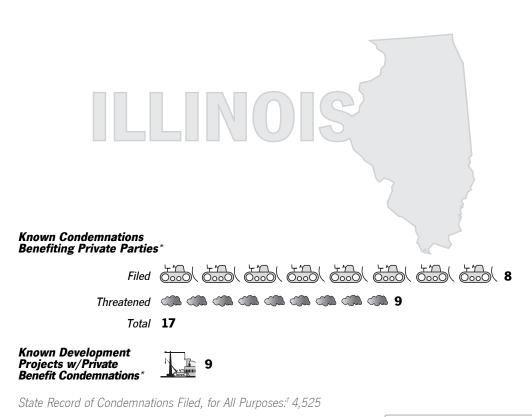


## OVERVIEW

Idaho has a strong record of avoiding the use of eminent domain for private parties. Our research shows no instances within the past five years of such private use takings. The Idaho state legislature even passed a new law that strengthens the notice rights of property owners. Senate Bill 1515, which was enacted on April 14, 2000, requires any governmental body that attempts to seize property through eminent domain to advise property owners in writing of their constitutional rights. Any failure to advise citizens of their rights creates a presumption of coercion in any contract between the condemning authority and the individual.<sup>186</sup> With greater information for condemnees and little or no use of eminent domain for private development, Idaho ranks as one of the best states in the country for protecting owners from eminent domain abuse.

<sup>186</sup> S.B. 1515, 55th Sess. (Idaho 2000), codified at IDAHO CODE § 7-711A (Michie 2002). The notice required under this statute must include an explanation of the power and need of the condemning authority to take the property, a statement telling the individual that the government is required to negotiate with him for purchase of the property or to pay him for any diminution of value of the property, and the manner in which the value shall be determined (fair market value determined by best use of the property). In addition, it must tell property owners that they can sue in court for damages, that they have access to all government appraisals, and that they can hire their own appraiser and attorney. (In certain situations, the government may pay attorney and court fees for the owner.) Finally, the condemning authority must give at least 30 days' notice before it can take any property.





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# OVERVIEW

Illinois' eminent domain rollercoaster came to an end in 2002. A major lawsuit challenging the use of eminent domain to condemn private land for parking for a Gateway racetrack had been wending its way through the courts since 1999. On its way up, the case saw three reversals. The case concluded in April 2002 when the Illinois Supreme Court reversed itself and found that the taking was for private use and therefore unconstitutional. The decision reflects a growing awareness in courts that the power of eminent domain is being abused. While Illinois cities did condemn several businesses for private developers, other projects failed, and one was abandoned after the Illinois Supreme Court decision. Even the Governor expressed distrust of the use of quick-take powers for redevelopment. Local governments would do well to heed the signs and not waste taxpayer money trying to take property for other private parties.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened. \**Annual Report of the Illinois Courts: Statistical Summary,* Administrative Office of the Illinois Courts, 1998-2002 (includes condemnations for traditional public uses).



## LEGISLATIVE ACTIONS

After an Illinois Supreme Court decision sharply criticizing the Southwestern Illinois Development Authority,<sup>187</sup> the Illinois Legislature failed to renew the agency's quick-take authority in August 2002. The agency still hopes to regain its powers.<sup>188</sup>

# Private Use Condemnations

#### Aurora

The City of Aurora came up with a plan to pour \$450 million of state and local public funds into the downtown RiverCity redevelopment project, which would include a convention center, a multi-purpose arena, and another of the ubiquitous new residential, retail and hotel developments. The City did not own the land, so of course it planned to condemn it. In July 2000, the City won approval from the state legislature for the use of quick-take condemnation powers. However, the plan met with resistance from Illinois Governor George Ryan, who opposed both the public largesse and the land-taking procedures to be employed by Aurora. Gov. Ryan issued an amendatory veto to the quick take bill. In his veto message, Ryan declared that "quick-take authority can be an excellent tool," but he added that the process should not "trample on the property rights of citizens and business owners."<sup>189</sup>

Not surprisingly, once the Governor signaled his opposition to the use of public funds and condemnation powers to subsidize the RiverCity redevelopment scheme, the project fell apart. Public support for RiverCity eroded, and the sour economy called into question the viability of such a huge, risky redevelopment. Riverfront Partners, the private developer behind RiverCity, scoffed at the idea that the plan would have to be paid for primarily with private funds, and backed out of the plan.<sup>190</sup> In November 2001, Aurora officials finally scuttled the RiverCity plan and went back to the drawing board.

#### Chicago

Harriet and Sol Price owned a piece of property on a prime corner of Chicago's North Side, on which they intended to build a four- or five story building to house a shoe store and residences. However, the City denied all of their building proposals, and instead condemned the land. The City wanted a two-story all-retail building instead of a four-story building with some residences. The City then transferred the land to another private developer.<sup>191</sup>

#### Des Plaines

Des Plaines City leaders approved a redevelopment project to convert a "blighted" area of town into a multi-use retail and condominium development, anchored by a large grocery store. The Oehler Funeral Home, a longtime downtown business, stood in the way of the project, so in June 2001 the Des Plaines

<sup>190</sup> Hal Dardick, "RiverCity Enthusiasm Running Low," Chicago Tribune, July 20, 2001, at 1D.

<sup>&</sup>lt;sup>191</sup> David Roeder, "Title Fight: City Sues Couple for Deed to N. Side Property," *Chicago Sun-Times*, Feb. 1, 2000, at Financial 38.



<sup>&</sup>lt;sup>187</sup> Southwestern III. Dev. Auth. v. Nat'l City Env. LLC, 768 N.E. 2d 1 (III. 2002).

<sup>&</sup>lt;sup>188</sup> David van den Berg, "Southwestern Illinois Development Authority Wants Powers Renewed," *Belleville News-Democrat*, Nov. 22, 2002.

<sup>&</sup>lt;sup>189</sup> Hal Dardick, "Slow Stream; Despite Veto of Fast-Track Power, Aurora Pushes Plans for River," *Chicago Tribune*, July 30, 2000, at 7K.

aldermen gave City attorneys a green light to start condemnation proceedings against the funeral home if negotiations for the site failed.<sup>192</sup> The City began eminent domain proceedings against the funeral home in February 2002.<sup>193</sup> While the condemnation case continued, the funeral home got permission to relocate within the city after being forced to reduce the planned size of its new facility.<sup>194</sup>

### Des Plaines

Walgreens wanted to open a new store in Des Plaines, but without the hassle of finding land and purchasing it from willing sellers. So Walgreens enlisted the help of the Des Plaines Board of Aldermen, which used its eminent domain powers to bully two businesses and one homeowner off their properties. Elmer's Goodyear, a local service station, had operated in Des Plaines for 55 years. After the City threatened to condemn Elmer's if it refused to sell out, the service station's owner reached an agreement conveying title to the land to the City.<sup>195</sup> In January 2002, the City authorized eminent domain to take the two other targeted properties, the Des Plaines Glass Co. and the home of Irene Angell.<sup>196</sup> Ms. Angell, who was born in this same house over 80 years ago, ironically had met her late husband in a Walgreens store. Ms. Angell eventually settled with the City.

There was no pretext that the property was blighted. It was just property that Gateway wanted, that it was not able to buy, and that SWIDA intended to procure on its behalf for a substantial fee.

#### East St. Louis

In 1999, the Southwestern Illinois Development Authority (SWIDA) began the process of condemning 148 acres belonging to National City Environmental LLC and reselling the land to Gateway International Motorsports Corp. for a parking lot to accommodate visitors to large auto racing events. Gateway had previously tried to purchase the property, but National City did not want to sell its land, on which it planned to expand its scrap-metal and recycling business.<sup>197</sup>

So Gateway went to the offices of SWIDA. It picked up an application for SWIDA to use eminent domain and paid the \$2,500 appli-

cation fee for condemnation for "private use"—yes, that's actually what the application said.<sup>198</sup> SWIDA's lawyers must have forgotten to tell the agency that property may be condemned only for "public use" under the U.S. and Illinois constitutions. For private condemnations, SWIDA requires the private beneficiary to reimburse SWIDA for the value of the condemned property and also charges an extra 6 to 10 percent of the property's value—which amounts to a commission for using its power of eminent domain.<sup>199</sup> For the

<sup>192</sup> Amy McLaughlin, "Des Plaines' Main Street Plan Unveiled," *Chicago Daily Herald*, Jan. 17, 2002, at News 1. <sup>193</sup> "City Targets Funeral Home," *Chicago Daily Herald*, Feb. 13, 2002, at News 3.

<sup>194</sup> Mark Shuman, "Funeral Home Move is Okd," *Chicago Tribune*, Sept. 15, 2002, at 7A; Amy McLaughlin, "Funeral Home Gains OK for Dempster Site," *Chicago Daily Herald*, Sept. 4, 2002, at News 4.

<sup>195</sup> Amy McLaughlin, "Des Plaines Moves Ahead on Several Land Purchases," *Chicago Daily Herald*, Nov. 30, 2001, at News 4.
 <sup>196</sup> Amy McLaughlin, "Des Plaines Holds Off on Church's Expansion," *Chicago Daily Herald*, Jan. 24, 2002, at Neighbor 1.
 <sup>197</sup> Daniel C. Vock, "Quick Take OK for Commercial Use: Court," Chicago Daily Law Bulletin, Apr. 19, 2001, at 1.
 <sup>198</sup> Southwestern III. Development Authority v. National City Environmental LLC, 2001 III. LEXIS 478, at \*51 (III. Apr. 19, 2001)

2001) (Kilbride, J., dissenting).

<sup>199</sup> Southwestern III. Dev. Auth. v. Nat'l City Env. LLC, 768 N.E. 2d 1, 4 (III. 2002).

Gateway condemnation, SWIDA would receive \$56,500, which was more than the agency's appropriated budget for that year.<sup>200</sup>

There was no pretext that the property was blighted. It was just property that Gateway wanted, that it was not able to buy, and that SWIDA intended to procure on its behalf for a substantial fee. The best SWIDA could do was claim that the condemnation served a public purpose because Gateway would generate tax revenue for the City through its racing events. So National City decided to mount a court challenge to the condemnation.

The case went through a series of reversals. First, the trial court approved the condemnation, but the Illinois Appellate Court rejected it in stinging language.<sup>201</sup> The Illinois Supreme Court then reversed again, 4-3, in sharply divided opinions.<sup>202</sup> Only a few months later, the Illinois Supreme Court granted a rehearing in the case.<sup>203</sup> Upon rehearing, the Court held exactly the opposite of its previous decision, finding that the condemnation was for a private use and was not authorized by law.<sup>204</sup> The Institute for Justice filed an amicus brief at the Illinois Supreme Court in support of National City Environmental.

Illinois Supreme Court Justice Rita B. Garman, writing for the majority, admonished that "[t]he power of eminent domain is to be exercised with restraint, not abandon."

Illinois Supreme Court Justice Rita B. Garman, writing for the majority, admonished that "[t]he power of eminent domain is to be exercised with restraint, not abandon."<sup>205</sup> The court acknowledged that the expansion of Gateway "could potentially trickle down and bring corresponding revenue increases to the region." But, the court held, "revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power."<sup>206</sup> The court concluded that the project "is a private venture designed to result not in a public use, but private profits."<sup>207</sup> The U.S. Supreme Court rejected SWIDA's request for review.<sup>208</sup> This landmark decision by the Illinois Court is not only a major victory for private

<sup>201</sup> Southwestern III. Dev. Auth. v. Nat'l City Env. LLC, 710 N.E.2d 896 (III. App. 1999) (holding condemnation not for public use).

<sup>202</sup> Mike Fitzgerald, "Illinois Supreme Court Upholds Seizure of Land for Motorsports Firm's Parking," Belleville News-Democrat, Apr. 20, 2001; *Southwestern III. Dev. Auth. v. Nat'l City Env. LLC*, 2001 III. LEXIS 478, at \*4 (III. Apr. 19, 2001) (holding condemnation for public use).

<sup>203</sup> Southwestern III. Dev. Auth. v. Nat'l City Env. LLC 748 N.E.2d 194 (III. 2001) (granting rehearing).

<sup>204</sup> Southwestern III. Dev. Auth. v. Nat'l City Env. LLC, 768 N.E. 2d 1, 11 (III. 2002) (holding condemnation not for public use).

<sup>205</sup> Id.

<sup>206</sup> *Id.* at 10.

<sup>207</sup> *Id.* at 9.

<sup>208</sup> Southwestern III. Dev. Auth. v. Nat'l City Env. LLC, 123 S. Ct. 88 (2002) (denying certiorari).



<sup>&</sup>lt;sup>200</sup> Southwestern III. Dev. Auth. v. Nat'l City Env. LLC, 768 N.E. 2d 1, 4, 6 (III. 2002); Illinois State Budget for Fiscal Year 2000, ch. 7, at 91. The amount of \$56,500 is six percent of the \$900,000 value set by the trial court, plus the \$2,500 application fee.

property owners, but also demonstrates that courts are becoming increasingly critical of redevelopment schemes set up to line the pockets of wealthy developers at the expense of ordinary landowners.

## East St. Louis

The Masjid Al-Muhajirum mosque, a nonprofit religious organization, bought several lots in East St. Louis to expand its temporary mosque and to develop a permanent place of worship for the local Muslim community. However, a group of private developers wanted the land to build Parsons Place, a multi-million dollar mixed-income residential complex they had been planning. When they could not persuade the mosque to sell its land to them, and before the mosque had a chance to take any action to implement its own plans, the developers turned once again to the Southwestern Illinois Development Authority (SWIDA), hoping that it would condemn the land in favor of their redevelopment project.

In March 1999, SWIDA authorized the use of eminent domain proceedings to take the mosque's land, and soon after filed a quick-take proceeding. The mosque challenged the condemnation, arguing that the taking was not for public use. At trial, SWIDA admitted that the purpose of the condemnation was to transfer privately owned land to another private party, but asserted that a valid public use existed because the land was "blighted." The trial court ruled in favor of the developers. On appeal, the Appellate Court of Illinois upheld the lower court ruling, and in January 2001 transferred the mosque's land to the developers.<sup>209</sup>

## Elgin

In September 2002, the Elgin City Council voted to begin eminent domain proceedings against the Northern Illinois Coin Shop, a decades-old business that occupies part of a parcel that the City promised to Par Development Co., a private developer, for a six-story luxury condominium building. The \$28 million Par project is a major part of Elgin's River Park Place downtown revitalization project, which ironically includes a number of financial incentives aimed at encouraging small business owners to locate there.<sup>210</sup> In December 2002, the local planning commission voted against proceeding with the Par project, but only because of opposition to the particulars of the \$4 million incentive deal brokered by the City and the developer. The condemnation of the coin shop is not affected by the collapse of the Par deal; the City is still taking the property to make way for future private development.<sup>211</sup>

## Swansea

The Town of Swansea really wants a new "Town Center" adjacent to its Metrolink train station, so much so that it refuses to let longtime successful local businesses stand in the way of its dream. On December 18, 2001, the Swansea City Council authorized the Southwestern Illinois Development Authority (SWIDA) to use eminent domain to force five businesses out of the way of the \$25 million project. One business quickly settled with the private developer, while the City later dropped plans to condemn two others.<sup>212</sup> By February 2002, the Swansea Moose Lodge and 84 Lumber Co. were the only two properties still at issue.

In place of the apparently undesirable 84 Lumber Co., a hardware and lumber store, the Town of Swansea has a grand vision of building... a Home Depot, another hardware and lumber store. The Town claims that Home Depot will provide more jobs than 84 Lumber and that it is therefore justified in condemning 84 Lumber in order to transfer the land to its competitor.

<sup>209</sup> See *Southwestern III. Dev. Auth. v. Masjid Al-Muharijum*, 744 N.E. 2d 308, 312 (III. App. 2001).
<sup>210</sup> Kara Spak, "Elgin Votes to Condemn Decades-Old Coin Shop," *Chicago Daily Herald*, Sept. 26, 2002, at News 3.
<sup>211</sup> Kara Spak, "River Park Place Plan Gets Thumbs Down," *Chicago Daily Herald*, Dec. 17, 2002, at News 1.
<sup>212</sup> Robert Goodrich, "Swansea Town Center Would Displace 2 Businesses; Project Had Made Five Firms Targets for Condemnation," *St. Louis Post-Dispatch*, Feb. 28, 2002, at St. Clair-Monroe Post 1.

## Government Helps Rich People Find Homes

While most hard working lowerand middle-income families look upon their modest homes with a sense of pride, local government officials take a different view. A tidy but smaller family-occupied home is just an obstacle standing in the way of the preferred homeowner, who is wealthy and lives in a high-density, luxury condominium development.

Many of the situations documented in this report are the result of such attempts by cities to condemn homes to make way for upscale residences. Willowick, Ohio, plans to condemn 30 cottages along the shores of Lake Erie and replace them with luxury mansions and condominiums. Although the existing homes are not in actual disrepair, the City claims that they pose a health and safety threat because streets in the area are narrow and the sewers are outdated. Why fixing these problems requires bulldozing the whole neighborhood is a good question, one for which the nervous owners are seeking answers.

In Tempe, Arizona, the Pillow family is fighting to keep their home of 45 years, while the City wants to replace it with a newer, larger home. Shaker Heights, Ohio, will be trading its affordable housing in for luxury housing. The idea in all these projects is that working-class and middle-class residents move out (to wherever it is that such people move), and highlytaxable people who like to shop at the new upscale retail stores move in.

Sources: All of these situations are described in this report under their respective cities.

In place of the apparently undesirable 84 Lumber Co., a hardware and lumber store, the town of Swansea has a grand vision of building ... a Home Depot, another hardware and lumber store. The Town claims that Home Depot will provide more jobs than 84 Lumber and that it is therefore justified in condemning 84 Lumber in order to transfer the land to its competitor.

Swansea Mayor Michael Buehlhorn said that he was open to the idea of incorporating into Swansea Town Center one of the other businesses that will be displaced, World Class Gymnastics, as long as its facilities do not get in the way of planned parking. However, the mayor believed that 84 Lumber could not compete with the economic stimulus Home Depot promised to bring. The mayor simply was not interested in finding a way to include 84 Lumber.

84 Lumber hired an attorney to fight the town.<sup>213</sup> However, the company determined that it stood little chance of prevailing, and soon thereafter reached an agreement with the developer to sell its property and relocate. The developer offered the Moose Lodge \$3.2 million to move. However, the lodge turned the offer down. On March 21, 2002, SWIDA voted to condemn the lodge property, which is the last parcel standing in the way of the Town Center project.<sup>214</sup> The developer hoped to begin construction on the first phase of the Town Center in mid-2002. However, after the Illinois Supreme Court decision in April 2002, Swansea officials rescinded their approval of the redevelopment plan. Representatives of the Moose Lodge were pleased. "We've told them from the beginning that this place is not for sale," commented Bob Quirin, Moose Lodge trustee. <sup>215</sup>

#### Wheaton

In 2000, the Wheaton City Council condemned three buildings belonging to longtime merchant Robert Sandberg, claiming that the condemnations were in the public interest.<sup>216</sup> One of the buildings

<sup>213</sup> Sue Britt, "Business Closings Causing Headaches; Home Depot Site Stirs Changes in Swansea," *Belleville News-Democrat*, Feb. 26, 2002, at 1A.

<sup>214</sup> Sue Britt, "Authority Votes to Force Out Moose Lodge," *Belleville News-Democrat*, Mar. 22, 2002, at 3B.

<sup>215</sup> Will Buss and David van den Berg, "Swansea Still Hopes to Get Home Depot; Eminent Domain Rulings Sank Effort to Get Land," *Belleville News-Democrat*, June 5, 2002, at 1A.

<sup>216</sup> Bob Goldsborough, "Outerwraps: Wheaton Votes to Condemn Properties Belonging to Clothier," *Chicago Tribune*, Sept. 24, 2000, at 7B.



houses Sandberg's Store for Men, which Sandberg opened in 1958.<sup>217</sup> The City had plans to renovate, redevelop, lease and eventually sell the buildings to another private owner who will use them in a manner more acceptable to the City.

However, in June 2001 the City's plan hit a snag when it was revealed that the City failed to follow procedural guidelines in setting up the tax-increment-financing district in which the three buildings are located. In its rush to take Sandberg's property, the City had failed to give proper public notice of which buildings could be condemned in the district. Wheaton was forced to drop its condemnation suit against Sandberg.<sup>218</sup> For now, the City's plans to turn Sandberg's property over to another private owner are on hold.<sup>219</sup>

This is the second time the City has tried to take Sandberg's property. In 1986 it tried to use eminent domain to take one of the buildings. After six years of litigation and \$146,000 in legal bills incurred by Sandberg, the Illinois Supreme Court ruled that the local redevelopment ordinance authorizing the taking was unconstitutional.<sup>220</sup> Some people (or government entities) never learn!

<sup>217</sup> Victoria Pierce, "Shop Owner Questions Wheaton Tactics; Power to Force Sale Being Used Unfairly, Man Says," *Chicago Daily Herald*, Sept. 21, 2000, at News 1.

<sup>218</sup> Bob Goldsborough, "Council Drops Suit Against Merchant," *Chicago Tribune*, June 17, 2001, at 7K.

<sup>219</sup> Bob Goldsborough, "Council Fixes Rules for Tax District," *Chicago Tribune*, Jan. 20, 2002, at 3R.

<sup>220</sup> Bob Goldsborough, "Outerwraps: Wheaton Votes to Condemn Properties Belonging to Clothier," *Chicago Tribune*, Sept. 24, 2000, at 7B.

## Beating the Competition is as Easy as Getting the City to Give You Their Business

Cities regularly use eminent domain to favor one business over another. In Illinois, the Swansea City Council authorized the condemnation of an 84 Lumber Store so that the City could replace it with a Home Depot. Cities want slicker, trendier business establishments. That's why Lancaster was happy to condemn the 99 Cents Only store for Costco. Both San Leandro, California, and Merriam, Kansas, condemned used car dealers for new car dealers. Cleveland forced out a working-class bar so that it could have an upscale restaurant instead. And San Jose, California, is condemning a successful shopping center full of Mexican merchants and transferring it from its current owner, who has been redeveloping it, to another developer. The City claims that the project is not moving fast enough, so the plans call for keeping most of the buildings and tearing down one entire building to move it over slightly. The merchants who can now afford the leases on their spaces will be displaced for several years, then able to afford the new rents only if subsidized by the government. Unlike City officials, the local merchants would prefer their current market to the gentrified one the City seems to have in mind.

Sometimes, the choices are so incomprehensible that it seems as if local bureaucrats just want to feel like they are in control, like when Chicago condemned a piece of land because its owners wanted to build a four- or five-story building while the City wanted a two-story one built by a different developer. Government may condemn property for "public use," not to select favorite retail establishments and favorite property owners. This type of micromanagement, resulting in huge financial gains to some businesses and losses to others, is a patent abuse of power.

Sources: All of these situations are described in this report under their respective cities.



| Known Condemnations<br>Benefiting Private Parties                 | <b>5</b> *                   |                   |                          |
|---|------------------------------|-------------------|--------------------------|
| Filed   | 2000 Land Land Land 4        |                   |                          |
| Threatened  | ciji ciji ciji ciji ciji (51 |                   |                          |
| Total   | 55                           |                   |                          |
| Known Development<br>Projects w/Private<br>Benefit Condemnations* |                              | 5                 |                          |
|   |                              | Legend the legend | <b>a</b> =10 <b>b</b> =1 |

# OVERVIEW

Indiana is growing more aggressive in its use of eminent domain to benefit private parties. The legislature tried to pass a bill permitting governments to take property and evict owners more quickly. Indianapolis has taken a large amount of property for private industry, and other cities have attempted similar maneuvers. These efforts have met with decidedly mixed results in court. Although a court permitted the Indianapolis condemnations, attempts to take a residential restriction in Fort Wayne and a church in South Bend were thwarted by court decisions. With these two recent defeats, perhaps Indiana cities will think twice before using eminent domain for private development.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened.



## LEGISLATIVE ACTIONS

Representative Brian Hasler proposed a bill to give the government quick-take authority in eminent domain cases. Introduced in January 2002, the bill would have permitted the plaintiff in an eminent domain action (i.e. the government) to take possession of the defendant's property upon payment to the court clerk of a deposit equal to the last amount offered by the plaintiff to the defendant.<sup>221</sup> Fortunately, the bill died in committee.

# Private Use Condemnations

#### Fort Wayne

William and Judy Daniels own a home in the Broadmoor Addition residential subdivision of Fort Wayne. Since the subdivision was first laid out, the properties have had a restriction (called a "restrictive covenant") that they could be used only for single-family residences. HNS Enterprises owns three unoccupied homes along the main road in the subdivision, which it wanted to demolish and convert into a shopping center. HNS submitted a rezoning petition to the Allen County Area Plan Commission seeking to vacate all the restrictive covenants in the subdivision. That would allow HNS to build the shopping mall.

The Plan Commission approved HNS' rezoning petition, on the grounds that commercial development could be beneficial to the public. So in April 2000 the Daniels family filed suit in federal court seeking a declaratory judgment and permanent injunction against removal of the restrictive covenants. The district court granted the Daniels' summary judgment motion and voided the acts of the Plan Commission purporting to vacate the covenants. The Seventh Circuit ruled that under Indiana state law, economic development on its own does not constitute a valid public purpose. Instead, redevelopment agencies must declare an

## According to the Court, regardless of any agency findings of public purpose, the speculative public benefit that would come from vacating the restrictive covenants would be "incidental at best."

area to be "blighted" in order to condemn for the purpose of commercial development. In this instance, however, there was no declaration of blight.<sup>222</sup> The agency did not even make a finding of public purpose. According to the Court, regardless of any agency findings of public purpose, the speculative public benefit from vacating the restrictive covenants would be "incidental at best."<sup>223</sup>

#### Indianapolis

Lucian Anderson owned an unoccupied home in the Fall Creek Place neighborhood of Indianapolis. Since 2000, the City had been acquiring and refurbishing homes in the area, then selling them to other private owners as part of an urban redevelopment project. After Anderson refused to sell his home to the City, the local redevelopment agency condemned the property. Anderson never received personal notification of the City's

<sup>221</sup> See H.B. 1066, 112th Sess. (Ind. 2002).
<sup>222</sup> See *Daniels v. Area Plan Commission*, 306 F.3d 445, 463 (7th Cir. 2002).
<sup>223</sup> *Id.* at 465.



action, even though the City had been negotiating with him for years. In addition, Anderson overlooked the miniscule eminent domain notice that ran in the newspaper for three weeks. The trial judge rejected Anderson's notice challenge, forcing him to accept damages based on the City's lowball appraisal.<sup>224</sup>

### Indianapolis

During the 1980s, local businessman and political figure Bob Parker began purchasing properties in the Martindale-Brightwood neighborhood of Indianapolis. He bought a total of 10 acres there, and hoped to someday transform the area into a booming industrial park. Then the City came along with a brilliant redevelopment idea for Martindale-Brightwood: It would condemn Parker's land and an additional 70 acres to create Keystone Enterprise Park, a (you guessed it) booming industrial park. The City reached agreements with many of the targeted landowners. However, Parker opposed the City's proposal to take land he had spent years accumulating, especially because it planned to develop the land exactly as he had planned. In July 2001, Indianapolis City attorneys asked a Marion Superior Court judge to condemn Parker's property, claiming that he stood in the way of its development plans. The City even disputed Parker a mere \$349,950 for the parcel, which Parker claimed was worth \$3.8 million. The City even disputed Parker's ownership of part of the land.<sup>225</sup>

In a September 28, 2001 decision, the judge sided largely with the City, and Parker's property was subsequently condemned. Indianapolis officials hope to begin selling lots in the wooded, 30-acre north section of the park by the summer 2002. Parker, who was once an unsuccessful mayoral candidate, is steamed, claiming that the City stole his idea and now "is trying to poison me with my own prescription for helping this neighborhood."<sup>226</sup>

#### Indianapolis

Elizabeth Fernando owned the Plaza Parking Garage, located between two apartment buildings slated for renovation. After four years of failed negotiations, the City condemned her garage in May 2002, claiming that the property was a necessary missing piece of its plan to redevelop the block. The City plans to sell Fernando's property to private developers.<sup>227</sup>

#### Mishawaka

AM General wanted to expand its auto manufacturing facility in Mishawaka. In January 2000, the automaker announced plans for a \$200 million plant expansion that would produce a new sport utility vehicle based on the all-terrain military vehicle known as the Hummer, which the company already built in its existing Mishawaka factory. One problem for AM General, however, was that the land on which it proposed to expand was already occupied by a neighborhood of 51 homes.<sup>228</sup> So, the redevelopment commission of St. Joseph County stepped in to act on the automaker's behalf.

The County announced that by March 2000 it would decide whether to declare the surrounding neighborhood as "blighted," which would allow it to condemn the homes and transfer ownership of the land to AM General. Many of the targeted homeowners were angered by the County's announcement. For one, the

<sup>224</sup> Jennifer Wagner, "Man is Latest to Try to Block City Acquisition of Property," *The Indianapolis Star*, June 20, 2002, at B1.

<sup>225</sup> Vic Ryckaert, "Landowner Fights City on Eastside Site's Fate," *The Indianapolis Star*, July 10, 2001, at B1.
<sup>226</sup> Doug Sword, "City to Begin Developing Land for Industrial Park," *The Indianapolis Star*, Oct. 29, 2001, at A1.
<sup>227</sup> Jennifer Wagner, "Man Is Latest to Try to Block City Acquisition of Property," *The Indianapolis Star*, June 20, 2002, at B1.

<sup>228</sup> Deanna McCool, "Homeowners Unhappy," *South Bend Tribune*, Jan. 13, 2000, at A1.



neighborhood consisted of well maintained, decidedly middle-class homes that were nothing like the ramshackle eyesores conjured up by the term "blight." Also, the County had made no attempts at negotiation with individual owners, who were generally in favor of the redevelopment.<sup>229</sup>

As the County's decision date approached, AM General reached agreements with the owners of the seven properties that directly abutted its already existing facility, allowing the automaker to begin the project. Around the same time, the County announced that it would delay until July 2000 its decision on whether to designate the area as blighted, which was a necessary step toward condemnation. This would give AM General more time to negotiate directly with the other owners.<sup>230</sup> Over the next four months, the company began in earnest to negotiate for the rest of the properties, and by the July deadline, agreements had been reached with all of the remaining owners. This obviated the need for the blight designation or eminent domain proceedings altogether.<sup>231</sup>

Certainly AM General's willingness to deal directly with the owners and take their concerns seriously helped, but the owners still knew that if they did not sell, the County would move forward with the condemnations.

## South Bend

City Chapel, a South Bend religious group with about 100 members, operated a church in a four-story downtown building that once housed a large retail store. When the City condemned the building for private redevelopment, the church sued on state First Amendment grounds, claiming that the City's actions illegally infringed on City Chapel's right to worship and conduct church activities. The case made it to the Indiana Supreme Court, which ruled that the church was entitled to an opportunity to have a trial to litigate its First Amendment claims.<sup>232</sup> On the eve of trial, the City decided to negotiate with City Chapel and the case settled.<sup>233</sup>

<sup>229</sup> Rick Thackeray, "Proposed Hummer Plant Raises Eminent Domain Questions," *The Indiana Lawyer*, Mar. 29, 2000, at 6.

<sup>230</sup> Deanna McCool, "2 Owners Find AM General Deal Fair," *South Bend Tribune*, Mar. 29, 2000, at D1.

<sup>231</sup> Jason Callicoat, "In General, Hummer Plant Negotiations End Well," *South Bend Tribune*, Aug. 6, 2000, at C1.

<sup>232</sup> See *City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E. 2d 443, 454 (Ind. 2001).

<sup>233</sup> Terrence Bland, "Church Site Is 'One More Piece of the Puzzle'," *South Bend Tribune*, Aug. 4, 2001, at A4.

## Houses of Worship: Just Another Tax Liability

To a city seeking more tax dollars, a church is a liability. Almost any other use generates more revenue than a house of worship. Churches in desirable areas can thus find themselves in the cross-hairs of local governments and developers. In addition to the condemnation action filed against the church in South Bend, at least seven other houses of worship have been condemned or threatened with condemnation in the past five years.

Religious institutions that operate in urban areas are particularly vulnerable. The Southwestern Illinois Development Authority condemned land purchased by a mosque to build its permanent home, in order to transfer the property to a developer putting up apartment buildings. Similarly, the North Hempstead Community Development Agency condemned land purchased by St. Luke's Pentecostal Church. St. Luke's wanted a permanent home for its congregation; the agency wanted private retail. In Lexington, Kentucky, a group called the God's Center lost ownership of a defunct movie theater it wanted to turn into an African-American cultural center, in favor of a rival private organization that wanted to open its own cultural center there. Two churches in Atlantic City were razed after they sold to MGM Grand under threat of condemnation. MGM Grand decided not to build there. Hillsboro. Oregon, is condemning a Christian Science Reading Room for a commercial/residential project. Boynton Beach, Florida, may take the Jesus House of Worship for private retail. And if New Rochelle leaders had succeeded in their attempts to remove a neighborhood for an IKEA, two churches would have been among those to go.

Sources: All of these situations are described in this report under their respective cities.





#### Known Condemnations Benefiting Private Parties\*



Total 4

Known Development Projects w/Private Benefit Condemnations

|  |  |  |  |  | 4 |
|--|--|--|--|--|---|
|--|--|--|--|--|---|

Legend  $\overleftarrow{m}$  =1  $\overrightarrow{m}$  =1

# OVERVIEW

lowa has had very few condemnations and threats of condemnation for private development in the past five years. In fact, the only reported instances of private condemnations were in Dubuque for a major waterfront redevelopment plan. Dubuque has condemned or threatened at least eight owners since 1990 in order to acquire the land for private retail and office space. Other cities in Iowa have exercised more restraint and refrained from engaging in private condemnations. The Iowa legislature has chosen to protect farmers, but not home or business owners, from condemnations for private use and also to give farmers greater notice about proposals to condemn one business's property recently lost in federal court.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened.



lowa

## LEGISLATIVE ACTIONS

In an attempt to prevent farms from being taken for private commercial development, the lowa legislature in 1999 added a provision that says that public use does not include the authority to condemn agricultural land for private development.<sup>234</sup> Unfortunately, the legislature did not provide the same protection for all lowa citizens.

## In 1999, the lowa state legislature passed a law that strengthened the rights of all lowa property owners to more information about government proposals to take their property. Apparently, the legislature regretted giving its citizens more information, so in 2000, it changed the law so that it only applies to owners of agricultural land.

The legislature's greater respect for the property rights of farmers than home or business owners became apparent again in legislation about notice of proposed condemnations. In 1999, the lowa state legislature passed a law that strengthened the rights of all lowa property owners to more information about government proposals to take their property.<sup>235</sup> Apparently, the legislature regretted giving its citizens more information, because in 2000, it changed the law to apply only to owners of agricultural land.<sup>236</sup> The provision requires an acquiring agency to mail written notice of the public hearing about a proposed development project to each owner of property that would be removed for the project. It also explicitly states that condemnation proceedings may not begin until the agency has made a "good faith effort" to mail and publish the notice.<sup>237</sup> Before this law, lowa cities could hold hearings and decide to condemn property without notifying the owner, who would find out about the condemnation only when it was actually filed. The government now must inform owners of agricultural properties, but no one else, of government hearings about project.

## Private Use Condemnations

## Dubuque

In May 2002, the Dubuque City Council voted unanimously to condemn a 1.5-acre tract of land owned by the Mississippi Valley Truck Center, Inc., to make way for \$150 million in future waterfront redevelopments to operate in conjunction with the \$188-million America's River project, which is already in the works. The City wants to clear out much of the area's industry so that the land can "meet its investment potential," according to the Port of Dubuque Master Plan. The truck center, which has been used to store logs and semi-tractor trailers, abuts the National Mississippi River Conference and Education Center. Local officials



## Demolition First, Objection Second: Iowa Sets Dangerous Legal Precedent

The City of Cedar Rapids passed a resolution seeking condemnation of property owned by Rex Realty Co. for a proposed new street. Rex Realty was not provided with prior notice of the condemnation or the availability of any pre-condemnation opportunity to challenge the validity of the taking. The company filed suit in federal court alleging that the lowa eminent domain statute violated its due process rights because it provided no notice or precondemnation hearing on the issue of public purpose. The company contended that the City took the property for a private purpose-a second driveway to a single adjacent parcel of private property. Amazingly, the district court ruled that the City acted properly, and that the question of public purpose "is purely political, does not require a hearing, and is not the subject of judicial inquiry."<sup>1</sup> Update: In March 2003, the U.S. Court of Appeals for the Eighth Circuit agreed with the trial court, holding that it was good enough for the company to challenge the condemnation after the property was taken.<sup>2</sup> The decision will affect the rights of all home and business owners in lowa, except farmers. The lowa legislature has made sure that farmers will receive better notice than Rex Realty did, but all other lowans can still find that they have missed crucial hearings on proposals to condemn their property.

 <sup>1</sup> Rex Realty Co. v. City of Cedar Rapids, 2002 U.S. Dist. LEXIS 2142, at
 \*9 (N.D. Iowa Jan. 29, 2002).
 <sup>2</sup> Rex Realty Co. v. Iowa, 2003 U.S.
 App. Lexis 4013 (8th Cir. Mar. 7, 2003). worry that without clearing this industrial land, vehicles exiting the conference center might have to pass by the logging operation, which might not be pleasing enough to the eye. Such a ghastly vision might in turn hurt Dubuque's effort to remake its image as a mecca for conventioneers. The City suggests that the truck center land might be used for conference center parking or an office build-ing. The City also used the threat of eminent domain to acquire more than 25 acres of other land near the truck center. <sup>238</sup>

## Dubuque

Dubuque also condemned a riverfront building that formerly housed the Dubuque Star Brewery, which operated at the location for many years until it closed in 1998. The Crompton Corp. owned the building and wanted to develop it. Crompton was still trying to determine how best to use the building in a way that fit in with the nearby America's River discovery center and aquarium project. However, the City decided to save Crompton the trouble and condemned the property for eventual private use, including a microbrewery/restaurant and other retail/commercial tenants.<sup>239</sup> The brewery is the eighth property that the City has acquired by eminent domain or under the threat of eminent domain for the area's tourist-oriented redevelopment since 1990.<sup>240</sup>

## Dubuque

Dubuque also condemned property owned by the Plastic Center, also known as The Fischer Companies, for a 200-room hotel and indoor waterpark along the riverfront.<sup>241</sup>

<sup>238</sup> Erin Coyle, "City Condemns Industrial Land; Eminent Domain: Truck Center Inc. Lot Will Be Used to Meet Investment Potential for the Port Area," *Telegraph Herald (Dubuque, IA)*, May 26, 2002, at A1.
<sup>239</sup> "Legal Battle Brewing Over Ownership of Brewery," *AP Wire*, Apr. 23, 2001.

<sup>240</sup> Erin Coyle, "City Makes Use of Eminent Domain Proceedings," *Telegraph Herald (Dubuque, IA)*, July 1, 2002 at A1; Erin Coyle, "'Tool of Last Resort' Spurs Development; Condemned: City Has Used Threat of Eminent Domain to Acquire Eight Properties Since 1990," *Telegraph Herald (Dubuque, IA)*, July 1, 2002, at A1.

<sup>241</sup> Erin Coyle, "City Makes Use of Eminent Domain Proceedings," *Telegraph Herald (Dubuque, IA*), July 1, 2002 at A1; Jeff Pieters, "Miles to Go Before Sleep at Hotel," *Telegraph-Herald (Dubuque, IA*), June 21, 2000, at A1.





Known Condemnations **Benefiting Private Parties\*** 

| Filed           |      |
|-----------------|------|
| Threatened      | ())) |
| Total           | 162  |
| opment<br>ivate |      |

Known Development Projects w/Private Benefit Condemnations\*

> Legend \_\_\_\_\_ =100 @ =1 L = 1

## 0 v f r v t f w

Unfortunately for the citizens of Kansas, their state is one of the worst abusers of eminent domain, especially in comparison to other states with similar population size. The Kansas Supreme Court in 1998 held that taking the homes of 150 families to make way for a private racetrack was a "public" purpose. Other cities, including Independence and Topeka, have followed suit, and the City of Merriam condemned a used car dealership for a higher-priced BMW dealership. It looks like Kansas home and business owners just better hope that their property doesn't draw the attention of any covetous developers, because Kansas cities are more than willing to use eminent domain on developers' behalf.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened.

# Private Use Condemnations

## Kansas City

In order to make way for construction of the NASCAR-owned Kansas International Speedway, Wyandotte County in 1998 condemned property belonging to 150 families within the 1,200-acre tract. Owners of 30 of the parcels challenged the takings in court. During the litigation, the owners managed to delay the project for several years, because Kansas law bars bond issuance for a project when litigation is pending. In the end, the Kansas Supreme Court upheld the condemnations, ruling that building a racetrack is a valid public purpose.<sup>244</sup> The homeowners received 125 percent of the fair market value of their homes, but many were nonetheless angry that they lost their homes for a privately owned racetrack. <sup>245</sup>

#### Merriam

In 1998, the City of Merriam condemned William Gross's property, which he leased to a used car dealership, so that Gross's neighbor, a BMW dealership, could expand.<sup>246</sup> The City sold Gross's property to Baron's BMW for the same price it paid Gross and gave Baron's \$1.2 million in tax-increment financing to build a new BMW dealership and add a Volkswagen dealership. The Merriam City Council said the project served the public interest because the City would make \$500,000 per year in sales tax revenues from the BMW and Volkswagen dealerships.<sup>247</sup>

In order to make way for construction of the NASCAR-owned Kansas International Speedway, Wyandotte County in 1998 condemned property belonging to 150 families within the 1,200-acre tract. Owners of 30 of the parcels challenged the takings in court.

As if it weren't bad enough to replace a used car dealership with a new car dealership, Gross had proposed using the site for a new Mitsubishi dealership, which would have raised the site's yearly tax revenue from \$40,000 to \$150,000. The City refused. It wanted the BMWs. Or, as the mayor explained, "The Baron BMW development will generate an awful lot of taxes. The property in Mr. Gross' hands has not produced ...." Gross depended on the income from his dealership for his retirement. <sup>248</sup> At the next election, voters responded by ousting half of the City Council.<sup>249</sup>

## Topeka

When Target wanted to build a new distribution center, a number of Kansas towns and cities happily vied for the chance to host the giant corporation. The courtship process was veiled in secrecy, and Target's developer would not even inform the various competing cities the name of the company seeking the new

<sup>244</sup> See State ex rel. Tomasic v. Unified Government, 962 P.2d 543 (Kan. 1998).

<sup>245</sup> John T. Dauner & Steve Nicely, "Speedway Wins High-Court Test; Ruling Approves Condemnation Powers, 125 Percent Valuation," *The Kansas City Star*, July 11, 1998, at A1.

<sup>246</sup> Dean Starkman, "Condemnation Is Used to Hand One Business Property of Another," *Wall Street Journal*, Dec. 2, 1998, at A1.

<sup>247</sup> Tim Baxter, "Court Sets Pace on Baron Case," *The Kansas City Star*, Sept. 5, 1998, at Zone 1.

<sup>248</sup> Brad Cooper, "Clash Over Condemnation; Merriam Decision Raises a Ruckus," *The Kansas City Star*, Aug. 14, 1998, at C1.
 <sup>249</sup> Martin Wooster, "Government as Land-Grabber," *The American Enterprise*, June 1, 2001, at 57.



facility.<sup>250</sup> Eventually Target chose Topeka, in part because of that City's commitment to spend over \$2 million helping the company acquire 11 parcels within a 207-acre tract that would later be tied in to a proposed 400-acre commercial/industrial park.<sup>251</sup> Although most landowners willingly sold their land to the County, Robert Tolbert and General Building Contractors refused to part with their four properties. So in April 2002, a Shawnee County district judge ruled that the County could use its eminent domain powers to acquire a 4,000-square-foot office building owned by General Building Contractors, as well as three lots owned by Robert Tolbert.<sup>252</sup> Both aggrieved owners filed appeals from the court's decision.<sup>253</sup>

<sup>250</sup> Alicia Henrikson & Michael Hooper, "Mystery, Intrigue at Core of Deal," *Topeka Capital-Journal*, June 15, 2002.
 <sup>251</sup> Steve Fry, Michael Hooper & Alicia Henrikson, "Sliver of Land Focus of Fight," *Topeka Capital-Journal*, Apr. 20, 2002.

<sup>252</sup> "Judge Rules for County in Land Deal," *Topeka Capital-Journal*, Apr. 27, 2002.

<sup>253</sup> Alicia Henrikson, "Dispute: County Used Eminent Domain Process to Take Land for Target Site," *Topeka Capital-Journal*, June 21, 2002.



| Known Condemnations<br>Benefiting Private Parties                 | 5*  |
|---|---|
| Filed   |   |
| Threatened  |   |
| Total   | 168   |
| Known Development<br>Projects w/Private<br>Benefit Condemnations* | 5   |
|   | Legend $\overleftarrow{cos} = 1$ $\overrightarrow{cas} = 1$ |

## 0 v e r v i e w

Kentucky courts prohibit the government from taking someone's property just to give it to another private party,<sup>254</sup> and a federal court struck down the attempt of one Kentucky city to declare an ordinary residential area blighted so that it could condemn and transfer the property to a private developer. Despite these clear judicial signals, Kentucky cities do not seem convinced. Both the State and the City of Newport have threatened owners with eminent domain in an effort to force them to sell "voluntarily." Newport has initiated condemnation proceedings to take property for a private residential and commercial development, while owners in Lexington and Newport (again) are challenging condemnations that might be for government use but that the owners allege are really for the benefit of private developers.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened. <sup>254</sup> See, e.g., *Prestonia Area Neighborhood Assoc. v. Abramson*, 797 S.W. 2d 708, 711 (Ky. 1990).



# Private Use Condemnations

## Glendale

The Howlett family found out the hard way what happens when the little guy successfully defeats a state's attempts to take his land for a billion-dollar project that serves to benefit another private party. The Hyundai Motor Company wanted to build its first U.S. manufacturing facility, and Kentucky officials mounted an all-out effort to lure the automaker to a 1,500-acre site in rural Hardin County. The only problem for the State was that the Howlett family did not want to give up its 111-acre farm. The family vigorously fought all efforts to condemn their land, wishing only to be left alone on their family farm. State officials then tried to bully the Howletts by portraying them in the press (without a hint of irony) as greedy opportunists trying to "extort" money from the state by demanding at least \$10 million for their farm. Eventually, the Howletts agreed to an option that would allow the state to buy it for \$6 million. But by then Hyundai had announced that it would build its plant in Montgomery, Alabama.

To the Howletts, the issue was never money, but rather about property rights and a desire to preserve the family's traditional way of life. Hyundai even stated that it could have built the plant without taking the Howlett farm. After losing his bid to lure Hyundai, though, Governor Paul Patton refused to accept the fact that Kentucky lost because of the state's own ineffectual leadership and inferior proposal to the automaker. Instead, Patton continued to accuse the Howletts, saying the family had tried to "destroy" the Hyundai deal by "kill[ing] the goose before it had time to lay the golden egg."<sup>255</sup> This attitude is typical of bureaucrats who have no interest in people's attachment to their homes and businesses but see owners just as obstacles to private and public money-making schemes.

## Highland Heights

The Gateway West area is located on a prime spot near Interstate 471 in Highland Heights. The 14-acre residential area housed 13 single-family homes. However, the city redevelopment agency wanted the strategically-located land to be used for such purposes as a hotel/conference center, office buildings or retail stores. City leaders envisioned a gleaming commercial gateway for this suburban Cincinnati community. In Fall 1997, the City sought to declare Gateway West a redevelopment area, which would allow it to condemn properties to eliminate "blight." Once it gained title to the land, the City could then sell it to private developers who would put the land to the City's desired use. The Highland Heights City Council adopted the redevel-

<sup>255</sup> Jim Warren, "Blame for Hyundai Loss Rejected; Attorney Calls Patton's Version Wrong, Unfair to Hardin Family," *Lexington Herald-Leader*, Apr. 3, 2002, at A1.

# Blight Makes Right: Unjustified Blight Determinations Pave the Way for Condemnation

The Cote Brilliant situation in Newport illustrates a phenomenon that is happening all over the country. Local government first decides to give other people's property to a private developer and then proceeds to designate the area as blighted in order to justify taking the property. With the outcome predetermined, cities will find a way to label anything blighted, using preposterous justifications for their designation. In Kentucky, a neighborhood with \$200,000 homes is blighted. Englewood, New Jersey, termed an industrial park blighted that had one unoccupied building out of 37 and generated \$1.2 million per year in property taxes. Richfield, Minnesota, labeled buildings blighted that did not have insulation that met Minnesota's rules for energy-efficient construction of new buildings. Lakewood, Ohio, calls homes blighted that do not have two-car attached garages. And various California cities have tried to label neighborhoods blighted for peeling paint and uncut lawns.

Most blight statutes provide a list of vague criteria that can establish blight. Pennsylvania's blight statute is typical. Areas are blighted if they have "unsafe, unsanitary, inadequate or over-crowded" dwellings, and certainly unsanitary and unsafe buildings sound like a problem. But Pennsylvania also calls areas blighted that have "inadequate planning,"

"excessive land coverage by buildings," "lack of adequate air and light," "defective design and arrangement of buildings," or "economically or socially undesirable land uses."1 Such broad definitions can encompass any area. An area can be inadequately planned if some current city planner wants to plan it differently. A use can be called economically undesirable if another one would generate more taxes. Pittsburgh found the Pittsburgh Wool Company blighted because the building covered too much of the land on the lot, and it found that the Fifth and Forbes neighborhood lacked sufficient air and light because it was full of the old-style row houses so common in the Eastern half of the United States. With definitions like that, cities can claim almost any home or business is blighted. Then, once an area has been labeled blighted, no matter how petty the justification, it magically transmogrifies into the most derelict area imaginable. With a blight designation any action-razing it to the ground, giving it to a private developer-is presumed legally to be for the public purpose of eliminating this terrible public nuisance.

Although city officials will usually tell citizens that blight designations are useful for funding and tax abatement, in fact a blight designation places all properties in the area at the mercy of both bureaucrats and developers. Residents should therefore view any proposed blight designation as the first move in a coming land-grab.

<sup>1</sup> 35 Penn. Stat. § 1702 (2002). Sources: All of these situations are described in this report under their respective cities. opment plan in April 1998 above the objections of many property owners affected by the designation, and even though neighborhood conditions were substantially similar to those in other Highland Heights neighborhoods (including those in which some City council members lived). The City also declared the area to be a high-crime zone, while admitting that only about 10 police calls per year were made to this area. Angered by the City's actions, these owners banded together to mount a federal court challenge to the decision establishing the redevelopment zone.

In July 1999, a U.S. District Court in Kentucky granted summary judgment to the landowners, finding that the City's actions were arbitrary, capricious and without a rational basis. The judge held that the subject properties were not blighted, although the City had tried to back up its actions with flimsy "blight" findings by its expert panel.<sup>256</sup> As the court noted, "Merely establishing a large administrative and legislative record does not entitle a legislature or administrative agency to declare an apple to be an orange."<sup>257</sup> On appeal the U.S. Court of Appeals for the Sixth Circuit vacated the District Court's decision for lack of certain jurisdictional findings.<sup>258</sup> After making them, the District Court reinstated its original opinion, and the case is now closed.<sup>259</sup> Without the blight designation, the City will be unable to condemn the homes of Highland Heights residents.

## Lexington

A battle is taking place over ownership of the Lyric Theatre, a historic building that was once Lexington's main movie theater catering to African-Americans during segregation. A religious group called God's Center has owned the defunct theater since 1984, but City leaders have been trying for years to wrest control of the theater and its future direction from the group. The City had pledged to use state funds to build an African-American cultural center, and had been sued by the State for not making good on its promise. So, in the mid-1990s, to settle the suit, the City attempted to condemn the Lyric and designate it as the future site of the promised cultural center. The settlement was obtained without the consent of God's Center, which was simultaneously working on its own plan to restore the old theater and create its own African-American cultural center.<sup>260</sup> Another reason for Lexington's aggression toward the Lyric was that City leaders were worried about public outcry

<sup>259</sup> See *Henn v. City of Highland Heights*, No. 98-95 (E.D. Ky. Mar. 23, 2001).
<sup>260</sup> Louise Taylor, "Trial of Dispute over Lyric Theatre Wraps Up; Judge Is Expected to Issue Decision Later this Month," *Lexington Herald-Leader*, Mar. 8, 2001, at B3.



 <sup>&</sup>lt;sup>256</sup> See Henn v. City of Highland Heights, 69 F. Supp. 2d 908 (E.D. Ky. 1999).
 <sup>257</sup> Id. at 913.

<sup>&</sup>lt;sup>258</sup> See *Henn v. City of Highland Heights*, 248 F.3d 1148, 3 Fed. Appx. 487 (6th Cir. 2001).

over the fact that municipal dollars were already going toward the restoration of the Kentucky Theatre, the location where whites attended movies during segregation. During the trial over the City's "public use" justification for the taking, God's Center presented evidence showing that the driving force behind the City's actions was a small group of individuals trying to put the theater under the control of the founder of Micro-City Government, a youth social and political outreach program. In April 2001, Fayette Circuit Judge Gary Payne upheld the City's condemnation, and God's Center appealed.<sup>261</sup> In November 2002, the Kentucky Court of Appeals upheld the trial court's decision, ruling that the proposed African-American cultural center is a valid public use.<sup>262</sup> God's Center attorney Gail Slaughter vows that the group will appeal all the way to the U.S. Supreme Court, if necessary. "The bottom line is that it's unconstitutional to take private property from one private group and give it to another private group," says Slaughter.<sup>263</sup>

#### Newport

Newport City officials are trying to remove dozens of homes in the Cote Brilliant neighborhood that stand in the way of a planned \$100-million retail and upscale residential development. In total, the project would require razing 150 homes. The original developer for the project was Neyer Properties, Inc., which negotiate d contracts to sell from most of the owners in the area. However, 13 owners refused to sell, and four filed suit in federal court to prevent the government from taking their homes. Shortly thereafter, the City decided to find a new developer.<sup>264</sup> The City wants to transform the hillside community into Newport Promenade, a combination of shopping and homes in the \$300,000 price range with views of the Cincinnati skyline. City Manager Phil Ciafardini says the existing neighborhood meets the definition of "blight." But Cote Brilliant residents disagree. Many of the homes are in the \$200,000 range, and the neighborhood has the second-highest economic base in Newport, according to the lawyer for the residents.<sup>265</sup> Lois Joy Sallee-Scheall, the most outspoken opponent of the Newport Promenade project among the targeted property owners, says she is insulted by the City's apparent preference for a different type of landowner. As Sallee-Scheall says, "What they are telling me is that I'm not worth as much as someone who can live in a luxury condo."<sup>266</sup>

By December 2002, the City had purchased more than 20 of the properties needed for the Newport Promenade development. Additionally, the City has begun eminent domain proceedings against several properties, most of which are related to owners the City cannot locate. The City has sought \$12 million in bonds to fund the acquisitions and has begun talking to Neyer again. However, some Newport officials are becoming disillusioned with the manner in which the City is forcing owners to sell their perfectly good homes under the threat of condemnation. Commissioner Beth Fennell, who voted against the redevelopment, is not comfortable with the arrangement. "I just don't feel like we should take a risk for the developer," she said. "I think we've overstepped our responsibilities. [The developer] should have to take the risks if they want the gains." Meanwhile, the four owners who are challenging the City's proposed condemnations press on with their suit. None of them are included in this first round of takings, but they want to make sure the City's redevelopment bureaucrats cannot condemn them next.<sup>267</sup>

<sup>261</sup> Louise Taylor, "Judge Backs City Takeover of Lyric Theatre; Citizens' Group Plans to Appeal," *Lexington Herald-Leader*, Apr. 14, 2001, at A1.

<sup>262</sup> See *God's Center Foundation, Inc. v. Lexington-Fayette Urban County Government*, 2002 Ky. App. LEXIS 2315, at \*1 (Nov. 8, 2002).

<sup>263</sup> Louise Taylor, "Appeals Court Backs City in Lyric Fight; God's Center Attorney Has No Plans to Give Up," *Lexington Herald-Leader*, Nov. 9, 2002, at C1.

<sup>264</sup> Stephenie Steitzer, "Newport Promenade; Retail Aspect Bogs Down," *The Cincinnati Enquirer*, Aug. 14, 2002, at 2C.
 <sup>265</sup> Dave Niinemets & Susan Vela, "City Starts Buying Land for Project," *The Cincinnati Enquirer*, Dec. 15, 2002, at 1B.
 <sup>266</sup> Karen Samples, "Fights Brew Over Use of Eminent Domain," *The Cincinnati Enquirer*, Jan. 10, 2002.

<sup>267</sup> Dave Niinemets & Susan Vela, "City Starts Buying Land for Project," The Cincinnati Enquirer, Dec. 15, 2002, at 1B.

#### Newport

A Newport landowner is taking the City to court over its attempt to condemn property for a new bus terminal. BIF, Inc. owns three parcels in downtown Newport, which it leases to Challenger Piping, Inc., a Goodyear tire store and an auto detailing shop. The Transit Authority of Northern Kentucky claimed that a new central bus depot is needed, and the City agreed to condemn the parcels for this purpose. The landowner claims, however, that internal memos show that the idea for the project originated not with the Transportation Authority, but with two private developers who are trying to develop an office tower on several blocks in the same area and who consider the BIF properties too downmarket to be near their new development. No feasibility or traffic study was ever conducted prior to condemnation. Documents produced for the court challenge indicate that the former city manager suggested that if BIF rejected the developers' offer, the City would help it concoct a plan to "build a public park or something dedicated to the public so the property could be purchased through eminent domain."<sup>268</sup> The Transportation Authority, on the other hand, claims that BIF is challenging the condemnation merely to jack up the final selling price, and denies that the bus terminal scheme is connected to any private development plans.<sup>269</sup> The lawsuit was filed in August 2002.

<sup>268</sup> Karen Gutierrez, "Filings Say Depot Plan an Excuse," *The Cincinnati Enquirer*, Aug. 15, 2002, at 1C.
 <sup>269</sup> Karen Gutierrez, "TANK: Lawyers Trying to Jack Up Land Price," *The Cincinnati Enquirer*, Aug. 27, 2002, at 1B.





Known Condemnations Benefiting Private Parties\*



Threatened Number unspecified

Total 5

Known Development Projects w/Private Benefit Condemnations\*

🕒 3

Legend  $\underbrace{\neg \neg \neg}_{-1} = 1$ 

# OVERVIEW

Louisiana has been relatively modest in its use of eminent domain for private parties. The main source of private condemnations in the past five years has been a hotel/convention center project in Shreveport, which generated five condemnations. St. Gabriel also condemned property for a private railroad spur. Courts upheld the Shreveport condemnations and the case in St. Gabriel. In the next several years, local officials may continue to use restraint in condemning property, or they may be emboldened by these judicial decisions and decide to push the envelope.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened.

# Private Use Condemnations

### Shreveport

City leaders in Shreveport have been trying for years to build a new convention center, a centerpiece of which would be a large, privately owned hotel. In 1999, Shreveport voters backed a bond referendum to raise the \$85 million needed for the project. The City then began studying various locations for the new convention center, eventually settling on a three-block strip along Caddo Street near the riverfront. The selected area included land owned by Chanse Gas Corp., which operated a warehouse and office building there, along with an adjacent parking lot. After fruitless negotiations between the City and Chanse Gas, the City condemned the property on January 11, 2000. Chanse Gas challenged the taking, arguing that the City's convention center project would not serve a public purpose, but instead would subsidize the construction of a new hotel to compete with the existing hotels in the area. Chanse Gas also argued that the convention center would drain the City's coffers to benefit private developers, thus jeopardizing other worthy public projects. The trial court disagreed, and upheld the taking.<sup>270</sup> The Louisiana Court of Appeals affirmed the ruling in August 2001, stating that the project was justified by the "economic development" the new convention center/hotel would bring to downtown Shreveport.<sup>271</sup> The Louisiana Supreme Court declined to review the case.<sup>272</sup>

#### Shreveport

As part of the same hotel/convention center development, the City and its design consultants determined that the best location for a 1,200-car parking garage was on a site adjacent to the planned hotel. The garage would be owned and operated by the City, but would serve both patrons of the convention center and hotel guests. The desired site comprised three parcels of land, all of which were owned by the Shreve Town Company. A City appraiser valued the land at \$870,000, but Shreve Town rejected the City's offer to buy the parcels at that price. The City refused to consider Shreve Town's offer to jointly operate the garage. In February 2000, the City Council voted unanimously to condemn the properties, stating that public necessity dictated that they be controlled by the City. The company challenged the condemnation in federal court. The trial court held that rather than being a mere amenity to the new convention center, the new parking facility was necessary to its success, and therefore the taking served a public purpose. The U.S. Court of Appeals for the Fifth Circuit affirmed, holding that the condemnation did not violate the Louisiana Constitution.<sup>273</sup>

## St. Gabriel

Illinois Central Railroad Co. sought to expropriate a strip of property owned by James and Barbara Mayeux for a proposed railroad spur leading to an LBC PetroUnited chemical storage facility on the Mississippi River. Illinois Central tried to negotiate with the Mayeuxs for an easement over their land, but the family was unwilling to sell. So the railroad filed a complaint for expropriation of the Mayeux land in Louisiana federal court, claiming that the proposed rail spur would serve a public and necessary purpose. After hearing arguments from both sides, the trial court granted the railroad a summary judgment on the issue.<sup>274</sup> The Mayeuxs appealed that decision, and in August 2002 the U.S. Court of Appeals for the Fifth Circuit

<sup>273</sup> See *City of Shreveport v. Shreve Town Corp.*, No. 00-0315 (W.D. La. Nov. 27, 2000), *aff'd*, 314 F.3d 229 (5th Cir. 2002).

<sup>&</sup>lt;sup>274</sup> See Illinois Central Railroad Co. v. Mayeux, 178 F. Supp. 2d 663 (2000).



<sup>&</sup>lt;sup>270</sup> See City of Shreveport v. Chanse Gas Corp., No. 00-0315 (Caddo Parish, La. June 16, 2000).

<sup>&</sup>lt;sup>271</sup> See *City of Shreveport v. Chanse Gas Corp.*, 794 So. 2d. 972 (La. App. 2001).

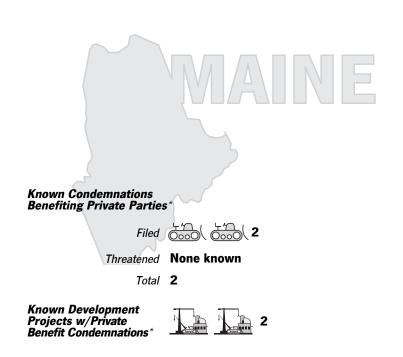
<sup>&</sup>lt;sup>272</sup> See City of Shreveport v. Chanse Gas Corp., 805 So. 2d. 209 (La. 2002).

reversed,<sup>275</sup> holding that regardless of Louisiana's statute allowing railroads to condemn "needed" private property, the taking must satisfy the U.S. Constitution's public use necessity requirement. The trial court stated that necessity is satisfied simply by declaring that the taking is for "railroad purposes." However, the Fifth Circuit held that a court must consider "whether there is an actual public demand for the expropriation."<sup>276</sup> Because the Mayeuxs showed that a genuine dispute existed on the issue of necessity, the Fifth Circuit remanded the case to the district court.<sup>277</sup> However, the appeals court agreed that taking property for a railroad spur that would serve one company could be a public use.

<sup>275</sup> See Illinois Central Railroad Co. v. Mayeux, 301 F.3d 359, 361 (2002).
<sup>276</sup> Id. at 368.
<sup>277</sup> Id. at 369.

# **CASTLE**

Maine



Legend  $\bigcirc$  =1  $\bigcirc$  =1

# OVERVIEW

In 1954, Maine's Supreme Court held that eminent domain could not be used simply to transfer property from one private owner to another.<sup>278</sup> Since then, Maine municipalities have refrained almost entirely from condemnations that benefit private parties. A Maine trial court in 2001 prevented an attempt to condemn for economic development, and the Maine legislature that same year passed a law providing for recovery of condemned property by its former owners if the government does not make use of it within eight years. The only cautionary note was a Maine Supreme Court decision allowing the condemnation of a private parking lot for a public parking lot leased to an island ferry and also providing parking for island residents. Still, the public aspects of the condemnation are significant, because the parking lot is owned by the government and serves the local transportation system. Thus, the decision poses little threat that eminent domain will be used more aggressively for private parties in Maine.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened. <sup>278</sup> See *Opinion of the Justices*, 131 A.2d 904, 905-06 (Me. 1957).



In 1954, Maine's Supreme Court held that eminent domain could not be used simply to transfer property from one private owner to another. Since then, Maine municipalities have refrained almost entirely from condemnations that benefit private parties.

## LEGISLATIVE ACTIONS

Maine recently passed a law strengthening the rights of property owners to reacquire property taken through eminent domain. In 2001, the Maine legislature passed a law that requires that if the condemned property is not used for the purpose of the taking within eight years, the former owner will have a right to purchase the property back. If the government entity wants to keep the property, it must reaffirm that it still intends to use the property for the original purpose. If the government does not still intend to use the condemned property for the original purpose, it must notify the former owner of the right of first refusal to purchase the property back. The former owners or their heirs then have 90 days to exercise their option.<sup>279</sup> The law was passed in response to a decision by Maine's highest court that allowed a municipality to sell property it had condemned nearly 40 years before and never used. The former owner had been trying to get it back (see below).

# Abandoned Use: Former Property Owner Fights to Regain Land

## South Portland

In February 2000, Maine's highest court cleared the way for South Portland City officials to sell a valuable 1.45-acre piece of property near the Maine Mall, despite the objections of the former owner, which had sued to regain ownership of the land. The City condemned the land in 1968, originally planning to build a fire station. The owner, a real estate partnership called South Portland Associates, was paid \$7,300 at the time. However, the City ultimately determined that the site was poorly located and too small for the project, so the property sat vacant. After 30 years, the City decided it would sell the land, whose value had multiplied to \$275,000. South Portland Associates sued on the grounds that state law forbids a municipality from using land taken through eminent domain for any purpose other than the originally stated public use. The City argued that the land rightfully belonged to the taxpayers and was purchased legally and in good faith. The trial court ruled that since Maine law neither sets deadlines for municipalities to use condemned land, nor spells out what happens when the municipality no longer wants to use the land, South Portland was free to sell the property to a private party. On February 18, 2000, the Maine Supreme Judicial Court upheld that decision, stating that the law places no limits on the City's resale of the land, even at a tremendous profit.<sup>280</sup> The following year, the Maine legislature passed a law allowing former owners to buy back property taken by eminent domain but not used for the original purpose of the taking (see above).

<sup>279</sup> 1 Maine Rev. Stat. § 815 (2002); H.B. 99, 120th Sess. (Me. 2001).

<sup>280</sup> See South Portland Associates v. City of South Portland, 746 A.2d 365, 368 (2000); see also John Richardson, "High Court: City May Sell Valuable Lot It Seized in 1968; South Portland Associates Was Forced to Sell a 1.45-Acre Parcel for a Fire Station that Was Never Built," *Portland Press Herald*, Feb. 29, 2000, at 1B.

# Town Learns from Past Redevelopment Mistakes that Eminent Domain Just Isn't Worth the Trouble

In November 2000, the Westbrook City Council approved the Riverfront Master Plan, a multimillion-dollar effort to revitalize the Presumpscot River waterfront by building a riverfront boardwalk and pedestrian river crossings.<sup>1</sup> City officials stated clearly that they do not intend to use eminent domain as part of the redevelopment, which comes as a relief to many small business owners in the area. During the 1960s and 1970s, the City undertook a disastrous urban renewal plan using public funds to raze many old, historic downtown structures, with the goal of replacing them with commercial complexes designed to compete with suburban shopping centers. However, the primary result of the earlier plan was that nothing ever got built, leaving many vacant lots and shuttered businesses. The plan totally destroyed central Westbrook's retail and residential fabric.<sup>2</sup> This time around, the City plans to work together with local property owners to transform the waterfront, rather than move them out of the way as it did in the past.

 <sup>1</sup> C. Kalimah Redd, "Westbrook Approves Plan for Riverfront," *Portland Press Herald*, Oct. 24, 2000, at 2B.
 <sup>2</sup> Tom Bell, "Plan to Remake Westbrook Met with Suspicion, Hostility; Critics Remember When the Downtown Was Torn Apart by Urban Renewal," *Portland Press Herald*, June 27, 2000, at 1B.

# Private Use Condemnations

## Cousins Island

Nancy Blanchard owned a 1.4-acre parking lot that she leased to Chebeague Transportation Company, which operates a ferry between Chebeague Island and Cousins Island. The lot served as the main parking lot for users of the ferry. When Blanchard decided in October 1999 not to renew the lease, the State Department of Transportation condemned the property to ensure that the ferry would not lose its parking. Chebeague Transportation Company is a publicly traded for-profit corporation that was created by Chebeague Island residents as a community enterprise, and the lot's parking spaces are set aside mainly for island residents. After the DOT seized the land and paid Blanchard, it leased the lot to the ferry for \$1 a year. Blanchard challenged the taking, but the trial court decided that it served an essential public use. On appeal, the Maine Supreme Judicial Court agreed, holding that the ferry's grant of priority parking to year-round residents of Chebeague Island does not render the use private.281

## Kennebec County

In 1998, the Kennebec Regional Development Authority condemned a parcel of land owned by Gary and Theresa Craig for the FirstPark "regional super park," a privately owned industrial development for which the developer would market sites to other private businesses. The Craigs refused to negotiate with the Authority, and instead the family challenged the taking in court. They argued that a condemnation solely for the purpose of spurring private economic development did not serve a valid public purpose under Maine law. In April 2001, the Kennebec County Superior Court agreed, ruling that the state's narrow interpretation of the term "public use" does not allow the taking of private property for development of a regional industrial facility.<sup>282</sup>

<sup>281</sup> Blanchard v. Department of Transportation, 798 A.2d 1119, 1128 (Me. 2002).

<sup>282</sup> See Craig v. Kennebec Regional Development Authority, 2001 Me. Super. LEXIS 51, at \*8-\*9 (Apr. 2, 2001).



| Public | Power, | Private | Gain |
|--------|--------|---------|------|
|--------|--------|---------|------|

| Known Condemnations<br>Benefiting Private Parties*                |                         |  |
|---|-------------------------|--|
| Filed   | <del>ද්ධි</del> ( ද 127 |  |
| Threatened  |                         |  |
| Total   | 1,237                   |  |
| Known Development<br>Projects w/Private<br>Benefit Condemnations* |                         |  |

State Record of Condemnations Filed, for All Purposes:<sup>+</sup> 935

Legend \_\_\_\_\_=100 ==100 \_\_\_\_=1

# OVERVIEW

The Maryland legislature is remarkably willing to authorize municipalities to use eminent domain for redevelopment projects. It approved eminent domain for 11 cities in just one legislative session. Baltimore is especially fond of eminent domain and used it to remove many small minority-owned businesses in its downtown area for future private development. At the end of 2002, the City approved a project that could displace as many as 800 households for businesses and newer private homes. Maryland officials seem unaware of the overwhelming disapproval of these tactics by Maryland citizens. A referendum in Baltimore County defeated the use of eminent domain for another private redevelopment project by a vote of 70 percent of voters. The differing agendas of bureaucrats and citizens are bound to cause conflict in the coming years.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened. <sup>†</sup>Compiled by the Maryland State Judiciary (includes condemnations for traditional public uses).

## **Baltimore County Property Owners Rally to Defeat State Eminent Domain Bill**

In January 2000, County Executive C.A. "Dutch" Ruppersberger proposed Senate Bill 509, a piece of state legislation that allowed Baltimore County to use its power of condemnation in order to acquire 310 properties in Essex-Middle River, Dundalk, and Randallstown. The land, including valuable waterfront property, would have been transferred to private developers. Local homeowners and business owners mounted an aggressive campaign opposing the County's use of eminent domain.<sup>1</sup> They lobbied against the bill in the Maryland legislature, but lawmakers in Annapolis overwhelmingly voted in favor of giving Ruppersberger the condemnation powers he requested. At the request of the property owners, the Institute for Justice testified against the bill.

Rather than admitting defeat, the owners and supportive members of the community began gathering signatures for a petition to force a citizen referendum on the bill, a procedure that had not been used in Baltimore County in 30 years. The group managed to secure 44,000 signatures, far more than the 24,000 needed.<sup>2</sup> The County grossly underestimated popular opposition to the idea of taking someone's home for a private developer. The referendum measure fueled a voter turnout of higher than 72 percent, and 70 percent of voters cast ballots opposing SB 509.<sup>3</sup> The plan to redevelop Baltimore's east end continues, but today it must be done without the County using eminent domain to force the transfer of private property from one person to another.<sup>4</sup>

<sup>1</sup> Joe Nawrozki & David Nitkin, "SB 509 Fires Up Passions," *Baltimore Sun*, Oct. 15, 2000, at 1F. <sup>2</sup> David Nitkin & Joe Nawrozki, "Voters to Decide Fate of Condemnation Law," *Baltimore Sun*, Nov. 6, 2000, at 1B.

<sup>3</sup> David Nitkin & Joe Nawrozki, "Condemnation Bill Defeated," *Baltimore Sun*, Nov. 8, 2000, at 1A.

<sup>4</sup> Joe Nawrozki, "For Now, Smooth Sailing for East-Side Revival Plan," *Baltimore Sun*, Aug 1, 2001, at 1B.

## LEGISLATIVE ACTIONS

During its 2002 session, the Maryland state legislature enacted laws authorizing the use of eminent domain for urban redevelopment projects in Capitol Heights,<sup>283</sup> Charlestown,<sup>284</sup> Cottage City,<sup>285</sup> Goldsboro,<sup>286</sup> Greensboro,<sup>287</sup> Henderson,<sup>288</sup> Hillsboro,<sup>289</sup> Landover Hills,<sup>290</sup> Marydel,<sup>291</sup> Preston<sup>292</sup> and Ridgely.<sup>293</sup> These broadly worded "slum clearance" bills will allow the cities to condemn any land within designated urban renewal districts and then sell it to private developers. The cities also have the power to alter the boundaries of those districts without notifying property owners potentially affected by the changes.

The referendum measure fueled a voter turnout of higher than 72 percent, and 70 percent of voters cast ballots opposing SB 509.3



<sup>283</sup> See HB 648, 416th Sess. (Md. 2002).
<sup>284</sup> See SB 312, 416th Sess. (Md. 2002).
<sup>285</sup> See HB 639, 416th Sess. (Md. 2002).
<sup>286</sup> See SB 191, 416th Sess. (Md. 2002).
<sup>287</sup> See SB 193, 416th Sess. (Md. 2002).
<sup>288</sup> See SB 190, 416th Sess. (Md. 2002).
<sup>289</sup> See SB 692, 416th Sess. (Md. 2002).
<sup>290</sup> See HB 635, 416th Sess. (Md. 2002).
<sup>291</sup> See SB 189, 416th Sess. (Md. 2002).
<sup>292</sup> See SB 690, 416th Sess. (Md. 2002).
<sup>293</sup> See SB 691, 416th Sess. (Md. 2002).

Citizens in Baltimore County, MD, spearheaded a referendum to defeat the condemnation of more than 300 properties for transfer to private developers.



## Private Use Condemnations

## Baltimore

The City condemned approximately 127 properties, including many small businesses, in the west side of downtown Baltimore as part of a \$350-million redevelopment plan.<sup>294</sup> Under the plan, the properties will be turned over to private developers to build hotels, retail stores, offices and residences. The \$70 million Centerpoint retail and residential development required the condemnation of many businesses, and now the City is looking at expanding the project and taking still more property.<sup>295</sup>

Among the many businesses removed in order to make way for the type of chain retail behemoths favored by the City were Hippodrome Hatters (a 70-year old family business), Sunny's Surplus, and the Paramount Hotel, an attractive 120 room Beaux-Arts hotel.<sup>296</sup> Some area merchants were able to relocate nearby; others closed or moved to a less desirable location.<sup>297</sup> Many other businesses are still in limbo. Young Cho runs a successful beauty salon that also falls within the planned condemnation area. Cho, a Korean immigrant, had saved for 15 years to buy the property. She, along with many other businesses, is still waiting to find out if she will lose her livelihood and the business for which she worked so hard.<sup>298</sup>

East Baltimore Development Inc. is overseeing the project, which is expected to displace around 800 households in the neighborhood and purportedly will be completed over the next 10 years. Apparently the City and developer subscribe to the notion that they have to destroy the village in order to save it.

#### Baltimore

In December 2002, the Baltimore City Council passed legislation that gives the City the power to condemn about 3,000 properties for an east side redevelopment project anchored by a biotechnology research park and up to 2,000 new and renovated homes. East Baltimore Development Inc. is overseeing the project, which is expected to displace around 800 households in the neighborhood and purportedly will be completed over the next 10 years.<sup>299</sup> Apparently the City and developer subscribe to the notion that they have to destroy the village in order to save it.

<sup>294</sup> Scott Calvert, "Building up the West Side," *The Baltimore Sun*, June 16, 2002, at 1F; Nora Achrati, "City Ordered to Pay \$219,000 for Site," *The Baltimore Sun*, Apr. 19, 2002, at 3B.

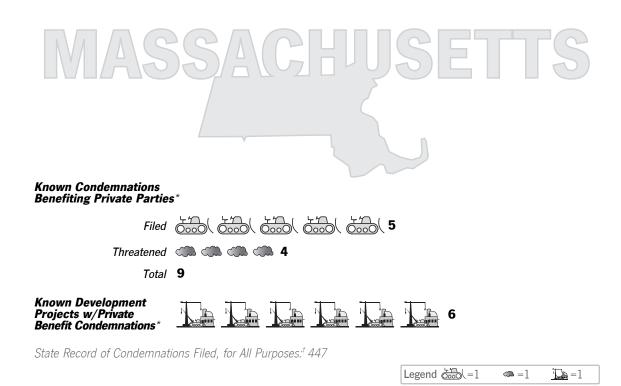
<sup>295</sup> Scott Calvert, "Building up the West Side," *The Baltimore Sun*, June 16, 2002, at 1F; Christopher Sherman, "West Side Redevelopment Initiative May Expand," *The Daily Record (Baltimore, MD)*, June 26, 2002, at News.

<sup>296</sup> Tom Pelton, "City's West Side Buyout to Begin," *The Baltimore Sun*, Nov. 20, 1999, at 1B; Tom Pelton, "Hotel Dispute Delays Renewal," *The Baltimore Sun*, Jan. 22, 2001, at 1A.

<sup>297</sup> Ezra Fieser, "West Side Revitalization Begins at Centerpoint," *The Daily Record (Baltimore, MD)*, June 6, 2002, at News.

<sup>298</sup> Gerard Shields, "Urban Renewal, Property Rights Collide in City," *The Baltimore Sun*, Jan. 12, 1999, at 1A.
 <sup>299</sup> Laura Vozzella, "City Council Approves Measure for East-Side Urban Renewal Plan," *The Baltimore Sun*, Dec. 7, 2002, at 2B.





# 0 v e r v i e w

Massachusetts government employees are far too fond of baseball. Three cities in the last five years have put forward plans for acquiring other people's property and building baseball stadiums. One plan was overturned in a citizens' referendum, another by a court. Boston is still holding out hope of condemning property for a new stadium, but the project is currently on hold. Boston in particular has a history of neighborhood devastation through eminent domain, particularly in the West End.<sup>300</sup> Massachusetts as a whole uses eminent domain for private parties less than many of its neighboring states,<sup>301</sup> but its cities still sometimes seek to excise stable local businesses with long-term employees in favor of the lure of upscale retail chain stores. The State has made some strides in the right direction. Its cities and redevelopment agencies should continue in this trend and eliminate the use of eminent domain for private parties.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened.

<sup>†</sup>Massachusetts Judicial Branch (includes condemnations for traditional public uses).

<sup>300</sup> See Michael Malamut, *The Power to Take: The Use of Eminent Domain in Massachusetts*, at 8 (Pioneer Institute for Public Policy Research Dec. 2000). This report can be obtained from the Pioneer Institute website at http://www.pio-neerinstitute.org/pdf/wp15.pdf.

<sup>301</sup> See generally, *id.* 



<u>Massachusetts</u>

# Private Use Condemnations

## Boston

The Boston Redevelopment Authority (BRA) used eminent domain to seize the historic Ames Building in order to help its owner break the leases of the building's remaining tenants. In 1998, Intercontinental Real Estate Corp. bought the 14-story, 110-year-old granite and sandstone structure, which was once the tallest skyscraper on the East Coast. The hotelier wanted to convert the building into a boutique hotel. Inconveniently, the building hap-



A landlord who wants to terminate a long-term lease generally may do so either by buying out the tenant, by waiting until the lease is up, or by paying whatever early termination penalties are stated in the lease agreement itself. However, this landlord had politically powerful friends and managed to use its clout to get the local government to intervene, using its power of eminent domain, on the landlord's behalf in this utterly private landlord-tenant dispute.

pened to have tenants at the time of purchase. Two of those tenants—the D'Angelo Sandwich Shop and the Taylor & Partners architectural design firm—did not want to move. D'Angelo's lease ran until 2012; Taylor's until 2003. The landlord needed to get out of its long-term lease agreements in order to make financing for its proposed hotel more easily available.

A landlord who wants to terminate a long-term lease generally may do so either by buying out the tenant, by waiting until the lease is up, or by paying whatever early termination penalties are stated in the lease agreement itself. However, this landlord had politically powerful friends and managed to use its clout to get the local government to intervene, using its power of eminent domain, on the landlord's behalf in this utterly private landlord-tenant dispute. In June 2001, the BRA agreed to condemn the building, which would automatically break the leases and clear title. Then the BRA would transfer the building right back to Intercontinental, minus those pesky leases. D'Angelo's promptly filed suit challenging the forthcoming condemnation.<sup>303</sup> The BRA did begin condemnation proceedings.<sup>304</sup> However, before a decision in its lawsuit, D'Angelo's reached a settlement with Intercontinental. The new hotel is currently under construction, and will open in 2003.<sup>305</sup>

## Boston

Boston leaders have been trying for years to build a new baseball stadium that will replace the aging Fenway Park. In 1999, Red Sox team officials unveiled a \$660 million plan to build a new Fenway on a 15-acre site adjacent to the old stadium. The plan provided that the team, the City and the State would share the cost of construction. In July 2000, Massachusetts Governor Paul Cellucci signed into legislation a bill

<sup>303</sup> Sarah Schweitzer, "BRA Plan to Seize Building Spurs Suit," *Boston Globe*, July 28, 2001, at A1.
 <sup>304</sup> Paula Restuccia, "Hub Zoning Code Causes Contention," *Boston Herald*, Jan. 25, 2002, at RE 39.
 <sup>305</sup> Thomas C. Palmer, Jr., "Small Hotels Add Up for City Boom Seen Helping Convention Center," *Boston Globe*, Mar. 18, 2002, at A1.



## Pittsfield Residents Vote Against Eminent Domain

On June 10, 2001, the Pittsfield City Council voted to create a private "civic authority" in Pittsfield, Massachusetts, for the purpose of building a new baseball stadium to attract and keep a minor league baseball team. The authority would own and operate the stadium, and it would have the power of eminent domain.

Many residents feared the prospect of eminent domain. Anne Leaf and others lived near the location that the City had proposed for the stadium and feared their homes could be taken for parking or other stadium uses.<sup>1</sup> One City councilor, after a 24-hour protest against the stadium, explained, "I support these people. I don't think eminent domain is a good thing."<sup>2</sup> The residents took action and gathered 5,200 signatures, about 18 percent of City voters, to force a referendum on the decision. On June 5, 2001, the citizens of Pittsfield voted against the creation of the authority and its eminent domain power.<sup>3</sup>

 "Councilors Vote to Create Stadium Authority," *AP Wire*, Jan. 11, 2001
 "Bleary-eyed City Councilor Ends Vigil," *AP Wire*, May 27, 2001.
 "Financially Strapped City

Votes No on New Baseball Stadium," *AP Wire*, June 5, 2001. calling the new Fenway a legitimate public purpose, and approving \$100 million in state funding for infrastructure improvements around the new stadium. The bill also called on the Boston Redevelopment Authority and the Economic Development Industrial Corporation to spend \$140 million acquiring dozens of properties needed for the project through eminent domain. The Red Sox would need to line up an additional \$352 million in financing.<sup>306</sup>

The Fenway project has made little progress since then. Red Sox ownership put the team up for sale in the fall of 2000, essentially leaving the project's future in the hands of the new owner. Meanwhile, the City has been reluctant to use eminent domain to take land for the stadium. State Attorney General Tom Reilly has serious doubts about whether state courts would agree with the legislature that the stadium serves a public purpose. In part, he fears that a state court may overturn any condemnations, based on a 1969 decision by the state Supreme Judicial Court that ruled an earlier plan for replacing Fenway was illegal because it required the taking of private land to benefit another private party. Red Sox officials had hoped to avoid using eminent domain by negotiating agreements with individual landowners but have not pursued trying to purchase the land.<sup>307</sup>

While the Red Sox ownership situation has been up in the air, the merchants and property owners around the proposed new stadium site have suffered. The City recently increased property tax assessments by 40 percent for the commercial buildings that occupy the stadium site, leading to huge tax increases for Fenway businesses. Moreover, the Red Sox have had little contact with Fenway property owners in the last year. Arthur D'Angelo, owner of Twins Enterprises and the largest single landowner on the site, says that has not heard from the team in a year and a half. Bill Sage, who owns a Howard Johnson hotel on the proposed ballpark site, said talks with a Red Sox real estate consultant went nowhere. Many owners have complained that they have been unable to convince companies to lease space around the proposed stadium site, even though the Fenway area is undergoing a vigorous revitalization. D'Angelo says he tried for months to lease out 40,000 square feet of office and retail space, but managed only to convince a high-tech firm to rent half the space, at less than half the going rate for space in the area. Other retailers and businesses have left the area altogether, creating the kind of "pre-condemnation blight" that often occurs when a large project threatens to move in, convincing property owners not to reinvest in their own property. Most Fenway area business owners would rather stay in the area, but they fear that the City's actions will ultimately force them to sell out.308

<sup>307</sup> Cosmo Macero, Jr., "Reilly Doubts Sox Plan Is Legal," *Boston Herald*, June 28, 2001, at Finance 35.

<sup>308</sup> Scott Van Voorhis, "Stalled Park Keeps Fenway Neighbors in Limbo," *Boston Herald*, July 9, 2001, at Finance 1.



<sup>&</sup>lt;sup>306</sup> Steve LeBlanc, "Fenway Deal Hinges on Question of Land Takings," *AP Wire*, Aug. 15, 2000.

In February 2002, the Red Sox were sold to an investment group headed by John Henry. As of yet, the new ownership has not taken any steps regarding a new ballpark. The nervous Fenway property owners continue to wait.<sup>309</sup>

### Somerville

Walter Lipsett's Central Steel Supply Co. has survived 39 years of economic ups and downs, as well as a devastating fire. Now the business may be destroyed by a most unnatural force, namely the scheming by Somerville officials. Private developers have purchased most of the neighboring properties for the Assembly Square retail development, and now the City wants to seize the Central Steel facility as well as an adjacent taxi company and brick factory, in order to complete the developer's land acquisition. Lipsett does not want to move, however, and has taken the City to court in order to prevent any condemnation from moving forward.<sup>310</sup>

#### Springfield

In the mid-1990s, the City of Springfield began trying to lure a minor league baseball team to town. To achieve this goal, the City would need a new baseball stadium to house the team. Then-Governor William Weld pledged \$10 million in state money for the stadium project, and the City formed Springfield Baseball Club LLC (SBC), a private, nonprofit corporation that would head up the process of finding a team willing to relocate to Springfield. However, no teams were available for sale, and when the City came to collect on Gov. Weld's "promise," they walked away empty-handed after learning that those funds had never been budgeted by the state, and that the state legislature adamantly opposed using taxpayer dollars to build stadiums for the purpose of benefiting privately owned baseball franchises.<sup>311</sup>

So Springfield Mayor Michael Albano cooked up a new scheme, in which attracting a baseball team would be an "all-consuming goal" of municipal action. Michael Graney, a friend of the mayor's and head of the local economic development corporation, was put in charge of SBC,<sup>312</sup> which would now own both the team and the proposed stadium once it was built.<sup>313</sup> Finally, in 1998 SBC entered into a franchise agreement with the Northern League whereby the league awarded Springfield a baseball team in return for the City's promise that a new stadium would be built before the start of the 2001 baseball season.<sup>314</sup>

<sup>310</sup> Benjamin Gedan, "City Weekly/Somerville/News in Brief; Bottom Line: Help," *Boston Globe*, Dec. 8, 2002, at City Weekly 12.

<sup>311</sup> City of Springfield v. Dreison Investments, Inc., Nos. 1999-1318, 99-1230 & 00-0014, 2000 Mass. Super. LEXIS 131, at \*25-26 (Mass. Super. Feb. 25, 2000).
 <sup>312</sup> Id. at \*27-\*29.

## Abandoned Use: Former Property Owner Fights to Regain Land

Richard Gray has been trying to get back a 13,000-square foot sliver of land that once belonged to his father. The Town of Sharon condemned it in 1961 for a road that was never built. A total of 42 acres belonging to 55 families were taken at the time. In 2000, Gray convinced the Board of Selectmen to vote in favor of declaring the land "surplus" so Gray could buy it back. However, since then the Town has done nothing, because of the complex process that must be undertaken to effect such a sale. According to the Town's lawyer, the only way the Town can give the land back is if the Town petitions the County, and the County votes to release the land. At that point, it must be offered first to the state, then to the Town and finally to a public auction, where there is no guarantee it would go to Gray. Rather than sign such a petition, Gray instead sued the Town. However. his suit was thrown out of Norfolk County court, which ruled that the statute of limitations on his petition had lapsed in 1962. Gray has appealed that decision, stating that he will not go away until he gets his family's land back.1

<sup>1</sup> Andrea Estes, "Dispute Over Land-Taking Dates to '61," *Boston Globe*, Sept. 5, 2002, at Globe South 1.

# CASTLE

<sup>&</sup>lt;sup>309</sup> Howard Ulman, "Closing Set for Wednesday, Changes to Follow," *AP Wire*, Feb. 26, 2002.

<sup>&</sup>lt;sup>313</sup> *Id.* at \*32. <sup>314</sup> *Id.* at \*35-\*36.

SBC and Mayor Albano chose a location for the stadium, and worked out a plan for the stadium site. They chose a plot in downtown Springfield that contained three privately owned parcels. One was Northgate Center, which consisted of a strip mall and a four-story office building. The second parcel was a small piece of vacant land abutting the Northgate land. The third parcel was occupied by a manufacturing plant.<sup>315</sup> Both the shopping center and manufacturer were thriving, and none of the three parcels were blighted or substandard.<sup>316</sup> During the land acquisition process, Graney served a dual role in the negotiations, as head of both SBC and the City agency that would be exercising eminent domain if those negotiations failed.<sup>317</sup>

All three of the targeted owners refused to sell their land for the stadium project, so the City commenced actions to condemn the parcels. It had to move quickly in order to meet its obligations to the Northern League. The City could not declare the properties blighted, so it just said the public purpose was building a ballpark. The owners challenged the City in court.

In February 2000, a Massachusetts Superior Court judge issued a harsh ruling denying the stadium condemnations. Judge Constance Sweeney excoriated Springfield for its willingness to build a stadium "through whatever means possible,"<sup>318</sup> for enlisting a self-dealing economic development director, and for using public money to build a private baseball stadium that would only benefit private interests.<sup>319</sup> Judge Sweeney's sharp rebuke of Springfield's actions also has frustrated the Boston Red Sox's plans for a possible new baseball stadium,<sup>320</sup> and could serve as a springboard for overturning future land takings for privately owned stadiums nationwide.

#### Worcester

In September 2000, the Worcester City Council voted to seize the Quinsigamond Baptist Church through eminent domain to make way for an expanded parking lot for the Webster First Credit Union. The 110-year old church was home to a mission that was created by area Baptists in the mid-1800s. It was owned by the Methodist Church across the street.<sup>321</sup> Because it is an attractive building with a lot of history, Preservation Worcester, a local preservation society, came up with the funds needed to relocate the church to another nearby site and renovate the historic structure. The organization, which raised the money through private donations, had hoped to set an historical tone for future long-term revitalization of the Quinsigamond Village neighborhood.<sup>322</sup> However, after condemnation, the building was owned by the City, which decided that the cost of maintaining the renovated church would be too high. Worcester officials began seeking other, more commercial uses for the building that would produce tax revenue.<sup>323</sup> The bank got its parking lot. The Methodist Church lost its building, and the City will manage to have two private beneficiaries out of one condemnation.

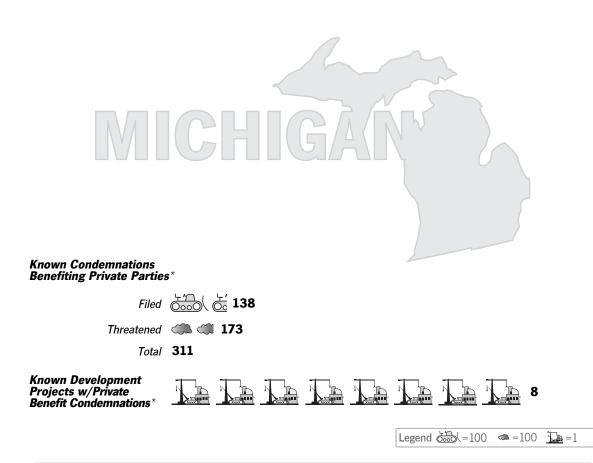
<sup>315</sup> *Id.* at \*3.
<sup>316</sup> *Id.* at \*21.
<sup>317</sup> *Id.* at \*44-\*45.
<sup>318</sup> *Id.* at \*27.
<sup>319</sup> *Id.* at \*138-\*150.

<sup>320</sup> See, e.g., Joan Vennochi, "Judge's Decision Is Bad News for Red Sox," *Boston Globe*, Apr. 18, 2000, at A11; Cosmo Macero, Jr., "Reilly Doubts Sox Plan Is Legal," *Boston Herald*, June 28, 2001, at Finance 35.

<sup>321</sup> Linda Bock, "Church May Become Village Center," *Telegram & Gazette (Worcester, MA)*, July 15, 2000, at A4. <sup>322</sup> "Just in Time; Historic Church Saved from Demolition," *Telegram & Gazette (Worcester, MA)*, Sept. 19, 2000, at A10.

<sup>323</sup> "City Hopes Old Church Yields Taxes," *Telegram & Gazette (Worcester, MA)*, May 1, 2002, at B1.





## 0 v e r v i e w

Michigan is notorious because of its supreme court's decision in Poletown.<sup>324</sup> That decision is cited all over the country for the proposition that homes and businesses can be taken solely for another business. Perhaps regretting that decision, the Michigan Supreme Court has decided in favor of property owners in subsequent public use cases.<sup>325</sup> In 2001, the Michigan Supreme Court struck down its Private Roads Act because it allowed condemnations that are not for public use. Some Michigan appellate and trial court decisions have criticized eminent domain actions for the benefit of private parties, although some others have upheld similar takings. Detroit has paid no attention to the courts and continues to use eminent domain shamelessly for all kinds of private parties—casinos, relatives of the mayor, sports team owners and private developers. The rest of Michigan has shown more restraint, and it is always possible that after a few more court decisions, Detroit too will get the hint.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened. <sup>324</sup> See *Poletown Neighborhood Council v. Detroit*, 304 N.W. 2d 455 (Mich. 1981). <sup>325</sup> See *City of Lansing v. Edward Rose Realty*, 502 N.W.2d 638 (Mich. 1993).

## LEGISLATIVE ACTIONS

The Michigan legislature passed a bill in 2002 that revises the state's eminent domain laws and makes it easier to condemn individual properties and transfer them to private developers. House Bill 4028, which Governor John Engler signed into law on March 5, 2002, strengthens the ability of local governments and redevelopment agencies to condemn parcels of land designated as "blighted," even where that land is not located in a redevelopment zone. H.B. 4028 sets forth the process for municipalities to acquire such property and eventually sell it to private developers. Interestingly, while the new law imperils many private homes and small businesses in Michigan, it provides specific exemptions for industrial, farm and railroad properties from similar takings.<sup>326</sup> According to section 2(c), "blight" designations under this law cannot include structures or lots inherent to farming operations, any property belonging to railroad companies and industrial properties whose taxes are paid and that are in areas zoned for industrial use.<sup>327</sup>

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## Private Use Condemnations

## Allouez Township

Glen Tolksdorf owned a piece of land in rural Michigan that was landlocked, and completely cut off by neighboring parcels from access to a public roadway. Tolksdorf wanted to subdivide his land into separate lots for housing, so he tried first to negotiate with the other owners to secure easements for a private road and utility lines that would travel across their properties and onto his own. However, the other owners did not want a road bisecting their properties, and refused to grant Tolksdorf the easements. So in 1992, Tolksdorf sued the other owners under the Michigan Private Roads Act, an old statute that allowed a private landowner to petition the township to open a private road across another landowners' property.<sup>328</sup> The act called for a jury to determine whether the road is necessary, and also to determine the dollar amount that a petitioner must pay to compensate the owner of the land where the road is built.

In May 2001, the Michigan Supreme Court upheld the rights of private landowners by determining that the Private Roads Act violates Michigan's constitution, because it allows the government to condemn private property for a private, rather than public, benefit.<sup>329</sup> The Michigan court rejected Tolksdorf's argument that the act predominantly advances a public interest by enhancing the value of otherwise landlocked property. Instead, the court held, the Act merely provides an improper mechanism for the state to use its eminent domain power to force the transfer of land from one private person to another.<sup>330</sup>

<sup>326</sup> Amy Lane, "Capitol Briefings: Blighted-Land Bill Heads to Senate, With Exemptions," *Crain's Detroit Business*, July 16, 2001, at 6.
<sup>327</sup> See H.B. 4028 § 2(c), 91st Sess. (Mich. 2001).
<sup>328</sup> Opening of Private Roads and Temporary Highways Act, Mich. Comp. Laws § 229.1 et seq.
<sup>329</sup> See *Tolksdorf v. Griffith*, 626 N.W. 2d 163, 165 (Mich. 2001).
<sup>330</sup> See *id.* at 168.



#### Detroit

In a 1996 referendum, Michigan voters approved casino gambling in Detroit. Shortly thereafter, an advisory committee recommended that the three casinos allowed under the referendum be clustered within a 110-acre parcel of land along the riverfront. At the time, the land mostly consisted of restaurants and other businesses. Almost immediately after the advisory committee's recommendation, most of these businesses began to suffer under the black cloud of threatened eminent domain.

Greektown, Motor City and MGM Grand all opened temporary casinos in downtown Detroit, and the City began trying to assemble the riverfront land needed for permanent casino development. Local newspaper polls showed that 63 percent of local residents opposed a riverfront casino district.<sup>331</sup> City officials were not deterred.

In August 1999, the City filed suit in Wayne County Circuit Court to condemn 47 privately owned parcels of land along the river, but did little in the meantime to negotiate with the landowners over compensation. The owners fought the City, and in December 1999, a judge sided with the owners and threw the condemnation cases out. Chief Circuit Judge Michael Sapala ruled that, although the casino district would be a valid public use for the land, the City had nonetheless failed to make good faith offers to the landowners.<sup>332</sup>

The City then tried to buy the land outright, but was ultimately unsuccessful. In 2001, Detroit Mayor Dennis Archer announced that the City could no longer afford to buy the entire parcel, and that the City would have to scale back its casino redevelopment effort. Under the revised plan, only the MGM Grand would relocate to the riverfront. The new MGM Grand would occupy parcels of land whose previous owners had already agreed to sell. The only part of the riverfront development requiring condemnation of private property would be several waterfront parcels taken for a public park adjacent to the casino. Greektown and Motor City would stay in their current downtown locations, which have since undergone expensive renovations as each casino has added an 800-room hotel.<sup>333</sup>

<sup>331</sup> See e.g., Tina Lam, "Most Want 3 Casinos to Stay Put," *Detroit Free Press*, Mar. 13, 2001, at 1A.

<sup>332</sup> "Late News: Judge Dismisses 47 Suits on Riverfront Property," *Crain's Detroit Business*, Jan. 31, 2000, at 1.

<sup>333</sup> Tina Lam, "Only MGM Will Move to Detroit Riverfront; Archer: Clustering 3 Casinos Would Be Too Costly," *Detroit Free Press*, Mar. 30, 2001, at 1A.

## Condemnations for Private Parties Destroy Black Neighborhoods

From the 1950s through the early 1970s, cities busily engaged in "slum clearance" or "urban renewal." This largely meant clearing areas that city leaders thought were dirty and disorganized in favor of nice, clean, orderly housing projects. The result was a massive relocation, often of black and integrated neighborhoods. People who owned their own houses and lived in neighborhoods with friends and family were forced into small cookie-cutter apartments in giant cement buildings cut off from their previous community.<sup>1</sup>

Eminent domain these days is more ecumenical-everyone suffers. But modern condemnation practices still destroy black neighborhoods in order to benefit private parties. In one project in Detroit, the City bought up property in the neighborhood for years and then left it abandoned and deteriorating until few residents remained. Then the City condemned for private upscale residential development. Atlantic City removed a long-standing middleclass black neighborhood to install a tunnel to a new casino that was never built. American Beach, Florida, the only Florida beach that was open to black people before integration, is looking at condemning its smaller landowners in favor of luxury hotels and condominiums. Jacksonville, Florida, also is condemning an historically black neighborhood, this time for a local law firm's headquarters. And Charleston, West Virginia, keeps coming up with plans to replace its black neighborhoods with stadiums and retail projects. Land-hungry development agencies are always looking for strategically situated older neighborhoods. Long-established black communities are often centrally located and thus particularly vulnerable to condemnation for private development projects.

<sup>1</sup> See Martin Anderson, *The Federal Bulldozer* (M.I.T. Press 1964) for an account of the legacy of urban renewal programs. All of the cases discussed appear in this report in the sections for their respective cities.

Under the threat of condemnation, the Alibris agreed to sell. What the authority did not tell the Alibris was that the \$264,551 it used to buy their land had actually been loaned to the authority by Mike llitch, who owns both the Detroit Tigers and the Detroit Red Wings hockey franchise. From the time the City chose the Woodward Avenue site for the Lions' and Tigers' stadiums, llitch had been quietly acquiring land across the street in hopes of someday building a new hockey arena adjacent to the sports complex.

Of course, even though some of the properties escaped condemnation, they had to bear the consequences of being threatened with condemnation for several years and the cost of opposing the condemnations in court.

#### Detroit

In the late 1990s, Detroit decided to build two new stadiums, one each for the Lions football team and the Tigers baseball team. The stadiums would be adjacent to each other along Woodward Avenue in downtown Detroit. Land acquisition costs were split between the teams and the City, with the state chipping in an additional \$25 million to the effort. The plan called for the stadiums themselves to be jointly owned by the City and the respective teams, with the teams retaining a majority interest.

Over the course of a few months in 1996, the Detroit/Wayne County Stadium Authority reached settlements that gave it title to all but 24 of the properties on the stadium site. The authority then condemned those 24 remaining properties, which comprised about a quarter of the total land for the project, and paid the owners figures equal to what it had originally offered them. Most of the remaining owners did not challenge the government's authority to take the property, but were not happy with the amount of money offered. The owners asked for millions of dollars more, but the jury disagreed.<sup>334</sup>

Only two owners actually challenged the power of the stadium authority to take the property. Freda Alibri and her family owned and operated Prime Parking LLC on a one-acre lot on Woodward Avenue. The Alibris' property was across the street from both of the new stadiums, and the stadium authority claimed it needed the Alibris' lot for stadium parking. Under the threat of condemnation, the Alibris agreed to sell. What the authority did not tell the Alibris was that the \$264,551 it used to buy their land had actually been loaned to the authority by Mike Ilitch, who owns both the Detroit Tigers and the Detroit Red Wings hockey franchise. From the time the City chose the Woodward Avenue site for the Lions' and Tigers' stadiums, Ilitch had been quietly acquiring land across the street in hopes of someday building a new hockey arena adjacent to the sports complex. Once the Alibris learned of the loan from Ilitch to the stadium authority, and the fact that the authority was planning to transfer title to the Alibris' land as repayment of the Ilitch loan, the family sued to get their land back.

In August 2000, a judge ruled that at the time the stadium authority sought the Alibris' property, it did not have the power to condemn it. That power was the only reason the Alibris sold. Since there was no power, the sale was invalidated. The judge ordered the stadium authority to transfer the land back to the Alibris. On appeal, however, the decision was reversed. The appeals court found that the trial court should have

<sup>&</sup>lt;sup>334</sup> Tina Lam, "Dispute Could Cause Price of Land for Stadiums to Rise," *Detroit Free Press*, May 17, 1999, at 1B; Tina Lam, "Landowners Lose with New Stadiums; Condemnation Cases Go Against Higher Payouts," *Detroit Free Press*, Feb. 25, 2000, at 1B.



looked at the case as an agreement to purchase, rather than as a condemnation. Since the Alibris agreed to sell, and they did not show the existence of fraud, they were bound to honor that agreement.<sup>335</sup>

One other owner was luckier. The stadium authority also filed a condemnation action against a building owned by Joseph Maday. The Woman's Exchange Building is separated from the rest of the project area by a church. The authority had no current plans for Maday's property and no idea what it would do with it. The judge rejected the condemnation, ruling that the taking was unnecessary.<sup>336</sup>

#### Detroit

Detroit wanted to transform a lower east side neighborhood into upscale urban housing that might boost the local property tax base and census count. One obstacle to the City's \$92 million redevelopment plan,

## When residents attempted to buy City-owned property in the neighborhood, the City refused to sell. Even someone from the City Council's research and analysis division believed the City helped caused blight in the neighborhood.

however, was that the 90-acre site near the Detroit River was already occupied by 223 homes and flats.<sup>337</sup> Without seeking any input from the homeowners and residents, the City enlisted local developer Graimark Realty Advisors to implement the redevelopment plan, which would replace all the existing homes, worth an average of about \$30,000 each, in addition to other vacant land the City already owned, with more than 400 houses costing around \$175,000 each.<sup>338</sup> The City tried to buy up the properties from existing owners, but after two years about 50 owners still refused to sell. So in 1999, Detroit officials decided to oust the remaining landowners using eminent domain.<sup>339</sup>

Everyone agreed that the area had been going downhill—many of the homes were abandoned and in disrepair. But the remaining residents argued that the City had been buying property in the area and then leaving the properties empty and failing to maintain them. When residents attempted to buy City-owned property in the neighborhood, the City refused to sell. Even someone from the City Council's research and analysis division believed the City helped caused blight in the neighborhood.<sup>340</sup> The homes that remained occupied were classic, well-made homes with features like stained glass and leaded windows.<sup>341</sup>

The project required the eviction of many long-term residents of this once-vibrant black neighborhood. Freda Harrison had lived in her home since 1953. Clarence Henderson had lived in the neighborhood since 1929.<sup>342</sup> Virginia Cantrell, who moved to the neighborhood in 1954, commented, "They are taking

- <sup>335</sup> Daniel G. Fricker, "Stadium Authority Must Give Lots Back," Detroit Free Press, Aug. 4, 2000, at 1A; Alibri v.
- Detroit/Wayne County Stadium Authority, 254 Mich. App. 545, 554-56, 566 n. 2 (2002).
- <sup>336</sup> See Detroit/Wayne County Stadium Authority v. Mayday, No. 97727648CC (Wayne County Cir. Ct. Nov. 19, 1998).
- <sup>337</sup> Jennifer Dixon, "Residents Forced to Move Want Answers," *Detroit Free Press*, Feb. 13, 1999, at 10A.
- <sup>338</sup> "Residents Fume at City's Deal-Making," *Detroit News*, March 5, 1999, at 1A.
- <sup>339</sup> "Upscale Development Upsets Longtime Detroit Homeowners," AP Wire, Mar. 5, 1999.
- <sup>340</sup> Mark Puls, "Detroit Homes Face Date with Bulldozer," Detroit News, Jan. 2, 2001, at 1A.
- <sup>341</sup> "Neighbors Fight to Save a Piece of Detroit's Past," *Detroit News*, March 5, 1999, at 1A.
- <sup>342</sup> Jennifer Dixon, "Fighting to Stay Put," *Detroit Free Press*, March 2, 2000, at 1B.

private property to give to a private developer for private profit."<sup>343</sup> Harrison, Henderson and Cantrell were among the approximately 18 homeowners who sued the City to prevent losing their homes.<sup>344</sup>

During the course of the ensuing litigation, several facts came to light that called into question the roles of some who worked on behalf of the developer. For instance, Dennis Archer Jr., the son of Detroit Mayor Dennis Archer, served as director of business development for Graimark. Also, C. Beth DunCombe, the Mayor's sister-in-law, who had previously also worked for Graimark, now served as president of the Detroit Economic Growth Corp., which handled the City's end of the development. Archer Jr., DunCombe and Graimark were also partners in other business ventures. The suing homeowners raised questions about the propriety of these associations, as well as the fact that Graimark did not have to bid against other developers for the project. The City denied any impropriety, because Archer was not a principal in Graimark and DunCombe said she was not involved in the project.<sup>345</sup> As of March 29, 2002, the case was still pending.<sup>346</sup> Construction has now begun on the project, called Jefferson Village. About six homeowners still remain at the end of 2002.<sup>347</sup> The lawsuit settled before a judicial decision.

#### Detroit

Detroit wanted to build a municipal sewage overflow basin on 19 acres of vacant land owned by Crown Enterprises, Inc. The City adopted a resolution stating that condemnation of the Crown land was necessary for the project, and that the primary purpose of the drainage basin was to benefit the public. The resolution was based on the report of a City environmental engineer, who recommended that the City build the basin on 12 acres of Crown's property, and reserve the remaining seven acres for future expansion of the basin or other proper uses.

When the City condemned the Crown land, the company challenged the taking. The state trial court dismissed Crown's complaint, and upheld the condemnation of the entire parcel, even though the seven acres were not necessary to the project. Crown appealed to the Michigan Court of Appeals, arguing that a genuine issue exists as to whether the City's reason for the excess taking serves as a mere pretext for what Crown believes is the true reason the City wants to take the entire parcel. According to Crown, the City's environmental engineer skewed his findings in order to recommend a basin site that would not be adjacent to a new subdivision owned by Windham Realty, a private developer. Windham had mounted a campaign to persuade the City that placing the facility near the subdivision would hurt the developer's efforts to sell homes there.

In February 2002, the Michigan Court of Appeals affirmed the trial court's decision. The appeals court based its decision on the Poletown case, and stated that it is up to a jury to decide the relative extent of the public and private benefits in a land condemnation for "public use." However, in this case Crown had failed to convince the court that such an issue actually existed, and therefore the case should be dismissed.<sup>348</sup> The Michigan Supreme Court refused to hear the case.<sup>349</sup>

<sup>343</sup> "Neighbors Fight to Save a Piece of Detroit's Past," *Detroit News*, March 5, 1999, at 1A.
<sup>344</sup> "Residents Sue to Stop Condemnation of Their Homes for New Development," *AP Wire*, Aug. 4, 1999; Jennifer Dixon, "Fighting to Stay Put," *Detroit Free Press*, March 2, 2000, at 1B.
<sup>345</sup> "Residents Fume at City's Deal-Making," *Detroit News*, March 5, 1999, at 1A.
<sup>346</sup> Bill Johnson, "Don't Use Race Against Gentrification," *Detroit News*, Mar. 29, 2002, at 11A.
<sup>347</sup> Tom Walsh, "Once-dead Detroit Housing Plan Alive," *Detroit Free Press*, Nov. 15, 2002.
<sup>348</sup> See *City of Detroit v. Crown Enterprises*, *Inc.*, No. 00-012666-CC, slip op. at 7-8 (Mich. App. Feb. 19, 2002).
<sup>349</sup> See *City of Detroit v. Crown Enterprises*, *Inc.*, 644 N.W.2d 759 (Mich. 2002).



#### Detroit

In April 2001, Wayne County condemned 11 properties, totaling 1,200 acres, for Pinnacle Aeropark, a proposed mixed-use business park with a focus on development of light manufacturing plants, hotels, golf courses and other private development. The County stated that taking the land was a "public necessity," because the development would create jobs, stimulate private investment in the area and stem population loss. However, the County made no determination as to how exactly it would use each parcel, and no companies had committed to the project. The owners challenged the condemnations, arguing that the agency exceeded the scope of its powers, but in December 2001 the trial court allowed the County to take all the land.<sup>350</sup> The case awaits decision by the Michigan appellate court.

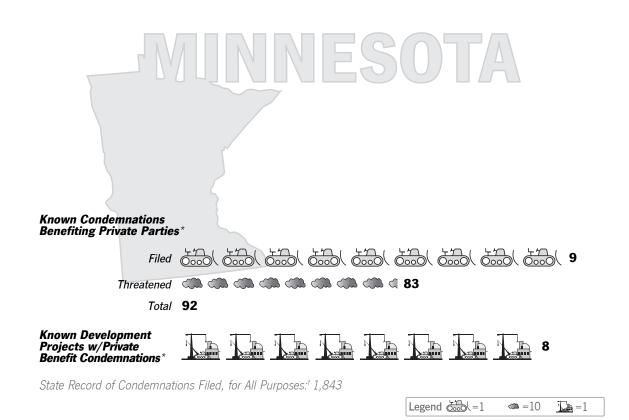
#### Detroit

In 1979, the U.S. government initiated eminent domain actions to acquire land from Detroit International Bridge Company (DIBC) for a project to expand a U.S. Customs facility on the American side of the Ambassador Bridge in Detroit. DIBC owns the bridge. Seventeen years later, as part of the same plan, the government condemned a small portion of land owned by Commodities Export Company, which operated a duty-free store where government officials planned to build an expanded truck ramp. There was no legislation authorizing the condemnation, which occurred pursuant to an agreement between DIBC and the government whereby DIBC, a private entity, would fund the acquisition of Commodities' land. Not coincidentally, the principal owner of DIBC is also principal owner of Ammex, Inc., which operates the only competing duty-free store in Detroit. Commodities sued to prevent the condemnation, arguing that the stated "public purpose" of the project was a mere sham and a cover-up for the purpose of putting Commodities out of business, to the sole benefit of its competitor. At trial, however, the federal trial court ruled in favor of DIBC, holding that Commodities failed to prove that the taking was in bad faith.<sup>351</sup>

#### Novi

The City of Novi set out to construct two new roads that would supposedly relieve traffic congestion at a major local intersection. One of the proposed roads was designed specifically to serve industrial traffic going to two businesses—General Filters, Inc. and Progressive Tool & Industries Co. In order to get the land needed for the spur, the City brought an action to condemn a parcel of property owned by a number of trusts belonging to the Adell family and leased to the Novi Expo Center. The Adells challenged the condemnation on the ground that the proposed spur served primarily to benefit the two industrial facilities to which the spur would lead. The City tried to argue that since the road would be open to the public, its purpose was public by definition according to Michigan's eminent domain statute. The trial court disagreed, holding that the Adells had met their burden of showing that the condemnation served no valid public purpose. The Michigan Court of Appeals upheld the trial court's ruling that the primary purpose of the taking was to confer a private benefit on General Filters and Progressive Tool.<sup>352</sup>

<sup>350</sup> See *Wayne County v. Hathcock*, No. 01-113583 (Wayne County Circuit Ct. December 19, 2001).
 <sup>351</sup> See *U.S. v. Certain Land in Detroit*, 43 F. Supp. 2d 762 (E.D. Mich. 1999).
 <sup>352</sup> See *City of Novi v. Robert Adell Children's Funded Trust*, 253 Mich. App. 330, 355-56 (2002).



## 0 v e r v i e w

Minnesota's record of the last five years is decidedly mixed. The Twin Cities and its suburbs continue to engage in development projects, both large and small, that condemn some people's property for other private businesses. There have been at least eight projects with private condemnations in the last five years. Given that in the same time, Minnesota reports nearly 2,000 total condemnation actions filed, it seems likely that some of those also were condemnations for private parties. While Minnesota cities, particularly Minneapolis and St. Paul, continue to condemn for private use, Minnesota courts have sounded repeated notes of caution. Two Minnesota courts of appeals required condemning agencies to give owners a chance to contest public use before they lose their property. One trial court found a condemnation in Apple Valley to have an obvious private purpose and threw it out. And the Minnesota Supreme Court is torn on the issue of private use—it split evenly on two cases, leaving two utterly inconsistent appellate court opinions. One said that a St. Paul condemnation was valid and for the public purpose of eliminating blight, while the other said the same property was not blighted. Meanwhile, the legislature has considered but not decided several proposals to limit eminent domain for private use. Thus, both the law and politics of eminent domain in Minnesota remain in flux.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened. \*The Research & Evaluation/Court Services Division of the Minnesota Supreme Court (includes condemnations for traditional public uses).



## LEGISLATIVE ACTIONS

The Minnesota legislature also came out with a mixed piece of legislation affecting the state's eminent domain laws. House Bill 2135 originally proposed prohibiting political subdivisions that acquire private property through condemnation from selling the property to another private person for a period of five years.<sup>353</sup> Such a prohibition would have sharply discouraged the frequent practice of condemning property for the purpose of selling it to another private party. That provision did not pass. Instead, the legislature passed a law requiring that potential condemnees be given mailed and newspaper notice of public hearings about the proposed acquisition of their property. At the same time, though, the legislature also decided that if the city fails to give notice, it won't affect the validity of the condemnation. The statute does not address the obvious question-why bother giving notice if there are no consequences for failing to notify?

# Private Use Condemnations

#### Apple Valley

Valley Sales, Inc., operates a Buick dealership in Apple Valley on land that it has leased from Joseph Graeve since 1985. In 1996, Valley Sales tried to buy the land from Graeve for \$1.2 million, but Graeve did not accept the offer. So Valley Sales decided that an alternate way of gaining title to the land would be to have the Apple Valley Economic Development Authority (EDA) condemn the land and give it to Valley Sales. The EDA held public meetings to discuss the possible condemnation, but coincidentally did not provide notice of any of those meetings to Graeve. Valley Sales and EDA crafted a redevelopment plan designed to withstand a legal challenge and concocted a statement of public purpose for the taking. At no point did the EDA advise the City Council of the proposed condemnation, or seek the City's Council's approval.

## Minnesota Courts Strengthen Pre-Condemnation Notice Rights of Property Owners

In May 1999, Douglas County authorized condemnation of a 2.5-acre parcel owned by Dennis Rapp for reconstruction and improvement of County Road 61. Shortly thereafter, the County proceeded with the condemnation and awarded Rapp \$6,000 in compensation. Rapp filed suit challenging the condemnation, and the trial court ruled that the taking violated the Minnesota Constitution because the authorizing statute prevented judicial review of the public purpose of the condemnation prior to the actual taking. The Minnesota Court of Appeals agreed, and voided the condemnation.<sup>1</sup> The result of this decision is that owners must be allowed to contest public use before they lose possession of their property.

When the City of St. Paul commenced eminent domain proceedings pursuant to the City charter seeking temporary and permanent easements over property owned by Sinclair Oil Corp., the company took the City to court. The City wanted the land for a street improvement, and Sinclair operates a gas station there. The trial court overturned the condemnation because the procedures set forth in the City charter do not allow for judicial review of the public purpose or necessity of a condemnation until after the condemnation and actual taking have occurred. In August 2002, the Minnesota Court of Appeals affirmed the trial court's ruling and voided the taking.<sup>2</sup> This case confirms the holding in the Rapp case, discussed above, that owners must be given an opportunity to challenge public use before they lose their property.

<sup>1</sup> See *In re Rapp*, 621 N.W. 2d 781, 787 (Minn. App. 2001).

<sup>2</sup> See *Sinclair Oil Corp. v. City of St. Paul*, 2002 Minn. App. LEXIS 966, at \*1-\*2 (Aug. 20, 2002), *rev. denied*, 2002 Minn. LEXIS 649 (Minn. Oct. 15, 2002).

<sup>353</sup> H.B. 2135, 82nd Sess. (Minn. 2001).

# **CASTLE**

In September 2001, the EDA finally sent Graeve a notice to appear at an EDA meeting where the group was to consider condemning his land. This was Graeve's first indication that his property had been targeted. At this meeting, Graeve addressed the EDA, which as it turned out had already voted to condemn the land. It then filed a condemnation action for the property. Graeve challenged the taking in the Dakota County District Court. On March 25, 2002, Judge Thomas M. Murphy handed down a scathing decision, in which he dismissed the taking and admonished the EDA for creating blatant pretexts for condemning Graeve's land.<sup>354</sup> Judge Murphy even went so far as to state that if Minnesota law had authorized him to award attorney's fees to Graeve, he would definitely have awarded them in this case.<sup>355</sup>

Judge Thomas M. Murphy handed down a scathing decision, in which he dismissed the taking and admonished the EDA for creating blatant pretexts for condemning Graeve's land.

#### Lino Lakes

The Lino Lakes Economic Development Authority filed a petition to condemn four undeveloped parcels of property, stating that the parcels were small and oddly shaped, and that it was necessary to acquire them to make private development of the land economically feasible. George Reiling, the owner of one of the parcels, challenged the taking. Reiling alleged both that the Town lacked a public use for the condemnation, and that the Town violated state law by failing to hold hearings or issue the necessary findings as required before establishing an economic development district. However, both the trial court and the Minnesota Court of Appeals disagreed with Reiling's argument and allowed the condemnation to go forward.<sup>356</sup>

#### Minneapolis

Developer Opus Northwest LLC owned property in downtown Minneapolis that was located within a taxincrement-financing (TIF) district that the City established to finance a redevelopment project. The City had put out proposals for developing the area, and Opus, a major developer, submitted a proposal. The City went with one of Opus'

competitors, the Ryan Corporation. Ryan promised to bring a Target store, and Opus proposed an office building. The City redevelopment agency then condemned the parcel so that it could



<sup>354</sup> See Apple Valley Economic Development Authority v. Graeve, No. C9-01-10596, slip op. at 19-21 (Minn. 1st Dist. Ct. Mar. 25, 2002).
 <sup>355</sup> Id. at 19.

<sup>356</sup> See Lino Lakes Economic Development Authority v. Reiling, 610 N.W. 2d 355 (Minn. App. 2000).



transfer it to Ryan. Opus challenged both the formation of the TIF district and the alleged public purpose behind the taking. The trial court upheld the condemnation. On appeal, the Minnesota Court of Appeals affirmed the trial court's ruling, and the Minnesota Supreme Court denied review.<sup>357</sup> Adding insult to injury, the appeals court in a later ruling compelled Opus to reimburse the redevelopment agency for the portion of its attorney fees attributable to the developer's TIF challenge. Condemnees cannot be made to pay attorney's fees for challenging a condemnation, but the court held that the TIF challenge was separate and thus subject to fees.<sup>358</sup> Almost immediately after this experience, Opus served as the developer in another project that involved eminent domain (see below). Opus argued in its own suit that the condemnation lacked a public purpose, but it conveniently forgot that problem as soon as it benefited from eminent domain.

#### Minneapolis

In December 2002, the Minneapolis Community Development Agency (MCDA) forced Sowles Steel Erectors Co. to sell its three-acre construction business under threat of condemnation, to make way for a



\$7.4 million housing development. Under the MCDA's plan, Sowles sold its property to the MCDA, which will then sell the site to the private developers behind the housing project. In total, the development is expected to include 192 units of townhouses, lofts and condominiums. Sowles did not want to sell its property or to make a move that would require transporting 1,000 semi-truck loads. However, the MCDA had threatened to condemn. Explained owner Dan Sowles, "We kind of had our backs against the wall."<sup>359</sup>

#### Richfield

Richfield wanted to assist electronics store giant Best Buy in its effort to build a new corporate headquarters. In 1998, the town created a tax-increment-financing (TIF) district encompassing 43 acres, and declared the properties within the district to be "blighted."

 <sup>357</sup> See Minneapolis Community Development Agency v. Opus Northwest LLC, 582
 N.W. 2d 596, 602-03 (Minn. App.), rev. denied, 1998 Minn. LEXIS 779 (Oct. 29, 1998).
 <sup>358</sup> See Opus Northwest LLC v. Minneapolis Community Development Agency, 599 N.W. 2d 582, 585 (Minn. App. 1999).
 <sup>359</sup> "Sowles Clears Out for \$7.4M Minneapolis Housing Project," The Business Journal (Minneapolis-St. Paul), Dec. 6, 2002, at 7.

## Great-Grandmother Takes City Officials on Tour of Her Home, Convinces Them Not to Take It

Doris Dahline recently achieved success in her battle with local officials in Eagan who wanted to condemn her home as part of a business redevelopment plan. The City Council was set to vote on whether to condemn Dahline's property, a measure that was expected to pass. However, at the eleventh hour the 72year old great-grandmother, who spent 30 years transforming her house into a dream home, took City officials on a tour of the house. Afterward, she attended the City Council meeting with her lawyer hoping to make another plea. Before she could speak, however, Mayor Pat Awada informed her that the Council had decided not to condemn Dahline's home and that the City would allow her to live in her home as long as she liked. Though the home would remain within the Eagan redevelopment district, the City agreed to sign an agreement that forbids it from condemning her property. In return, Mrs. Dahline agreed that when she dies, or if she ever decides to sell her home, the City will have a first chance to buy it.<sup>1</sup>

<sup>1</sup> Joe Kimball, "Eagan Woman's Fight to Save Home Culminates in a Surprise: Victory," *Minneapolis Star-Tribune*, Jan. 7, 2002, at B1.

# **CASTLE**

The properties consisted of 67 homes, 87 apartments and 13 businesses. Two of the businesses slated for condemnation were small car dealerships owned by the Walser family.<sup>360</sup>

Best Buy's developer, Opus Northwest LLC (see above), reached settlements with nearly all of the property owners within the district. However, the Walsers refused to negotiate, as they objected to the forced taking of their land and the family business. When Richfield began eminent domain proceedings against the properties, the Walsers contested the taking on the grounds that it did not serve a public use. They also sued the Town in a separate lawsuit. The second suit alleged, among other things, that the Town had illegally stretched the definition of "blight" in an attempt to meet the public use threshold required by state eminent domain law, as a means of pleasing the large corporation, and that the area did not meet the standards for a TIF district.<sup>361</sup>

The trial court in both cases ruled in favor of the Town, finding both a public use and a proper designation of blight.<sup>362</sup> The Minnesota Court of Appeals decided the condemnation case first, holding in a cursory manner that the condemnation was for the public purpose of removing blight, which is well-established under Minnesota law. The court briefly mentioned that there was traffic in the area and that auto dealers were located near residences.<sup>363</sup> Four months later, a different panel of the Minnesota Court of Appeals reversed the trial court in the case brought by the Walsers and held that the local Housing and Redevelopment Authority failed to properly establish the TIF district. This court actually discussed the evidence in some detail. In a scathing opinion, Judge Amundson said that the Town exhibited a "particular municipal meanness" and "completely ignored" the legal requirements for establishing the district. For example, the agency had classified all buildings as blighted that did not have insulation that matched the energy efficiency standards for the construction of new buildings. Also, the judge questioned whether the particular financing method was used "primarily" for a public purpose, as the law requires.<sup>364</sup> The court's attempt to distinguish the two cases was largely unavailing. The factual holdings in the TIF case show that there was no blight in the area and that any finding of blight was pretextual.

The Minnesota Supreme Court heard both cases in 2002 and split 3-3 on both.<sup>365</sup> The Institute for Justice filed an amicus brief on behalf of Walser in the TIF case. When a supreme court splits evenly, the lower court opinion is affirmed, but without opinion and with obviously diminished precedential value. Thus, Minnesota is left with one case holding that the condemnation is for the purpose of eliminating blight and another holding that there was no blight. The U.S. Supreme Court denied Walser's request for review of the public use ruling,<sup>366</sup> so Minnesota citizens will have to wait for another day to find out what the limits

Minnesota

<sup>360</sup> Chuck Haga, "Richfield Council OKs Best Buy Move," *Minneapolis Star Tribune*, May 9, 2000, at 1B.
<sup>361</sup> Dan Wascoe, Jr., "Suit Challenges Richfield Plan," *Minneapolis Star Tribune*, Nov. 19, 2000, at 1B;
<sup>362</sup> See *Housing & Redevelopment Authority v. Walser Auto Sales, Inc.*, 630 N.W.2d 662, 665 (Minn. App. 2001); *Walser Auto Sales, Inc. v. City of Richfield*, 635 N.W.2d 391, 393 (Minn. App. 2001).
<sup>363</sup> Housing & Redevelopment Authority v. Walser Auto Sales, Inc., 630 N.W.2d 662, 668-69 (Minn. App. 2001).
<sup>364</sup> Dan Wascoe, Jr., "Court: Richfield Erred in Best Buy Project," *Minneapolis Star Tribune*, Nov. 14, 2001, at 1B; see Walser Auto Sales v. City of Richfield, 635 N.W. 2d 391, 399-403 (Minn. App. 2001).
<sup>365</sup> Housing & Redevelopment Authority v. Walser Auto Sales, Inc., 641 N.W.2d 885 (Minn. 2002); Walser Auto Sales v. City of Richfield, 644 N.W.2d 425 (Minn. 2002).
<sup>366</sup> Housing & Redevelopment Authority v. Walser Auto Sales Inc., 123 S. Ct. 437 (2002).



are for the government taking private homes and businesses for private developers.

#### St. Paul

The St. Paul City Council is planning to condemn the Hillcrest Entertainment Center, a local bowling alley, so that the local Housing and Redevelopment Authority (HRA) can turn the property into new housing, offices and commercial space. The once-popular bowling alley, formerly known as Hafner's, has



become a target of neighborhood complaints in recent years. The new owners also have a dance club on the premises, and calls to the police from local residents have increased.<sup>367</sup> On March 13, 2002, the City Council approved a measure to allow the HRA to acquire the center through negotiations or eminent domain. The Council president explained that rather than a bowling alley, there was a demand for housing in the area. At the same meeting, the City approved funding for the acquisition of a privately owned vacant tract of land in the Railroad Island neighborhood to make way for 148 single-family homes.<sup>368</sup> Had the City not been planning for private development, perhaps it could have taken steps to reduce the noise short of condemning the property.

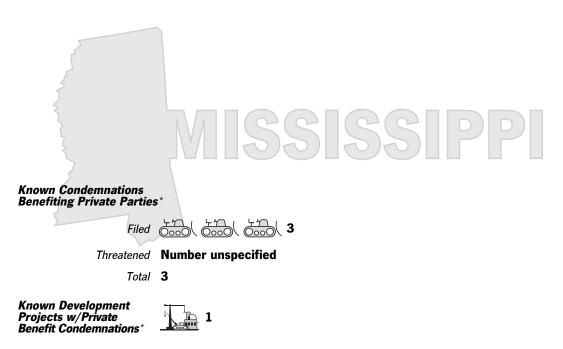
#### St. Paul

The Baillon Company owned a parcel of land in downtown St. Paul, which it leased to Imperial Parking, Inc., for use as a public parking lot. In 1999, the St. Paul City Council passed a resolution supporting the construction of an enclosed walkway linking major downtown hotels and the St. Paul Civic Center (known as the RiverCentre). Several of the beneficiary hotels were partially owned by the St. Paul Port Authority. The walkway plan called for erecting of a three-story connector building on the Baillon land that would provide skyway and tunnel connections to the pedestrian link. In November 2000, the Port Authority filed a petition for the "quick- take" of the Baillon property. Baillon contested the taking, but the district court approved the Port Authority's action. In August 2001, the Minnesota Court of Appeals affirmed, holding that the owner did receive a hearing before the quick-take and that the hearing satisfied due process.<sup>369</sup> Furthermore, the appeals court ruled that the condemnation served a valid public purpose, despite the fact that the Port Authority invoked its eminent domain powers for the benefit of its own private-sector investments.<sup>370</sup>

<sup>367</sup> Curt Brown, "Night Spot May Give Way for Housing" *Minneapolis Star Tribune*, Mar. 13, 2002, at 9B.
 <sup>368</sup> Mary Lynn Smith, "East Side Housing Plans Approved by St. Paul HRA," *Minneapolis Star Tribune*, Mar. 14, 2002, at 7B.

<sup>369</sup> See *Port Authority of St. Paul v. Baillon Co.*, 2001 Minn. App. LEXIS 888, at \*8 (Aug. 7, 2001), *rev. denied*, 2001 Minn. LEXIS 674 (Minn. Oct. 16, 2001). <sup>370</sup> *Id.* at \*14-\*15.





State Record of Condemnations Filed, for All Purposes:<sup>†</sup> 7

Legend (=1)

## OVERVIEW

Mississippi has, at least for the moment, averted major problems with private condemnations. But there are warning signs of more trouble to come. The Mississippi legislature seems bent on taking property for private parties, and ignoring the outrage of their constituents against this abuse of power. The Mississippi Supreme Court also has counseled caution. Several bills to limit the power of eminent domain failed, while one expanding the power of eminent domain for private corporations sailed right through. The State seems undaunted by the public outcry that occurred when a state agency tried to take the homes of rural Mississippians for a Nissan plant. Because the state withdrew the condemnations, the Mississippi Supreme Court did not have an opportunity to rule on the issue of private condemnations. It did, however, uphold the right of owners to challenge whether condemnations are for public use. The events surrounding the Nissan condemnations also brought together activists and citizens in opposing eminent domain abuse, and that activism will no doubt continue in the coming years.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened. \*The Mississippi Supreme Court (includes condemnations for traditional public uses).



## LEGISLATIVE ACTIONS

The Mississippi legislature had a number of bills on its agenda relating to eminent domain during its most recent session. Unfortunately, several that would have increased protections for property owners died in committee as the 2002 term expired. House Bill 966 would have amended Mississippi law to allow eminent domain and quick-take proceedings only for "governmental purposes," and also would have guaranteed that "[t]itle to property taken through eminent domain shall never vest in a private entity or person."371 House Bill 1250 would have gone even further, allowing government entities in the state to use eminent domain only "for the construction of public roads or for the construction of roads, buildings or other infrastructure for the state, political subdivisions of the state, public schools, public institutions of higher learning or public community or junior colleges."372 House Bill 1251 would have guaranteed that when property taken through eminent domain is subsequently leased, the condemnee shall have a right of first refusal.<sup>373</sup> House Bill 1315 would have provided for payment of costs incurred by a property owner if the owner prevails in an eminent domain challenge.<sup>374</sup> None of these passed.

Instead, what did pass was a bill that weakened property rights in eminent domain cases. House Bill 1639 gives regional economic development alliances new powers to enter upon condemned property before purchase for the purpose of conducting engineering surveys.<sup>375</sup> H.B. 1639 also takes direct aim at the Nissan plant court challenge by specifically authorizing development alliances to condemn properties for projects designated under the Mississippi Major Economic Impact Authority only if the County has received a binding commitment from a developer to undertake the project in that county.<sup>376</sup> Governor Ronnie Musgrove signed H.B. 1639 into law on March 20, 2002.

<sup>371</sup> H.B. 966 § 1, 2002 Leg. Sess. (Miss. 2002).
<sup>372</sup> H.B. 1250 § 1, 2002 Leg. Sess. (Miss. 2002).
<sup>373</sup> See H.B. 1251, 2002 Leg. Sess. (Miss. 2002).
<sup>374</sup> See H.B. 1315 § 9, 2002 Leg. Sess. (Miss. 2002).
<sup>375</sup> See H.B. 1639 § 1, 2002 Leg. Sess. (Miss. 2002).
<sup>376</sup> See H.B. 1639 § 2, 2002 Leg. Sess. (Miss. 2002).

## Mississippi Supreme Court Strengthens Pre-Condemnation Rights of Property Owners

Fred Lemon owned two lots along U.S. Highway 90 that he leased to two businesses, Ocean Springs Pawn & Jewelry and Bayou Sporting Goods. The Mississippi Transportation Commission (MTC) condemned both properties for a highway expansion project in August 1997. An amendment to the state eminent domain statute that had just passed in July 1997 granted MTC a right to immediate possession of Lemon's properties. Under the new law, Lemon had no opportunity to challenge the public use of the taking before the MTC took possession. MTC did not even serve Lemon with notice of the condemnation until a week after it had occurred. Lemon challenged the taking by arguing that the revised statute violated his due process rights, but the trial court ruled in favor of MTC. In March 1999, the Mississippi Supreme Court reversed on grounds that the Mississippi Constitution mandates that the condemnor meet the burden of proof on the issue of public use before private property may be taken through eminent domain. The statute as it was written allows the property to be seized first, with a public use showing only required in cases where the owner challenges the taking after the fact, when title has already passed to the condemnor.<sup>1</sup>

<sup>1</sup> See Lemon v. Mississippi
Transportation Commission, 735 So.
2d 1013, 1023 (Miss. 1999).

# CASTLE

## After the State dismissed the condemnations, Lonzo Archie expressed his relief. "We could not be more happy. My father and the rest of our family can now live out our days on our land."

## Private Use Condemnations



Lonzo and Matilda Archie fought the State of Mississippi's eminent domain action and won. They will now be able to keep what is rightfully theirs—their home and land.

#### Canton

In 2000, the Mississippi legislature passed the "Nissan Act," which authorized the state to pour money and incentives into a proposed future Nissan manufacturing plant. The Nissan Act also gave the Mississippi Major Economic Impact Authority (MMEIA) the power to condemn property for the new facility.<sup>377</sup>

After pressuring most of the owners in the area to sell, the MMEIA condemned three homes in 2001 in order to transfer the land to Nissan. One of the homes belongs to Andrew Archie. who is in his late 60s, diabetic, and in poor health. He has lived on the land since he was eight years old. He lives there surrounded by his wife, children and other family members. His children, including Lonzo Archie, who owns one of the other homes being condemned, have never lived anywhere else. The condemnation would have required a total of 15 Archie family members to move.378 The MMEIA also sought to condemn the home of Percy and Minnie Bouldin, who had

Mississippi

<sup>377</sup> Emily Wagster & Patrice Sawyer, "Legislator Says Nissan Project to be Announced Thursday," *The Clarion-Ledger (Jackson, MS)*, Nov. 7, 2000, at 1A; Miss. Code Ann. § 57-75-11.

<sup>378</sup> Timothy R. Brown, "State Files for Eminent Domain to Grab Land for Nissan Project," AP Wire, Feb. 9, 2001.





Lonzo Archie stands in front of the road to his house–Archie Road. Recounting his battle with the state, Archie explained, "I am angry, sad, that the state wants to take our land and turn it over to a private company. If our land goes a part of us goes. You can buy our house, but you cannot buy our home."

lived in their home for more than 40 years and raised their 13 children there. Percy did much of the construction of their house with his own hands.<sup>379</sup> The case drew national attention, including the support of Martin Luther King III and the Southern Christian Leadership Conference.

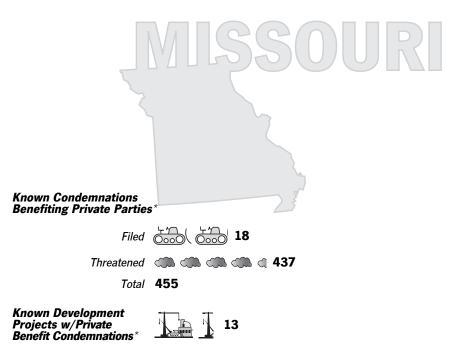
Amazingly, both Nissan and the former head of the MMEIA publicly admitted that the project would go forward even if Nissan was unable to get the Archie and Bouldin homesteads. The three properties constitute a tiny portion of the overall area—28 acres at the southern end of the project out of a total of 1,400 acres. But the MMEIA explained that "What's important is the message it would send to other companies is we are unable to do what we said we would do."<sup>380</sup> It wanted to save face with future developers, so that next time it promises to take someone's home for private development, the developer will believe that the MMEIA can follow through.

The Archies and Bouldins are close friends, and both families, represented by the Institute for Justice, challenged the constitutionality of the MMEIA's actions in condemning their homes. The trial court ruled against them on July 26, 2001,<sup>381</sup> and the MMEIA planned to go forward with the demolitions. The Institute for Justice secured stays of the condemnations until the Mississippi Supreme Court could hear the case in mid-2002.<sup>382</sup> Unable to proceed with the demolition, and after the case had been partially briefed in the Mississippi Supreme Court,

the State voluntarily dismissed the cases against Andrew and Lonzo Archie and stopped its attempt to condemn the Archie properties. The Bouldins agreed to sell their long-time home.<sup>383</sup> After the State dismissed the condemnations, Lonzo Archie expressed his relief. "We could not be more happy. My father and the rest of our family can now live out our days on our land."<sup>384</sup>

<sup>379</sup> See Record in *Bouldin v. Mississippi Major Economic Impact Authority*, No. 2001-CA-01296 (Miss. Supreme Court).
<sup>380</sup> David Firestone, "Black Families Resist Mississippi Land Push," *The New York Times*, Sept. 10, 2001, at A20.
<sup>381</sup> "Families to Appeal Ruling that State can Take Property for Nissan Plant," *AP Wire*, July 28, 2001; see *Mississippi Major Economic Impact Authority v. Archie*, No. CO-2001-0082 (Madison County, Miss. Spec. Ct. July 26, 2001).
<sup>382</sup> Heath A. Smith, "Nissan Land Hearings Delayed," *The Clarion-Ledger (Jackson, MS)*, Sept. 29, 2001, at 28.
<sup>383</sup> John Porretto, "Families Happy with Resolution of Nissan Land Case," *AP Wire*, April 9, 2002.
<sup>384</sup> Nikki Burns, "Agreement Reached Between State, Black Landowners," *The Mississippi Link*, April 17, 2002, at 1.





State Record of Condemnations Filed, for All Purposes:<sup>†</sup> 1,841

Legend  $\bigcirc$  =10  $\bigcirc$  =10  $\bigcirc$  =10

## OVERVIEW

Missouri has one of the worst records on eminent domain abuse in the country. Cities and towns across the state regularly use eminent domain for the benefit of private parties. There have been at least 13 instances in the past five years. Missouri also allows private redevelopment corporations to condemn property.<sup>385</sup> And Missouri courts, despite an express constitutional admonition that courts should exercise their own judgment on public use,<sup>386</sup> nevertheless approve nearly every condemnation, no matter how private the purpose or how unnecessary the condemnation. Missouri law and practice desperately need reform to stem the tide of eminent domain abuse.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened.

<sup>†</sup>Missouri Judiciary (includes condemnations for traditional public uses).

<sup>385</sup> Rev. Stat. Mo. § 353.130.





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## Private Use Condemnations

#### Brentwood

The Town of Brentwood has been attempting for the last five years to redevelop the Rankin-Evans neighborhood. In October 2000, the local board of aldermen voted to label the neighborhood as "blighted," and approved a tax abatement measure that would allow Winther Investment, Inc., a private developer, to demolish 27 existing homes and businesses that sit on 7.5 acres of land. Winther wants to build a 350-unit apartment complex on the site.<sup>387</sup> The aldermen said they would use eminent domain to help the developer acquire the land needed for the project, but only after a substantial number of owners have agreed to sell.<sup>388</sup> By March 2001, over 70 percent had reached agreements with Winther, leaving only 12 remaining homes and businesses. At that point, Winther could begin condemning properties and had filed at least one condemnation.<sup>389</sup> Further developments were not reported.

#### Creve Coeur

A citizens' advisory committee in 2001 created a redevelopment plan that called for replacing two car dealerships, the Creve Coeur Country Club and the American Legion with a mixture of commercial office and high-density residential space. The private developer involved says the plan is needed as a "road map" for the City's future, and that it would help the City avoid spot zoning and create aesthetically pleasing areas in which similar types of businesses are clustered. One of the car dealerships lies in an area slated to become Creve Coeur's future Town Center, which the plan contends will be "'the place to be' – a place that people gravitate toward and a place for public gatherings and celebration." The owners of both car dealerships vow to oppose the use of eminent domain to take their property, which is earmarked under the plan.<sup>390</sup> In March 2002, the City tried to appease the affected businesses by adding language to the plan that says "existing businesses should be included in the planning process." Of course, this feeble assurance of inclusion in discussions is no guarantee against eminent domain.<sup>391</sup>

#### Creve Coeur

Elsewhere in Creve Coeur, the City Council in June 2002 decided to consider a private developer's plan to build a new Walgreens store on the site of a small shopping center. Though the developer vows that his pro-

<sup>387</sup> Matt Sorrell, "Brentwood OKs Redevelopment, Sale of Unused Property; Rankin-Evans Area Will Be Blighted," *St. Louis Post-Dispatch*, Oct. 23, 2000, at West Post 4; Phil Sutin, "Brentwood Residents Are Persuaded to Sell Homes to Developer," *St. Louis Post-Dispatch*, June 15, 2000, at West Post 1.

<sup>388</sup> Phil Sutin, "Brentwood Residents Are Persuaded to Sell Homes to Developer," *St. Louis Post-Dispatch*, June 15, 2000, at West Post 1.

<sup>389</sup> Michelle M. Meyer, "Brentwood Homeowners Angered by Plan to Condemn Their Houses," *St. Louis Post-Dispatch*, Mar. 26, 2001, at West Post 3.

<sup>390</sup> "Car Dealer Weber Fights Creve Coeur Master Plan," St. Louis Business Journal, Nov. 30, 2001, at 5A.

<sup>391</sup> Phil Sutin, "Creve Coeur Adds Sentence to Plan to Ease Business Worry," *St. Louis Post-Dispatch*, March 21, 2002, at West Post 1.



Missouri

## Vacate Your Premises Now; Your Government Might Want It Someday

In addition to taking land for planned private projects, local governments sometimes take land just because they think they might want the land sometime in the future. Unlike the court deciding the Kansas City, Missouri, case, most courts reject attempts by government to take property with no idea what to do with it. Connecticut courts rejected the condemnation of a yacht club in Bridgeport and homes in New London because the cities had no plans for the property. So did a Michigan court reviewing a condemnation supposedly for a stadium in Detroit.

It should come as no surprise that when the government takes property hoping to use the property sometime, the land often sits empty. That's what happened in Dallas, Texas, where the City condemned an apartment building, kicked out all the residents, and now has left the building standing empty. Phoenix, Arizona, condemned a grocery store and ended up with a vacant lot. One project in Maplewood, Missouri, is being built now on downtown property that has remained vacant since the City condemned it for "urban renewal" 30 years ago.

Projects also fail when developers opt out of a project or decide the deal isn't sweet enough for them. Cincinnati, Ohio, ended up with a parking lot when Nordstrom backed out of a planned development. Elgin, Illinois, has been condemning a local rare coin shop even though the development project fell through. Atlantic City, of course, has condemned many properties for casinos that were never built. East Hartford forced a local bakery to close under threat of condemnation but also ended up with no developer, no bakery and no project. And the New York Stock Exchange decided it didn't need a new headquarters after the agency condemned all the property. Now New York is returning some buildings and footing a huge bill. Even the threat of condemnation can destroy neighborhoods, like Sunset Hills, Missouri, where many homeowners in a once closely-knit neighborhood sold their homes under threat of condemnation to a developer for a project that never materialized.

Far too often, owners lose their homes and businesses for projects that don't get built or that never existed in the first place.

Sources: All of these situations are described in this report under their respective cities.

posal will not involve taking any houses, he admits that he might ask the City to use eminent domain to help him assemble properties for the project.<sup>392</sup>

#### Independence

Ken McClain, a local lawyer and real estate developer, wanted to build the Lakeside Shopping Center. The Independence City Council agreed, so the Council granted McClain the authority to condemn three properties, including a Checkers and a Pizza Hut, that stood in the way of the new shopping center. All three were forced to sell their property to McClain, and a privately owned shopping center now stands in their place.<sup>393</sup>

#### Kansas City

The idea for the Midtown Marketplace in Midtown Kansas City began in 1992. Eight years passed without any construction on the Marketplace. According to a report in 1997, the City had obtained title to all the property and cleared the site. Some property had been condemned for the project. Eventually, Home Depot agreed to open a store, and planners approached Costco. Costco was interested but almost dropped out of the project. City officials then promised to condemn two more businesses in the area, and Costco agreed to stay in the project. One business sold, and the City condemned the other, a temporary labor agency. Construction on the project began in 2000.<sup>394</sup>

#### Kansas City

Kansas City claimed it wanted to expand its airport, and the City Council passed an ordinance authorizing the City to acquire eight parcels of land and to use eminent domain "if necessary." The City's

<sup>392</sup> Phil Sutin, "Council Agrees to Consider Projects in Creve Coeur; Redevelopment Sought at Two Locations on Olive Street," *St. Louis Post-Dispatch*, June 10, 2002, at West Post 3.

<sup>394</sup> Joe Gose, "Vigor, Delay Both Affect Glover Plan," *The Kansas City Star*, March 4, 1997, at D1; Mark Couch, et al., *The Kansas City Star*, June 28, 2000, at City 14.



<sup>&</sup>lt;sup>393</sup> Trisha L. Howard, "McClain Wins Power of Eminent Domain," *The Kansas City Star*, Apr. 5, 2000, at Independence Star 1.

## ...owners succeeded in forcing the referendum, but the project was approved by a large majority. As Mayor Mark Langston explained, "We decided not to raise property taxes, but unfortunately we had to get rid of 150 homes."

attempts to purchase the land were unsuccessful. The owners did not want to sell. When the City then condemned the property, all eight landowners challenged the taking in court. At trial, the City revealed that it wanted the properties in question not for the expansion of actual airport facilities, but to accumulate land for future aviation-related commercial/industrial uses by private businesses. The City had already tried to attract McDonnell-Douglas to build a facility at the airport, but this effort ultimately failed. Now the City wanted the land in case another airport-type business came along looking for free land.

The trial court decided in favor of the landowners, holding that the City's taking was not for a valid public purpose. On appeal, the City argued that airport-related commerce and industry are necessary for the operation of a major airport. The Missouri Court of Appeals bought the City's argument and reversed the trial court's decision, ruling that the City's desire to compete in the future with other cities trying to attract industry constitutes a valid public necessity in the present. The appeals court cited no relevant authority in making this determination, but rather justified its holding under the proposition that Missouri law allows courts to use a "broad and flexible approach" in deciding what constitutes a public use.<sup>395</sup> This ruling runs contrary to the legal standard used by most other states that property may be condemned only for a reasonably foreseeable future public use. In this case, with no plan on the horizon and no guarantee that the City would ever find a developer, there was no foreseeable use at all. Missouri courts, however, seem determined to go further than those in almost any other state in approving condemnations.

#### Maplewood

The Town of Maplewood wanted to lure developers as a means of increasing tax revenues and the City budget. In May 2001, the Maplewood City Council announced that it would offer up chunks of the City to any developer promising to deliver tax revenue.<sup>396</sup> Maplewood officials approved a plan submitted by Pace Properties to build a Costco and Home Depot. THF Realty also submitted a proposal for a Sam's Club and Wal-Mart at the same location, but Maplewood liked the Costco project better.<sup>397</sup> Eventually, Maplewood officials switched to THF Realty's plan, for which THF wanted to demolish more than 120 homes and apartments. In May, 2002, the Maplewood City Council declared the area blighted, even though it was made up of tidy homes with well-kept lawns.<sup>398</sup>

Many of the residents loved their neighborhood and did not want to move.<sup>399</sup> The energetic but politically weak property owners who stood to lose their homes mounted a petition drive to put a referendum on the November 2002 ballot regarding the condemnation and tax incentive issues.<sup>400</sup> The owners succeeded in

<sup>395</sup> See City of Kansas City v. Hon, 972 S.W. 2d 407, 414 (Mo. App. 1998).

- <sup>396</sup> Safir Ahmed, "Selling Out: To Save Maplewood, Some Residents Have to Go," *Riverfront Times (St. Louis, MO)*, Nov. 28, 2001. <sup>397</sup> Kathie Sutin, "Homeowners Want Bigger Buyout," *St. Louis Post-Dispatch*, Sept. 3, 2001, at West Post 1.
- <sup>398</sup> Greg Freeman, "Residents Fight City Plan to Raze Homes, Make Way for Wal-Mart," *St. Louis Post-Dispatch*, June 30, 2002, at C3.

<sup>399</sup> *Id.*; Safir Ahmed, "Selling Out: To Save Maplewood, Some Residents Have to Go," *Riverfront Times (St. Louis, MO)*, Nov. 28, 2001.

<sup>400</sup> Greg Freeman, "Residents Fight City Plan to Raze Homes, Make Way for Wal-Mart," *St. Louis Post-Dispatch*, June 30, 2002, at C3.

### The Thomsons have lived on their 350-acre dairy farm for five generations. Currently, 76-year old Robert "Bud" Thomson and his five children and four grandchildren live and work on the farm. The City stood to make a projected \$1.7 million in additional tax revenue by turning the farm into an industrial park.

forcing the referendum, but the project was approved by a large majority.<sup>401</sup> As Mayor Mark Langston explained, "We decided not to raise property taxes, but unfortunately we had to get rid of 150 homes."<sup>402</sup>

Since the November 2002 referendum victory, THF Realty has signed contracts with some of the owners and was preparing to initiate condemnation actions against the property owners who would not sign. However, Alan Bornstein of THF hinted after the election that the developer may be hedging on going forward with the project, saying that while he expects the shopping center to be completed by September 2004, "[t]here are so many things that happen every day that could have an impact on the development."<sup>403</sup>

#### Maplewood

In 2001, the City of Maplewood approved a declaration of blight for a 35,000-square foot building formerly occupied by a Shop 'n Save grocery store. This measure taken by the City Council allowed the City to condemn the supermarket property and hand it over to another private developer.<sup>404</sup> In September 2001, the City Council approved the sale of the site to the St. Louis Brewery, which built a microbrewery and restaurant there.<sup>405</sup>

#### Springfield

In a closed meeting on October 11, 1999, the Springfield City Council unanimously voted to condemn the Thomson family farm in order to keep a proposed industrial park within the bounds of the Springfield school district. The Thomsons have lived on their 350-acre dairy farm for five generations. Currently, 76-year old Robert "Bud" Thomson and his five children and four grandchildren live and work on the farm. The City stood to make a projected \$1.7 million in additional tax revenue by turning the farm into an industrial park. The project also had the mayor's unqualified support.<sup>406</sup>

However, the citizens of Springfield immediately came to the Thomsons' rescue. In less than a week after its decision, the City received 1,750 phone calls protesting the condemnation. On October 15, 1999, the City Council held another meeting on the matter and this time voted unanimously against taking the Thomson farm. The mayor of Springfield declared that he had decided there were many other suitable sites within the school district that could be allocated for the industrial park,<sup>407</sup> raising the question, "Why did the City ever decide to take the Thomsons' farm?"

<sup>401</sup> Phil Sutin, "Bayless School District Voters Reject \$5 Million Bond Issue," *St. Louis Post-Dispatch*, Nov. 7, 2002, at South Post 1.

<sup>402</sup> Kathie Sutin, "Loss of Neighbors Tempers Joy Over Referendum in Maplewood," *St. Louis Post-Dispatch*, Nov. 11, 2002, at West Post 5.

<sup>403</sup> Kathie Sutin, "Developer Hedges on Maplewood Buyouts; Events Could Block Project, He Tells Residents," *St. Louis Post-Dispatch*, Nov. 21, 2002, at West Post 1.

<sup>404</sup> Glen Sparks, "Brewery, State Vie for Site in Maplewood," *St. Louis Post-Dispatch*, July 2, 2001, at West Post 1. <sup>405</sup> Kathie Sutin, "Maplewood OKs Microbrewery," *St. Louis Post-Dispatch*, Sept. 6, 2001, at West Post 1.

<sup>406</sup> Doug Johnson, "Farm Scene: Missouri City Wants to Boot Dairy Farm for New Industrial Park," *AP Wire*, Oct. 15, 1999.

<sup>407</sup> "Springfield Changes Mind, Admits Mistake, Won't Take Dairy Farm," AP Wire, Oct. 17, 1999.



#### St. John

In 1999, leaders of the Town of St. John began suggesting that the town should attract a large shopping center that would generate hefty tax revenues. In 2000, representatives of the Westin Group, a real estate developer, began approaching homeowners along Bristol Avenue with an offer to pay them \$500 to not sell their property for 18 months. This made many local residents nervous, as they began to suspect that the developer was trying to "buy" enough time to secure most of the properties in the area to build the rumored shopping center. Along with apprehension about the developer's motives came fear that the town would use eminent domain in favor of any proposed development.<sup>408</sup>

In November 2000, Walpert Properties, a division of the Westin Group, presented to the Town its proposal for St. John Crossing, a \$17 million shopping center that would include a Shop 'n Save grocery store, a restaurant and several smaller shops. The town liked Walpert's plan, and approved the use of tax increment financing, as well as the use of eminent domain to acquire properties for the development. Walpert began offering homeowners in the area \$85,000 each to move off of their current property.<sup>409</sup>

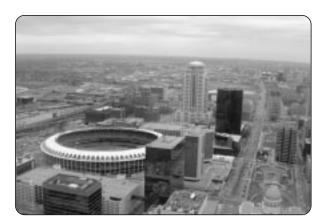
While some residents say that the price offered is more than fair, others argue that \$85,000 does not begin to compensate for what they will have to go through in order to move. Demolition work for the project began in November 2001, despite the fact that the developer had yet to reach agreements with one home-owner and two commercial property owners. The Town sent letters to the remaining owners indicating that it was beginning eminent domain proceedings against them.<sup>410</sup> News reports do not indicate whether the remaining owners settled or were condemned.

By April 2002, residents near the future shopping center were complaining. Not only had they been forced to endure the early-morning construction noise from the behemoth next door, but residents whose houses

face the back of the new shopping center noticed that vibrations from the construction have caused cracks to form on their walls and ceilings, and even caused some sewage pipes to rupture.<sup>411</sup>

#### St. Louis

In December 2001, the St. Louis Board of Aldermen approved a bill that gives the City the authority to condemn the St. Louis Centre, a downtown shopping mall, if current owners do not redevelop the mall in a way that satisfies City leaders.<sup>412</sup> The mall, which opened in 1985, was once the nation's largest downtown mall, but



<sup>408</sup> Kathie Sutin, "St. John's Bristol Avenue Residents Fear Eminent Domain; Developer Is Planning to Build Shopping Center," *St. Louis Post-Dispatch*, May 22, 2000, at North Post 1.

<sup>409</sup> Kathie Sutin, "Pace of Home Buyouts for St. John Crossing Project Is Picking Up; Slow Progress Irked Residents," *St. Louis Post-Dispatch*, Oct. 22, 2001, at North Post 7.

<sup>410</sup> Kathie Sutin, "St. John Center Work to Begin; Project Has Overcome Several Delays, Needs Agreements on Some Land," *St. Louis Post-Dispatch*, Nov. 5, 2001, at North Post 1.

<sup>411</sup> Kathie Sutin, "St. John Residents Say Construction Work Is Damaging Homes," *St. Louis Post-Dispatch*, Apr. 8, 2002, at North Post 3.

<sup>412</sup> Charlene Prost, "Slay Touts Projects that Could Revive Downtown Tourism," St. Louis Post-Dispatch, Dec. 11, 2001, at C6.





today only the lower two floors contain many retail tenants. If the City takes the mall through eminent domain, it plans to sell the property to other private developers for upscale retail use.<sup>413</sup> As of December 2002, the mall is for sale.<sup>414</sup> The City still retains the power of eminent domain.

#### St. Louis

In order to assist a developer planning to convert the eight-story Vanguard Building into loft apartments with a restaurant on the ground floor, the City condemned an adjacent privately-owned lot. The Vanguard renovation project had been stalled for two years because the building lacked enough parking to suit the developer's needs. It would have cost more money than the developer wanted to spend to build a parking area for tenants in the redeveloped building. However, thanks to St. Louis City officials, the developer was able to take the land it wanted for parking, allowing it to build a more profitable venture, without the hassle of having to purchase directly from the lot's owner.<sup>415</sup>

#### Sunset Hills

The Sunset Manor subdivision in the Town of Sunset Hills has 254 homes, which are mostly tidy little brickand-frame dwellings.<sup>416</sup> Town leaders decided the neighborhood would look better if those houses were bulldozed and replaced by commercial development. The Sansone Group, a private developer, presented the Town with a plan to build a \$115-million, 57-acre shopping center on the Sunset Manor site. The first phase would include 22 acres of retail stores, while the second would include 16 acres of offices and 19 acres of residential units (112 apartments, 44 "villas" and 56 condominiums). Mayor James Hobbs and other Town leaders heartily endorsed the planned development, and pledged to give the developer tax-increment-financing subsidies totaling \$46 million, as well as the use of eminent domain to force unwilling sellers out of their homes.<sup>417</sup> Some owners wanted to move, but many had lived in the neighborhood for years and were unhappy about being forced out. As a result, the once tight-knit neighborhood became bitterly divided.

The Sansone Group went on to purchase more than half of the homes in Sunset Manor. But in June 2002, the local Board of Aldermen abruptly changed its mind about bulldozing neighborhoods in favor of retail development. The Board voted unanimously to reject the Sunset Manor proposal, though it reached its decision not because of any aversion to the idea of seizing and destroying homes, but because the developer could not line up enough interested retailers.<sup>418</sup>

<sup>414</sup> Chern Yeh Kwok, "Gundaker Commercial Has Contract on Dillard's Landmark Downtown," *St. Louis Post-Dispatch*, Dec. 14, 2002, at Business 4.

<sup>415</sup> Jerry Berger, "City, County Put Final Touches on Study for Revitalization of Area Around Skinner-King," *St. Louis Post-Dispatch*, July 23, 2002, at A2.

<sup>416</sup> Bethany Halford, "Disappointed or Relieved, Sunset Manor Residents Resume Lives," *St. Louis Post-Dispatch*, June 20, 2002, at South Post 1.

<sup>417</sup> Theresa Tighe, "Despite Some Reluctance, the Buyout Goes On in Sunset Hills," *St. Louis Post-Dispatch*, Apr. 22, 2002, at South Post 1.

<sup>418</sup> Bethany Halford, "Disappointed or Relieved, Sunset Manor Residents Resume Lives," *St. Louis Post-Dispatch*, June 20, 2002, at South Post 1.



<sup>&</sup>lt;sup>413</sup> Mark Schlinkmann, "Slay Wants City to Have Power to Force St. Louis Centre Sale," *St. Louis Post-Dispatch*, Nov. 3, 2001, at News 13.



## 0 v e r v i e w

Montana can be proud of its record in the past five years. There were no reported instances of use of eminent domain for private parties between 1998 and 2002, and a bill to allow condemnation for private roads died in the legislature.



The Montana Supreme Court has limited the right of private condemnation for access roads to cases where the owner's land is presently being used as a farm or residence. House Bill 327, which was introduced in January 2001, would have significantly extended this right to include both non-farming lands and urban properties, including commercial developments. The measure died in committee...

## LEGISLATIVE ACTIONS

In 2001, the Montana legislature considered a bill that would have allowed private property owners whose property does not connect to public roads to bring condemnation proceedings against adjacent private properties for the opening of private roads over their land. The Montana Supreme Court has limited the right of private condemnation for access roads to cases where the owner's land is presently being used as a farm or residence.<sup>419</sup> House Bill 327, which was introduced in January 2001, would have significantly extended this right to include both non-farming lands and urban properties, including commercial developments. The measure died in committee because it missed the vote deadline and does not carry over into the next legislative session.<sup>420</sup>

<sup>419</sup> See, e.g., *Groundwater v. Wright*, 588 P.2d 1003 (Mont. 1979). <sup>420</sup> See H.B. 327 (filed as Draft 754), 57th Sess. (Mont. 2001).



|   | NEBRASKA                           |
|---|------------------------------------|
|   |                                    |
| Known Condemnations<br>Benefiting Private Parties                 |                                    |
| Filed   |                                    |
| Threatened  |                                    |
| Total   | 12                                 |
| Known Development<br>Projects w/Private<br>Benefit Condemnations* |                                    |
|   | Legend $\bigcirc$ =1 $\bigcirc$ =1 |
|   | OVERVIEW                           |

Omaha is the site of all reported cases of condemnations for private development in Nebraska in the last five years. The City has been implementing a massive redevelopment plan, which involves condemnations, threats of condemnation and large public expenditures. When one of the condemnees brought her case to the Nebraska Supreme Court, the court used a dubious legal technicality to evade applying Nebraska's strong caselaw forbidding condemnation for private parties.<sup>421</sup> And when courts refuse to exercise their duty, local governments feel free to abuse their power. It seems that until a Nebraska court steps in, Omaha will continue to remove local businesses and residents in favor of larger, more glamorous development projects.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened. <sup>421</sup> See *Chimney Rock Irrigation Dist. v. Fawcus Springs Irrigation Dist.*, 359 N.W.2d 100 (Neb. 1984).

## Private Use Condemnations

#### Omaha

In February 1997, the Omaha City Council enacted the Downtown Northeast Redevelopment Plan (DNRP), a \$2-billion plan to transform large areas of the City's historic downtown area and along the Missouri River. All of the property designated under the DNRP, regardless of actual condition, was labeled "blighted and substandard," meaning that the land could be subject to condemnation by the City for the purpose of redevelopment. The DNRP contains dozens of proposed construction projects, which read like a redeveloper's vision of Shangri-La: a new convention center and adjacent Hilton hotel; a privately funded performing arts center and adjacent pedestrian bridge over the river; a new headquarters for Union Pacific Railroad; a major expansion of the Douglas County jail, and a new riverfront headquarters for the Gallup Organization.<sup>422</sup> This redevelopment plan provides for many projects that will primarily benefit developers and other private entities and amounts to a monumental taking of private urban property that will consolidate hundreds of acres of downtown land in the hands of a few developers.

The City of Omaha, using more than \$28 million in public funds, ushered in the new Gallup Organization headquarters and training campus, and so transformed 66 riverfront acres into "Gallup University."<sup>423</sup> The Gallup site was owned by Aaron Ferer & Sons, which had operated a scrap-metal yard there since 1964. To realize their plan, the City Council armed the City planning department with eminent domain powers in order to acquire the land needed for the project. Under the threat of condemnation, Ferer & Sons had no choice but to give up its riverfront location. The company agreed to sell its land, which was then transferred to Gallup.<sup>424</sup>

#### Omaha

David and Florence Davis did not fare quite as well as Ferer & Sons. David Davis owned a parking lot in downtown Omaha, which provided his family with a steady income. However, the lot happened to fall within land designated under the DNRP as the future site for the new First National Bank data processing center and two parking garages. In 1997, the City, the bank and Jayhawk LLC, the private developer, entered into an agreement whereby Jayhawk would acquire Davis' property and build the data center, which the bank would occupy. The agreement also required the City to use its power of eminent domain to obtain the properties in the event that Jayhawk could not acquire them through voluntary purchase.<sup>425</sup>

David Davis was not interested in selling his lot, and the developer's negotiations with him failed. The City then declared the property blighted and filed a notice of condemnation against the Davis lot. Davis sued the City, the bank, and Jayhawk, alleging that the taking ran afoul of Nebraska law because it did not serve any public interest, but rather that of another private business. In the meantime, construction on the new facility began while the case was pending. The case made it all the way to the Nebraska Supreme Court, where the City and the bank argued that since construction on the data center was already near completion, the questions involved had been rendered legally moot.<sup>426</sup> The Nebraska high court dismissed the case, using the justification that Davis had failed to move for an injunction to prevent the taking of his property while the case was pending.<sup>427</sup>

<sup>422</sup> Steve Jordon, "Big Tonka Toys, Big Downtown Growth," *Omaha World-Herald*, Jan. 27, 2002, at Business 36.
<sup>423</sup> Chris Burbach, "U.P., Gallup Building Plans Head to Council," *Omaha World-Herald*, Dec. 7, 2000, at News 19.
<sup>424</sup> Robert Dorr, "Riverfront Project Flowing Along; Omaha's City Council Authorizes Property Purchases in the Area of the Development," *Omaha World-Herald*, Mar. 28, 2001, at News 17.

<sup>425</sup> See *Greater Omaha Realty Co. v. City of Omaha*, 605 N.W. 2d 472, 475 (Neb. 2000).

<sup>426</sup> Robynn Tysver, "City's Power to Condemn Challenged," *Omaha World-Herald*, Nov. 3, 1999, at News 17.
 <sup>427</sup> See *Greater Omaha Realty Co.*, 605 N.W. 2d at 478.



#### Omaha

Omaha is also spending \$30.5 million to acquire land, demolish buildings and improve utilities for a new \$260 million Union Pacific Railroad headquarters facility.<sup>428</sup> The Union Pacific project requires that the City condemn a whole city block, consisting of two 19th-century buildings and the surrounding parking lot. This will force four small local businesses to relocate: Tonda's Home Fixins restaurant, the Colonel's Shop convenience store, Dixie Quicks and the Great American Steak & Burger. The owners of all four businesses want to reopen elsewhere in downtown, but are not sure they will be able to find suitable space they can afford.<sup>429</sup>

#### Omaha

Three historic building owners in Omaha's Downtown Northeast redevelopment area tried a novel approach to avoid condemnation. The buildings were slated to be demolished in favor of a new performing arts center.<sup>430</sup> The owners, Frankie Pane, Todd Simon, and Raymond Alvine all spent years refurbishing their onceneglected historic buildings into unique urban structures. For years, they each lived under the constant threat of condemnation, as City officials weighed various redevelopment proposals targeting their properties. In January 2001, they formally asked the City Council to remove their property from the redevelopment district, a request believed to be the first of its kind in Omaha. They wanted to see their older buildings incorporated into the City's master plan rather than torn down to make way for new structures. Frankie Pane had already had to move his business establishment once to accommodate an earlier City redevelopment project, the Leahy Mall.

# Three historic building owners tried a novel approach to avoid condemnation.

## In January 2001, they formally asked the City Council to remove their property from the redevelopment district, a request believed to be the first of its kind in Omaha.

The building owners did not believe their efforts would succeed; in fact, their request for exclusion was rejected on February 5, 2002, when the Omaha City Council passed a resolution declaring again that the properties were blighted. The owners recognized that this brought them within reach of the City's long arm of eminent domain powers. Pane and Simon joined together in filing a lawsuit seeking an injunction to keep the City from taking their property.<sup>431</sup> They argued that there was little actual "blight" in the area where the properties are located. The City did not back down, but in this situation, the proposed beneficiary of the condemnations relented. The Omaha Performing Arts Society reversed its position and announced that it would exclude the four targeted buildings from its redevelopment plan.<sup>432</sup> These owners at least were lucky, while many others in the redevelopment area were not.

<sup>428</sup> Chris Burbach, "U.P., Gallup Building Plans Head To Council," *Omaha World-Herald*, Dec. 7, 2000, at News 19.
 <sup>429</sup> Victor Epstein, "Downtown Development; Union Pacific's Long Shadow Creeps Over Tiny Businesses, Future Site of Union Pacific Headquarters," *Omaha World-Herald*, June 24, 2001, at Business 1M.

<sup>431</sup> Nichole Aksamit, "Owners Sue to Save Buildings; The Suit Alleges that the City Didn't Follow Proper Procedures in Taking Property for a Performing Arts Center," *Omaha World-Herald*, Feb. 20, 2002, at 1B.

<sup>432</sup> Nichole Aksamit & C. David Kotok, "Fahey: Arts Center Back on Track; An Agreement to Allow the New Venue to Coexist with Old Buildings Surprises Many," *Omaha World-Herald*, Feb. 27, 2002, at 1A.

<sup>&</sup>lt;sup>430</sup> Ashley Hassebroek, "Raze Architecture for Arts? Historic Sites' Owners Upset What's Next?," *Omaha World-Herald*, December 5, 2001, at 1B.



#### Known Condemnations Benefiting Private Parties\*

**Benefit Condemnations**'

Filed Filed Threatened Total 18 Known Development Projects w/Private 2

Legend  $\overleftarrow{m}$  =1  $\overleftarrow{m}$  =1

## OVERVIEW

Nevada is teetering on a precipice. Only two years ago, the Nevada Supreme Court allowed the condemnation of private businesses for casino development. In that case, however, the owners did not contest that their property was blighted, and blight usually provides an independent legal justification for condemnation. In 2003, the Nevada Supreme Court will be deciding another condemnation challenge in a case where the redevelopment agency declared the property blighted without even surveying the block. This condemnation, too, benefited casino interests, but the behavior of the Las Vegas Redevelopment Agency in the most recent case was so outrageous that it will be difficult for any court to approve. The decision of the Nevada Supreme Court will have a major effect on private condemnations in the future, either encouraging flagrant abuse or warning redevelopment agencies that there are limits to their power.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened.



## Private Use Condemnations

#### Las Vegas

When John Pappas died, he left his widow, Carol, a commercial building in downtown Las Vegas, intending that its rents would provide for her retirement.<sup>433</sup> On December 8, 1993, the Las Vegas Redevelopment Agency (LVRA) served Mrs. Pappas with notice that it was condemning her property.434 The purpose of the condemnation was to transfer the land to a consortium of eight casinos for construction of a parking garage to serve a new downtown attraction known as the Fremont Street Experience.<sup>435</sup> Among the 15 legal documents she received that day was one stating that she had 30 days to respond. Unbeknownst to Mrs. Pappas, however, there was a hearing in only seven days to decide whether the LVRA would get immediate possession of the property. Mrs. Pappas did not know about the hearing and did not attend. The hearing judge granted title to the agency, and the building was promptly demolished before Mrs. Pappas ever appeared in court. Later the judge recused himself from the case because he had invested in one of the casinos that had sought acquisition of the property.

### The hearing judge granted title to the agency, and the buildings were promptly demolished before Mrs. Pappas ever appeared in court.

The case has been in litigation ever since. In 1996, a district court judge ruled that the condemnations were unconstitutional and illegal. In a harshly worded 65-page opinion, the judge found that the LVRA had "set itself up as an entity only unto itself." The court found that the agency ignored many basic statutes and procedures. For example, the supposed justification for the condemnation was that the area was blighted. However, surveys of the area revealed no blight; in fact, the LVRA had not even bothered to survey Mrs. Pappas' block.<sup>436</sup>

<sup>433</sup> "The Pappas Dispute," *Las Vegas Review-Journal*, Sept. 3, 2000, at 2D.
<sup>434</sup> *Las Vegas Downtown Redevelopment Authority v. Pappas*, No.
A327519, Opinion on Motion to Dismiss (July 3, 1996).
<sup>435</sup> Steve Sebelius, "It Was Worth Trying, Anyway," *Las Vegas Review-Journal*, Aug. 27, 2000, at 1J.

<sup>436</sup> Las Vegas Downtown Redevelopment Authority v. Pappas, No. A327519, Opinion on Motion to Dismiss (July 3, 1996).

## The House Always Wins: Casinos Top List of Eminent Domain Beneficiaries

Casinos win the prize for the most ruthless beneficiaries of eminent domain. And because they bring in so much tax revenue, local governments always let the casinos call the shots. In addition to demolishing Mrs. Pappas' building for a casino consortium before she even appeared in court, the Stratosphere casino convinced the Las Vegas Redevelopment Agency to condemn 17 of the Stratosphere's neighbors. In Atlantic City, the MGM Grand convinced the Casino Reinvestment Development Authority-the State casino agency-to condemn property for a casino it never built. Mirage Resorts required the condemnation of a neighborhood for a tunnel leading to the new casino it was supposedly going to build. After the homes were gone, Mirage merged with MGM Grand, which might, someday, build a casino at the end of the tunnel. Finally, in Detroit, the City filed condemnation actions against many waterfront businesses to make room for new casinos. The condemnations were thrown out because the City had not negotiated in good faith to buy the property. The City threatened that it would condemn the properties again if the owners didn't sell. In the end, however, after putting the businesses through years of uncertainty, two out of three casinos decided not to move there anyway.

Sources: All of these cases appear in this report in the sections for their respective cities.

# **CASTLE**

On March 29, 2000, the Nevada Supreme Court threw out the City's second too-early appeal and warned the City's attorneys against providing further "misleading information."<sup>437</sup> After a series of judges recused themselves for accepting campaign contributions from casino interests, the Nevada Supreme Court ruled that such campaign contributions did not disqualify judges.<sup>438</sup> The case then returned to the trial courts for various further proceedings on other issues. It finally went up to the Nevada Supreme Court on an appeal filed by the City from the order



dismissing the condemnation.<sup>439</sup> The Institute for Justice filed an amicus brief on behalf of Mrs. Pappas. **Update:** The Nevada Supreme Court held oral argument on February 10, 2003, and there will hopefully be a decision later in the year.

#### Las Vegas

In 1986, the Las Vegas City Council approved a long-term redevelopment plan for downtown Las Vegas. The plan's intent was supposedly to eliminate blight and deterioration, and it encompassed a total of 2,401 acres of property, most of it privately owned. The plan also authorized the Las Vegas Redevelopment Agency (LVRA) to use eminent domain to acquire substandard properties on a case-by-case basis.

Eight years later, the Stratosphere Corporation proposed a redevelopment project. It wanted to add an 11acre hotel/casino complex adjacent to its existing Stratosphere Tower. The company had been successful in acquiring several of the properties needed for the project, but stated in its proposal that it would require the LVRA to condemn 17 parcels of land. Paul and Laurel Moldon owned one of the parcels, which contained a commercial building. James and Aileen Crockett owned another parcel, which had formerly been a service garage for a car dealership. In April 1995, the Agency condemned both the Moldon and Crockett properties. The parties sued, claiming that the Stratosphere project had not been contemplated by the original redevelopment plan, and thus could not be implemented without amending the plan.<sup>440</sup>

The district court sided with the owners, and dismissed the LVRA's condemnation claim. The agency appealed, and over the next six years went to great lengths to delay a ruling on the matter by the Nevada Supreme Court, including requests for nine separate extensions of time to file briefs.<sup>441</sup> In November 2001, the Nevada high court did finally rule on the case, a 6-1 decision in favor of the City. This decision revived the City's condemnations but did not decide the issue of public use. The case has now returned to the trial court for further proceedings.<sup>442</sup>

- <sup>437</sup> Mike Zapler, "Settlement Talks Between City, Family Stalled," *Las Vegas Review-Journal*, Apr. 11, 2000, at 1B; "Misleading the Court," *Las Vegas Review-Journal*, Apr. 11, 2000, at 6B.
- <sup>438</sup> City of Las Vegas Downtown Redev. Agency v. Eighth Judicial Dist. Court., 5 P.3d 1059 (Nev. 2000).
- <sup>439</sup> City of Las Vegas Downtown Redev. Agency v. Pappas, No. 39255 (Nev. S. Ct.)

<sup>440</sup> See City of Las Vegas Downtown Redevelopment Agency v. Crockett, 34 P.3d 553, 555-57 (Nev. 2001).

- <sup>441</sup> Jan Moller, "Court: City Acted Legally in Seizure Attempt," Las Vegas Review-Journal, Nov. 16, 2001, at 1B.
- <sup>442</sup> City of Las Vegas Downtown Redevelopment Agency v. Crockett, 34 P.3d 553, 558-63 & n.48 (Nev. 2001).



Public Power, Private Gain



## $0 \vee e r \vee i e W$

News reports revealed no reported condemnations for private parties in New Hampshire between 1998 and 2002. This admirable restraint probably results in part from a decision of the New Hampshire Supreme Court in 1980 holding that New Hampshire's constitution did not allow condemnations for "economic development,"<sup>443</sup> i.e., local governments could not take land for private businesses on the premise that the business would create jobs and pay taxes. One legislative attempt to increase compensation for condemned businesses failed in 2002, but New Hampshire remains one of the best states to own a home or business without fear of it being taken for another private party.

443 See Merrill v. City of Manchester, 499 A.2d 216, 218 (N.H. 1985).

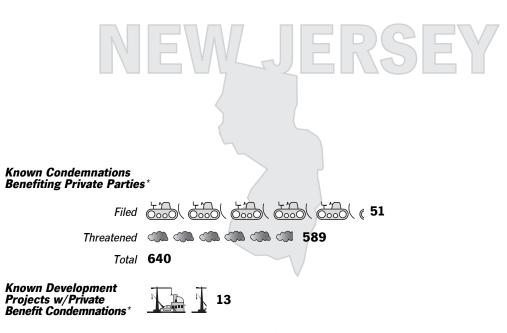
# **CASTLE**

## LEGISLATIVE ACTIONS

Recognizing that eminent domain takings often result indirectly in the closure of the businesses displaced by those condemnations, the New Hampshire state legislature sought to pass a bill that would protect business owners and minimize the destructive effects of eminent domain. In May 2002, both houses voted in favor of House Resolution 1393, which would have allowed business owners the option of accepting either fair market value or an amount that compensated them for the various costs associated with reestablishing the business in a new location.<sup>444</sup> However, Governor Jeanne Shaheen vetoed the measure, stating in her veto message that the bill would force higher costs on cities and towns, thus threatening municipal projects that rely on state and federal funds. The legislature was unable to come up with enough votes to override Gov. Shaheen's veto.<sup>445</sup>

<sup>444</sup> See H.R. 1393, 157th Sess. (N.H. 2002).
<sup>445</sup> Tom Fahey, "Legislature Can't Override Shaheen Vetoes," *The Union Leader (Manchester, N.H.)*, May 23, 2002, at A16.





State Record of Condemnations Filed, for All Purposes: + 2,571

Legend  $\overrightarrow{000} = 10$   $\overrightarrow{0} = 10$ 

## 0 v e r v i e w

New Jersey is a hotbed of private condemnations and attempted condemnations. While Atlantic City has seen three private condemnation projects, cities and towns all over the state have been trying to take property for developers they think will bring in more tax dollars. New Jersey courts have largely gone along with these condemnations, although there are some signs that the courts intend to impose at least outer limits. One court denied a condemnation on procedural grounds and another because the supposed public purpose was really a pretext for transferring the property, no strings attached, to a private party. Greater community opposition also has resulted in the failure of at least one private condemnation in recent years. Meanwhile, a bill that would have discouraged the casual condemnation of one business for another stalled in the New Jersey legislature, but its introduction is at least a hopeful sign.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened. \*New Jersey State Judiciary (includes condemnations for traditional public uses).

## LEGISLATIVE ACTIONS

A bill introduced in the New Jersey Senate in February 2002 sought to provide additional protection to business owners whose property is condemned for redevelopment purposes. Senate Bill 1074, sponsored by Republican Senators Gerald Cardinale and Henry McNamara, would have required condemnors to demonstrate to a court that the proposed use of a targeted business property is "of such significant public interest as to justify the relocation or retirement of the private business at that location." The bill also would have given the property owner more input into the appraisal process.<sup>446</sup> S.B. 1074 died in the Senate Community and Urban Affairs Committee.<sup>447</sup>

## Private Use Condemnations



Vera Coking was victorious in keeping her property. To this day she is still outraged, "The government was going to take my home from me to give to Trump so he could expand his casino. Where is the justice in that? We're not in another country where anyone can come in and say, 'We want your home. Get out!' This is America. My husband fought in the war and worked to make sure I would have a roof over my head, and they want to take it from me? I couldn't understand what the government was doing."

#### Atlantic City

Sometime in the mid-1990s, Donald Trump decided that he wanted to enlarge the operations of the Trump Plaza Hotel & Casino. He submitted a plan to the Casino **Reinvestment Development Authority** (CRDA), a state redevelopment agency, to enlarge the hotel and put green space, a driveway, and high-roller limousine parking on property across the street. That area happened to be occupied by several small businesses and a home. Some of the businesses agreed to sell, but Vera Coking, an elderly widow, Banin Gold Shop, and Sabatini's Italian Restaurant refused. Coking had lived in her house for more than 30 years. Peter Banin, who owned Banin Gold along with his brother, had emigrated from Russia and commented at the time, "The Soviet Union doesn't even do anything like this."448 The family-run Sabatini's Restaurant had occupied that same corner for more than 20 years. After the owners refused to sell, the CRDA initiated condemnation proceedings in July 1994.449 The owners then challenged the taking, arguing that Trump's limousine parking was not a public use and that, even if it was, the park-

446 See S.B. 1074, 210th Sess. (N.J. 2002).

<sup>447</sup> Charles Toutant, "Small Businesses Standing Ground Against 'Private' Condemnations Try to Stop Use of Eminent Domain that Aids March of Drug Superstores," *New Jersey Law Journal*, Apr. 22, 2002.

<sup>448</sup> Paul Schwartzmann, "She Kicks Sand in Trump's Face, Sneers at The Donald's Bucks," *New York Daily News*, July 26, 1998, at News 7.

<sup>449</sup> Casino Reinvestment Development Authority v. Banin, 727 A.2d 102, 107 (N.J. Super. 1998).



New Jersey

ing was just a pretext for giving Trump control of the property, which he could then use however he saw fit. The Institute for Justice represented Vera Coking.

### Peter Banin, who owned Banin Gold along with his brother, had emigrated from Russia and commented at the time, "The Soviet Union doesn't even do anything like this."

After some twists and turns in the courts, the trial court eventually ruled that Trump's limousine parking could be a public use. However, the court said, the evidence showed that once the property was transferred, Trump could do whatever he wanted with the property, and in fact Trump had already drawn up plans for additional casino space. The court therefore held that the CRDA's condemnation amounted to giving Trump a "blank check" to the property.<sup>450</sup> Because the taking was pretextual, the court ruled that the CRDA could not take the property.<sup>451</sup> Vera Coking still lives contentedly in her home; Banin's Gold Shop operates; and Sabatini's Restaurant still serves up delicious Italian meals.

#### Atlantic City

MGM Grand, Inc. wanted to open a new casino in Atlantic City. In 1996, the company announced plans to build a \$700 million hotel/casino/resort complex in the South Inlet section of town.<sup>452</sup> Within the few months following MGM Grand's announcement, the casino developer reached agreements to purchase most of the 147 homes and 402 vacant parcels in the way of the project.<sup>453</sup> As a means of forcing out the remaining property owners in the targeted area, the City in 1998 declared the unsold 9-acre portion of the 35-acre site to be "in need of redevelopment," which would allow for the use of eminent domain by the CRDA to further MGM Grand's casino plan.<sup>454</sup>

This action by the City prompted a lawsuit by Joseph Zoll, a businessman who owned about 200 parcels of land around Atlantic City, including eight lots within the MGM Grand project area. Zoll went to state court to challenge the validity of the City's redevelopment designation, but the trial court ruled in favor of the City. Zoll's appeal dragged on, however, tying up the entire MGM Grand project for several years.<sup>455</sup> Finally, after MGM Grand had spent more than \$50 million buying property, paying lawyers and financing other development issues in connection with the planned casino,<sup>456</sup> Zoll in August 1999 finally accepted an offer from MGM Grand and agreed to drop his appeals. With Zoll's lawsuit out of the way, the CRDA was free to use eminent domain to take the few remaining properties not yet owned by MGM Grand.<sup>457</sup>

New York businessman Shalom Dai owned two such properties in the project area. When the negotiations between Dai and MGM Grand failed to produce a settlement, the CRDA decided to use eminent domain

<sup>452</sup> "MGM Grand's Grand Casino; \$700M Hotel Combo Would Be One of Atlantic City's Biggest," *Newsday*, July 10, 1996, at A32.

<sup>453</sup> Bill Kent, "Real-Life Monopoly: MGM Bids on the Boardwalk," *The New York Times*, July 14, 1996, at 13NJ-6; Amy S. Rosenberg, "A.C. Residents Hold Ground; They Say they Will Make Way for Casinos—For a Fair Price," *Philadelphia Inquirer*, July 26, 1996, at B1.

<sup>454</sup> John Curran, "MGM Grand Frustrated by Atlantic City Project," *Las Vegas Review-Journal*, June 28, 1999, at 1D.
 <sup>455</sup> John Curran, "No Sure Bet: Land Acquisition, Delays Plague A.C. Casino Plan," *AP Wire*, June 23, 1999.
 <sup>456</sup> Id.

<sup>457</sup> Amy S. Rosenberg, "Holdout A.C. Landowner Sells to Casino," *Philadelphia Inquirer*, Aug. 13, 1999, at B5.



<sup>&</sup>lt;sup>450</sup> *Id.* at 111. <sup>451</sup> *Id.* 

## Local Opposition Defeats Plan to Condemn Famous Music Venue for Redevelopment

Asbury Park is redeveloping its waterfront under a plan put together by the City and private developer Ocean Front Acquisitions. Under the \$1.25-billion plan, Ocean Front would divide a 56-acre area into parcels, selling or leasing most to other builders to develop in phases over the next decade. Its developers claim the new waterside enclave will contain 2,500 new condominiums, 500 renovated units and 450,000 square feet of retail and entertainment space.<sup>1</sup>

Asbury Park's redevelopment threatened to displace the Stone Pony, a seaside rock 'n roll venue that was once the stomping ground of such New Jersey icons as Bruce Springsteen, Southside Johnny and Bon Jovi. The City wanted to condemn the Stone Pony and relocate the club to a new entertainment district south of the new waterfront development. However, local citizens started a massive letter-writing campaign arguing that the original Stone Pony was an important part of the City's heritage, and should be incorporated into the City's revitalization rather than forced out by it. Under a revised plan unveiled in February 2002, the Stone Pony and its outdoor beer garden will stay put. Other businesses nearby were not so lucky.2

<sup>1</sup> Rachelle Garbarine, "A New Plan to Revitalize Asbury Park Waterfront," *The New York Times*, Mar. 3, 2002, at K7. <sup>2</sup> Andy Newman, "Just Up the Road from E Street, a Rock Landmark Stands Its Ground," *The New York Times*, Feb. 25, 2002, at B1. proceedings to condemn the two properties and transfer ownership to MGM Grand. Dai sued the CRDA, claiming that it did not have the authority to condemn his land, because the casino project was not a "public purpose," as required by New Jersey law.<sup>458</sup> On November 19, 1999, New Jersey Superior Court Judge Michael Winkelstein rejected Dai's arguments and ruled in favor of MGM Grand. Judge Winkelstein then appointed three commissioners to set the price MGM Grand would have to pay Dai for his properties.<sup>459</sup> The jury set the price for Dai's property at \$1.3 million, a price much closer to MGM Grand's appraisal than Dai's.<sup>460</sup>

As soon as it had wrested control of the properties from Dai using the state's power of eminent domain, MGM Grand began making additional demands for millions of dollars in taxpayer-funded road and infrastructure improvements to benefit the resort.<sup>461</sup> However, before the new casino was ever built on the taken land, MGM Grand bought Steve Wynn's Mirage Resorts, Inc. (see below), and decided to walk away from its South Inlet casino plan in favor of developing the marina district site for which the CDRA had been busy condemning properties on behalf of Mirage Resorts. Even though the MGM Grand project fell through, the CRDA still took Shalom Dai's properties, in hopes that another casino might take MGM Grand's place sometime in the future.<sup>462</sup>

## all Atlantic City has to show for its original deal with Steve Wynn is community devastation and a tunnel to nowhere.

#### Atlantic City

The CRDA has a strange attitude about private property ownership, especially when the landowner is not a giant, politically favored casino interest. It treats Atlantic City residents like mere obstacles to be moved out of the way whenever a casino comes in and wants their land. In 1995, shortly after the development agency filed condemnation actions against Coking, Banin and Sabatini, casino magnate

<sup>458</sup> "Atlantic City Wins Condemnation Case," *The Record* (Bergen County, N.J.), Nov. 20, 1999, at A3.

<sup>460</sup> "MGM: Jury's Land Award to Hurt Atlantic City," *Gambling Online Magazine*, May 13, 2001, available at

http://www.gamblingmagazine.com/articles/40/40-486.htm.

<sup>461</sup> Amy S. Rosenberg, "MGM Grand Is Picked to Develop South Inlet; Atlantic City's Council Gave the Firm the Right to Build a Casino Complex. MGM Wants Road Improvements," *Philadelphia Inquirer*, Jan. 6, 2000, at B3.
<sup>462</sup> "MGM Grand May Cash in Its Chips on Casino Site," *Las Vegas Review-Journal*, May 22, 2000.



<sup>&</sup>lt;sup>459</sup> ld.

Steve Wynn announced that his Mirage Resorts Company was returning to Atlantic City, which the company had abandoned in 1989 over the City's refusal to suspend its own regulatory rules for Mirage Resorts' benefit.<sup>463</sup> Wynn's return, however, came at a price: He demanded that the City build a 2,200-foot tunnel leading from the Atlantic City Expressway directly to the new casino, which he wanted to build on unused City land in the marina district and which the City would be giving him for free.<sup>464</sup>

CRDA officials set about the process of condemning the land under which the new tunnel would run. Standing in the way were nine homes and one business along Horace J. Bryant Drive, which was the centerpiece of a thriving African-American neighborhood. When Mirage Resorts approached the landowners with offers to buy their property, six of the homeowners reached agreements to sell, as did the owner of the area's only dentist's office, whose office was among those targeted. However, when three homeowners refused to sell, the CRDA condemned their properties. The owners took the CRDA to federal court on civil rights grounds, and also challenged the lack of public purpose in state court. Lillian Bryant, the daughter of the street's namesake, was one of the owners fighting the CRDA. After exhausting their money and will to fight, Bryant and the other two owners eventually reached settlements with the agency. However, the money they received in return could never make up for the loss of homes they cherished in one of Atlantic City's only thriving and vibrant minority communities.465

One of the problems with corporate welfare projects supported by the government is that developers are not as committed to the plans as when they have invested their own money. So what happened next was no surprise. After the condemnations, Steve Wynn abruptly announced during the middle of the tunnel's construction that he was selling Mirage Resorts to MGM Grand, Inc. MGM Grand was already planning a mega resort at another location in

## New Jersey Township Tries to Use Condemnation to Squelch Affordable Housing Development

Local governments often abuse the power of eminent domain by taking or threatening to take property for other private parties. Sometimes, however, local governments improperly use their eminent domain power to punish an unpopular landowner or to eliminate a legal use that City leaders find undesirable. Panther Valley in Allamuchy Township is an exclusive gated community that contains 1,500 homes and approximately 80 percent of the township's population. Two private developers owned parcels of vacant land within Panther Valley, on which they wanted to build affordable multi-family housing in accordance with the New Jersey Supreme Court's requirement that localities attempt to increase the availability of affordable housing.<sup>1</sup> Baker Residential L.P. and Progressive Properties, Inc., owned 426 acres. The land was zoned properly and had been outfitted with sewers and other infrastructure in preparation for future development. However, after the developers obtained all the necessary permits to build their new residences, the Township filed condemnation actions against the property, claiming that it needed the land for "open space preservation, parkland and/or other public purposes." The developers took the Township to court and alleged that the takings were a pretextual attempt to prevent development of affordable housing in Panther Valley. At trial, the judge agreed with the developers, and held that the state's requirement that the Township provide affordable housing outweighed any need it might have for open space.<sup>2</sup>

 <sup>1</sup> See Southern Burlington County NAACP v. Township of Mt. Laurel, 336 A.2d 713 (N.J.), cert. denied, 423 U.S. 808 (1975).
 <sup>2</sup> See Carco Development Corp. v. Allamuchy Township, No. L-277-01, slip. op. at 54 (Hunterdon County Super. Ct. Apr. 26, 2002).

## **CASTLE**

<sup>&</sup>lt;sup>463</sup> "Wynn Makes His Return to Atlantic City," *The New York Times*, June 28, 1995, at D13.

<sup>&</sup>lt;sup>464</sup> Phil Roura, "Wynn Undeterred by Highway Detour," *New York Daily News*, Dec. 17, 1995, at Spotlight 33.

<sup>&</sup>lt;sup>465</sup> Amy S. Rosenberg, "A Tunnel Straight Through the Heart; To Some Displaced A.C. Residents, Moving to Facilitate Entry to a Casino Is Sheer Trauma," *Philadelphia Inquirer*, Aug. 18, 1998, at South Jersey B1.

Atlantic City. MGM Grand was not going to go forward with two major construction projects at the same time. Making matters worse, the other planned MGM Grand casino project had itself become embroiled in an orgy of financial concessions and eminent domain takings paid for by the public. Lillian Bryant, who all along had been an outspoken critic of the City's tactics and lack of civic responsibility in destroying the neighborhood once named in honor of her father, could say nothing about the situation except, "I told you so."<sup>466</sup>

The tunnel was completed in 2001, leaving neighborhood devastation in its wake.<sup>467</sup> A new casino has taken Steve Wynn's place and is slated to open in mid-2003. To the redevelopment bureaucrats in charge of divvying up Atlantic City on behalf of casino interests, a new casino is worth more than citizens' homes any day.

### Edison Township

A private developer wanted to build a retail center on a vacant, wooded six-acre parcel in Edison. The proposed center would consist of a Walgreens store, a bank and several other shops. After local opposition scuttled the plan, Township officials stepped in and agreed to buy the site for \$5.6 million, to preserve it as open space. To appease the developer, the Township decided to give it another site right across the street from the rejected one. Inconveniently for the Township, the Oak Tree Bus Co. occupied the substitute spot. A consultant hired by the Township concluded that the bus property was "unproductive and stagnant" because of a "pattern of underutilization" and "structural obsolescence." On the basis of the consultant's report, the Township declared the property a redevelopment zone, and began eminent domain proceedings. The Township uses the Oak Tree facility to transport local schoolchildren but apparently isn't concerned about what will happen when they have no buses.<sup>468</sup> Salvatore and Elvassa Quagliariello, owners of the bus facility and three rental homes on the property, opposed the condemnation and have taken the Township to court. The Quagliariello family has lived in Edison for generations, operating the Oak Tree Bus Co. for more than 50 years. Aside from the fact that the Town has no valid public purpose behind its decision to take their property for the benefit of another privately owned business, the Quagliariellos are insulted by their Town's apparent willingness to sell out local industry in favor of more attractive and lucrative chain retailers.469

#### Egg Harbor Township

The state Casino Reinvestment Development Authority (CRDA), in partnership with Egg Harbor Township, plans to acquire 27 privately owned properties on the north side of U.S. 40 over the next five years in an effort to rid the highway of the many lower priced motels that sprang up during the 1950s along this gateway to Atlantic City. The plan is to condemn the properties, raze the structures on them, and then consolidate the land in hopes of attracting a large private development to the area. Supporters of the project hope that they will land a large hotel/office complex to replace the roadside motels, which CRDA executive director James Kennedy believes attract illegal activity because they provide low-rent lodging. However, some of the motel owners are not too excited about the prospect of the City they have supported for decades snatching up their property and replacing them with large, favored developers. As Sunny Chokshi, owner of the Hi Ho Motel, says, "For the last

<sup>466</sup> Amy S. Rosenberg, "Stunned Atlantic City Officials Put up a Good Front," *Philadelphia Inquirer*, Mar. 8, 2000, at C1.
<sup>467</sup> Amy S. Rosenberg, "Atlantic City Tunnel Bears a Human Cost," *Philadelphia Inquirer*, July 22, 2001, at B1.
<sup>468</sup> Charles Toutant, "Small Businesses Standing Ground Against 'Private' Condemnations Try to Stop Use of Eminent Domain that Aids March of Drug Superstores," *New Jersey Law Journal*, Apr. 22, 2002.
<sup>469</sup> Jan Hefler, "Burlco Case Stokes Dispute Over Seizing Land; Pemberton Twp. Plans to Use Eminent Domain to Make Room for a CVS; A National Group Calls the Move Part of a Disturbing trend," *Philadelphia Inquirer*, Apr. 4, 2002.



10 years, I've been good here. I make money. Why should I go anywhere?"<sup>470</sup> The answer to that question, once Egg Harbor lines up a wealthy developer, is "because you have no choice," unless the motels decide to undertake the difficult and expensive process of going into court.

## Englewood

In 1999, the City of Englewood designated a 60-acre redevelopment zone, and began working with developer Hekemian Kasparian Troast LLC (HKT) on a plan to replace an industrial area with an office/retail/residential development. Under the \$500-million proposal, HKT would cover all of the City's costs in condemning properties and relocating the displaced businesses. Also, the developer would own and manage the development.<sup>471</sup> In order to accommodate HKT, City officials claimed that the properties targeted for condemnation were blighted and had caused a steady erosion of Englewood's tax base. However, the City's own study of the area found that active businesses occupied, or had plans to develop in the near future, more than 97 percent of the properties within the redevelopment area. The study also determined that only three of the 37 properties were poorly maintained, and only one building was not occupied and productive. Furthermore, most of the disputed land was located within one single office-industrial park that generated \$1.2 million per year in property taxes.<sup>472</sup>

In June 2001, 19 of the targeted property owners sued Englewood, seeking to reverse its 1999 designation and stop HKT's attempt to steal their land. The owners argued that the City's own findings contradicted the claim that there was "lack of proper utilization of land," which was necessary to justify eminent domain.<sup>473</sup> Those issues never got decided, however, because the owners discovered that the City had failed to publish a proper notice of its 1999 hearings. The lack of notice was a "fatal defect," ruled Judge Jonathan N. Harris, a New Jersey Superior Court judge. The judge dismissed the condemnation actions.<sup>474</sup>

At first, City officials retaliated with a smear campaign in which they distributed fliers portraying the challenging property owners as greedy individuals willing to use "scare tactics" to preserve their "tax haven." David Ulrich, one of the owners, explained why he brought the lawsuit: "I don't think anybody down here is against the concept of redevelopment. Our concern from the beginning is, 'Do not threaten to take away our properties.'" City leaders implied that they would simply approve another plan, without making any technical mistakes this time.<sup>475</sup> In the end, however, HKT came up with a modified development proposal, one that won't require condemning property. This project features 350 apartments, an 11-story office building, three retail structures and a parking garage, and can be accomplished without the City resorting to eminent domain.<sup>476</sup>

## Franklin Township

Residents in the Renaissance redevelopment area along Route 27 are outraged at the Township's attempts to push them out in order to make way for a private big-box retail development. The redevelopment area was adopted in 1995, with little fanfare or opposition. Residents did not protest the plan, mainly because the Township did

<sup>470</sup> John Curran, "Low-Roller Roadside Motels Face Extinction," *The Record* (Bergen County, N.J.), Aug. 24, 2001, at A4.
 <sup>471</sup> Douglass Crouse, "Englewood Redevelopment Plan Unveiled; \$500 M '24-Hour Community' Proposed," *The Record* (*Bergen County, N.J.*), Apr. 18, 2001, at L1.

<sup>472</sup> Douglass Crouse, "16 Sue to Stop Englewood Redevelopment," *The Record (Bergen County, N.J.)*, June 12, 2001, at L3.
 <sup>473</sup> Douglass Crouse, "Expert Questions Plan to Raze Industrial Park," *The Record (Bergen County, N.J.)*, May 9, 2001, at L3.

<sup>474</sup> Douglass Crouse, "Redevelopment Plan Nullified in Englewood," *The Record (Bergen County, N.J.)*, Oct. 13, 2001, at A1.
 <sup>475</sup> Douglass Crouse, "New Sparks in Englewood Redevelopment Battle," *The Record (Bergen County, N.J.)*, Feb. 1, 2002, at L3.

<sup>476</sup> Christina Joseph, "Developer Downsizes His Plan for Englewood," *The Record (Bergen County, N.J.)*, Nov. 7, 2002, at L1.

## Neighbors Rally to Defeat Condemnation Plans in New Brunswick

Bob and Eileen Albert own the Court Tavern in New Brunswick. The bar has been the Albert family business for decades. but since Bob and Eileen took over in 1981, they have booked popular bands and helped turn the area into a popular nightspot. When local developer Omar Boraie decided to build a project next to the Court Tavern with 100 condominiums, an office building and parking deck. he asked the City to condemn the bar to accommodate his project. After the New Brunswick Planning Board backed Boraie's plan, the Alberts organized over 250 people, who packed a public meeting on the project to protest the possible taking. Bowing to this public pressure, the City Council in April 2001 declined to allow the use of eminent domain for Boraie's development.<sup>1</sup>

<sup>1</sup> Sharon Waters, "Small-Business Owners Fight City's Big Plans," *Home News Tribune (East Brunswick, N.J.)*, Dec. 15, 2002, at A1.

## "I don't think anybody down here is against the concept of redevelopment. Our concern from the beginning is, 'Do not threaten to take away our properties.""

not bother to provide notice of public hearings to any of the affected owners, so they weren't aware that their properties could be taken under the plan. Now, however, the Township wants to bring Home Depot, Target and a supermarket to the Renaissance area, and it is not about to let the property owners stand in its way. A private developer has purchased some properties for the proposed retail center, and hopes that the Township will acquire the rest through eminent domain.<sup>477</sup>

## New Brunswick

Frederick Haleluk owns Mister Ice Bucket, a small business in New Brunswick that specializes in making ice buckets for hotel chains. Haleluk keeps his property in good shape-better than most in the area. It sits on a prime location at a busy local intersection. Unfortunately, the New Brunswick Housing and Urban Development Authority decided that Haleluk's business is "not the best utilization" of a site that is "key to developing the rest of the area." Since Mister Ice Bucket is an industrial business in the middle of an area the City has recently designated for retail uses, the redevelopment agency is trying to force Haleluk to sell his property to a private developer who wants to build a Walgreens pharmacy. The developer. Jack Morris, is the same one behind the condemnation of the bus facility in Edison for a Walgreens. In early 2002, Haleluk was served with condemnation papers. The matter is on hold until another location can be found for Mister Ice Bucket, but Haleluk says all the alternatives are too expensive or far away. Most of his employees live in the neighborhood and do not own cars, so any move will likely cost them their jobs. The City believes, on the other hand, that a nice, new chain drugstore on that prime corner is worth all those lost jobs.<sup>478</sup>

## New Brunswick

In the late 1980s, Jamaican immigrant Newell White bought a blighted building on rundown George Street in New Brunswick. He completely gutted the building and transformed it over the next decade into two popular dining draws, the Green Grotto restaurant and Jamaican Delight takeout. However, the City wants to take White's restaurants through eminent domain and give the property to favored developers as part of an amendment to the Lower George Street Redevelopment Plan. White does not want to give up his prime location, especially after he invested in the area at a time when the government left it to deteriorate. Though no specific development plans are in place, the City's planning director says that it's "probably not a realistic possibility to construct any new development around White's existing building." About 3,000 local residents signed a petition asking that the City refrain from taking White's property.<sup>479</sup> but still the planning board formally recommended in December

<sup>477</sup> "Residents Fear Route 27 Development," *Somerset Spectator*, Nov. 16, 2002.
<sup>478</sup> Charles Toutant, "Small Businesses Standing Ground Against 'Private' Condemnations Try to Stop Use of Eminent Domain that Aids March of Drug Superstores," *New Jersey Law Journal*, Apr. 22, 2002.

<sup>479</sup> Sharon Waters, "George St. Eateries Feeling the Squeeze," *Home News Tribune (East Brunswick, N.J.)*, Nov. 24, 2002, at A1



2002 that the City Council approve the redevelopment plan amendment that will now allow the City to take White's restaurants.  $^{480}$ 

### Pemberton Township

Dr. Khatoon Ginwala owned a small building in the Browns Mills section of Pemberton Township, where she had run her solo obstetrical practice for 10 years. Also operating in the building was a small clothing store. CVS Pharmacy, the nation's largest drugstore chain, wanted to open a new store on a parcel that included two vacant lots and Ginwala's building. Pemberton already had four locally owned pharmacies, but the Township Council, which had slapped Browns Mills with the "redevelopment area" label in 1996, made clear that the Town would condemn Ginwala's property if she refused to sell it to CVS's developer. Faced with the prospect of eminent domain, Ginwala felt compelled to reach an agreement with the developer.<sup>481</sup>

#### West Orange

769 Associates LLC owned a parcel of property in West Orange consisting of a medical office building and its parking lot. This parcel is located between a main road and two large tracts of land owned by Nordan Realty and Bel-Aire, both of which are private developers. In 1986, the Township planning board gave preliminary approval for a 95-home subdivision on the Nordan site, and a 198-home subdivision on the Bel-Aire site. The resolution provided access to the new subdivisions via Cedar Avenue, an existing but unimproved gravel/dirt road that would have to be paved and outfitted with utility lines, sidewalks and drainage sewers in order to meet local standards.

The Township's plan encountered heavy opposition from residents who lived close to the proposed road. Bowing to this pressure, the Township determined that it should study an alternative means of access to the two proposed subdivisions. The resulting study, presented in December 1991, recommended the construction of a new roadway on land that included one half-acre of the 769 Associates property, passing within several feet of the medical office building.

In July 1992, the Township entered into an agreement with Nordan Realty to implement the 1991 traffic study. The agreement also provided that Nordan would negotiate with the adjoining property owners to secure the necessary right-of-way access to its subdivision. If such negotiations failed, after a reasonable time the Township was obligated to acquire the property through eminent domain, with Nordan reimbursing the Township for all of its acquisition costs.

In January 1998, the Township began condemnation proceedings against the 769 Associates property. The case wended its way through the courts. The trial court ruled that the Township could take the property. The Appellate Division reversed the trial court's decision in July 2001, finding that the primary beneficiary of the condemnation was the private developer, not the public.<sup>482</sup> The New Jersey Supreme Court then reversed that decision, holding that the case involved condemnation for a public road, and a public road is a public use. Commenting on the 1998 Banin decision, the court held that pretextual condemnations were still impermissible, but that this condemnation was not pretextual and therefore could go forward.<sup>483</sup> The Institute for Justice filed an amicus brief in the New Jersey Supreme Court in support of 769 Associates.

<sup>&</sup>lt;sup>480</sup> Sharon Waters, "Small-Business Owners Fight City's Big Plans," *Home News Tribune (East Brunswick, N.J.)*, Dec. 15, 2002, at A1.

<sup>&</sup>lt;sup>481</sup> Jan Hefler, "Pact Reached on Property Sale," *Philadelphia Inquirer*, Apr. 20, 2002.

<sup>&</sup>lt;sup>482</sup> See Township of West Orange v. 769 Associates LLC, 775 A.2d 657, 664 (N.J. Super. Ct. App. Div. 2001).

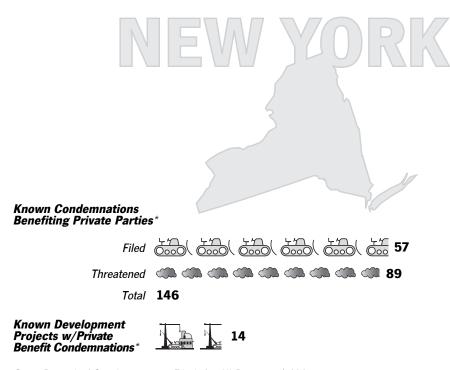
<sup>&</sup>lt;sup>483</sup> See Township of West Orange v. 769 Associates, LLC, 800 A.2d 86, 94 (N.J. 2002).



## 0 v e r v i e w

New Mexico is one of a handful of states that have no reported condemnations for private parties between 1998 and 2002. Its local governments have respected constitutional limits on government power, and home and business owners can feel secure in the knowledge that their rights in this area will be respected.





State Record of Condemnations Filed, for All Purposes:<sup>+</sup> 490

## Overview

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New York is perhaps the worst state in the country for eminent domain abuse. Just in the past five years, it has condemned small businesses for the New York Stock Exchange, The New York Times, Costco, and Stop & Shop. New York cities also have condemned the future home of an inner-city church for commercial development and forced the closure of a family furniture-making business in favor of a Home Depot. There have been at least 14 private use projects in New York between 1998 and 2002, taking at least 57 businesses. This enthusiasm for eminent domain is encouraged by the courts, which rubber stamp every condemnation and seem to consider any kind of private undertaking a public use. New York citizens, however, are beginning to wake up to the problems with eminent domain abuse and are beginning to object. One community in New Rochelle was successful in fending off a plan to take their homes and businesses for an IKEA. Other activism has been less effective, but as groups become more organized, they may well begin to have more success in defeating plans to take their property for other private parties.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened.

<sup>†</sup>These figures, covering only three years, were compiled by the New York Unified Court System and represent every county except Monroe County, for which information was not available. These numbers look suspiciously low in comparison to other states, but we have not been able to further verify them. Condemnations for traditional public uses are included. At the time of publication, no figures for 2001 or 2002 were available for any of New York State.

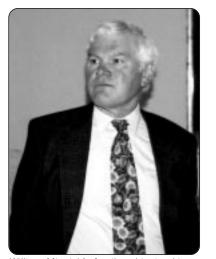
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## LEGISLATIVE ACTIONS

The New York state legislature recently considered a number of bills that would have changed the state's decidedly pro-condemnation eminent domain laws. Three competing bills would all have strengthened the rights of property owners by requiring delivery of written notice to owners prior to public hearings regarding condemnation of their property, and one would have required notice of the approval of the condemnation power. These bills died before any could pass the legislature.<sup>484</sup>

Private Use Condemnations



William Minnich's family cabinetmaking business will be replaced by Home Depot.

## East Harlem

William Minnich and his nephew, Bill Minnich, own Minic Custom Woodwork in East Harlem, a thriving custom-made furniture and cabinetry business that has been in their family for more than 70 years.<sup>485</sup> The Minnichs bought their East Harlem building in 1981, and devoted more than \$250,000 to renovating the building and adding permanent woodworking fixtures. The area around the Minnichs' building consisted of a diverse mix of residential, retail and manufacturing. However, the Empire State Development Corporation (ESDC) was unimpressed by the small businesses and local character of East Harlem. In 1998, ESDC came up with a plan to condemn a number of businesses, including the Minic Custom Woodwork building, in order to transfer the properties to one of the largest developers in New York. The Minnichs' building and nearby property would become a Costco and Home Depot.<sup>486</sup>

When the final approval for the redevelopment came through, the Minnichs and many of their neighbors filed a lawsuit challenging

the project. However, the trial court ruled that the Minnichs had missed an earlier deadline to appeal based on a prior notice of "determination and findings," which authorized condemnation of the property at some point in the future. The notice did not mention the right to appeal.<sup>487</sup> The Minnichs then brought a federal lawsuit challenging the constitutional sufficiency of the notice requirements of the New York eminent domain law.

Unfortunately, the federal court also ruled that the Minnichs should have brought up their claims before, during the state court proceeding in which the court ruled that they were too late to challenge the condemnation. (The court also ruled that knowledge of the deadline should be imputed to them through their state court lawyer, even though the Minnichs themselves didn't know about it.)<sup>488</sup> The Institute for Justice represented the Minnichs, along with other New York property owners, in the federal lawsuit. Exhausted after

<sup>485</sup> Phil Reisman, "Owners of Harlem Business Take on City Hall," *The Journal News (Westchester County, N.Y.)*, Feb. 22, 2001, at 1B.

<sup>486</sup> Douglas Montero, "Harlem's Being Built Up at Little Guy's Expense," *New York Post*, Aug. 6, 1999, at 20.
 <sup>487</sup> *In the Matter of East Harlem Business & Residence Alliance, Inc.*, 709 N.Y.S. 2d 174, 175 (N.Y. App. 2000).
 <sup>488</sup> *Minnich v. Gargano*, No. 00 Civ. 7481, 2001 U.S. Dist. LEXIS 14760, at \*17-\*18 (S.D.N.Y. Sept. 20, 2001).



<sup>&</sup>lt;sup>484</sup> See A.B. 2738, 224th Sess. (N.Y. 2002); see A.B. 11849, 224th Sess. (N.Y. 2002); see A.B. 7220, 224th Sess. (N.Y. 2002).

years of fighting to keep their building and their business, the Minnichs reluctantly agreed to sell. It will mean the end of their successful family business. They cannot reopen elsewhere, both because they cannot find another suitable location and because the permits they would need are almost impossible to obtain in New York.

## Glen Cove

The Glen Cove Community Development Agency adopted a resolution to condemn a three-story glass and brick enclosed shopping mall owned by Ardaas, Inc. Ardaas had recently purchased the property and intended to convert the mall into a catering hall/restaurant, a valid use under local zoning laws. The City's "public use" in taking the property from Ardaas was to reconvey it to a privately owned department store. The New York Appellate Division upheld Glen Cove's action. The court based its decision on the City's assertions that a local department store (which had previously expressed interest in purchasing the mall) would attract other businesses, strengthen the local economy and revitalize the area.<sup>489</sup>

## Ithaca, NY

The City of Ithaca has begun condemnation proceedings that will benefit one of two building owners. Gus Lambrou and Thomas Pine each own one half of a commercial building, where Pine also runs his 30-yearold office supply business. Lambrou, who is also a developer, is partnering with Cimenilli Development Co. in an office space/hotel project. Cimenilli and Pine negotiated for several months, but when Cimenilli couldn't buy the property voluntarily, it requested that the City condemn the building so that Cimenilli and Lambrou could proceed with their project.<sup>490</sup>



Tom Pine stands in front of his office supply store in Ithaca, NY. His building is slated for demolition for the Ciminelli project.

#### Jamestown

The Jamestown Urban Renewal Agency condemned two properties as part of the City's west side redevelopment effort. Mattia Miele owns Mattia's Restaurant, which sits on one of the sites. William and Norma Bendo own the other condemned property, which they lease to a donut shop. Jamestown has consolidated most of the properties in the redevelopment area, but wants to remove these two businesses to make way for future private development. Both Miele and the Bendos challenged the takings, arguing that there was no public purpose involved in the agency's actions. However, the New York state courts handed both property owners defeats, clearing the way for the agency to take them using eminent domain. The Bendos appealed their case to the Appellate Division, which in February 2002 upheld the taking.<sup>491</sup> According to the court, the City's stated purpose in condemning the Bendos' building, namely to create economic development stimulus, constitutes a valid public purpose.<sup>492</sup>

## New York City

The New York Times worked out a deal whereby the Empire State Development Corp. (ESDC) would condemn an entire Times Square city block on Eighth Avenue between 40th and 41st Streets for a new 52-

<sup>489</sup> See *In re Glen Cove Comm. Redev. Agency*, 712 N.Y.S.2d 553, 554 (N.Y. App. 1999).
 <sup>490</sup> Lauren Bishop, "Property Owner Says Ciminelli offered \$746K Office, Hotel Plan Criticized," *The Ithaca Journal*, (Dec. 3, 2002).

<sup>491</sup> Terry Frank, "Courts OK Eminent Domain Proceedings for 2 Restaurants," *The Buffalo News*, May 14, 2002, at B3. <sup>492</sup> *Bendo v. Jamestown Urban Renewal Agency*, 738 N.Y.S. 2d 615, 616 (N.Y. App. 2002).

## The price to be paid for the Times' new digs is \$84.94 million, or \$62 per square foot, compared with \$130 per square foot paid in a private transaction for a nearby parcel.

story office tower that will serve as the Times' new home. The project required that the ESDC condemn and raze 10 properties and a parking lot.

The targeted properties have been subject to condemnation since 1981, when the block was identified under the 42nd Street redevelopment project as a possible site of a merchandise mart. That development never materialized, but the hovering sword of eminent domain depressed real estate values and inhibited private development in the area for two decades. Ironically, most of the blight that served as rationale for the original redevelopment plan is now gone, but now that prosperity has returned to Times Square, the City is moving in to take property from those who stuck with the area in harder times in favor of wealthier development.

William and Stratford Wallace's family has owned the property at 620 Eighth Avenue since the turn of the 20th century, and the Wallaces had recently spent over \$3 million refurbishing the six-story building on his lot, attracting two major tenants during the late 1990s (the Taylor Business Institute and SAE Institute). Sidney Orbach, along with his two brothers, owned a 16-story building located at 265 West 40th Street with 30 different tenants, including Arnold Hatters and B&J Fabrics. The Sussex House dormitory housed 140 students. All of these residences and more than 30 thriving businesses will be swept away in order to accommodate the New York Times. <sup>493</sup>

The price to be paid for the Times' new digs is \$84.94 million, or \$62 per square foot, compared with \$130 per square foot paid in a private transaction for a nearby parcel. In addition, the Times and its developer will recoup any cost of acquisition that exceeds \$84.94 million in rent concessions, a figure the Times itself estimates may come to \$29 million. Buried in the 99-year lease agreement is an option provision stating that after 29 years, the Times may buy the site in exchange for one dollar.<sup>494</sup>

The ESDC officially condemned the properties in September 2001, before the Times' developer had made any attempt to buy them. The City and the ESDC tried their best to portray the booming Times Square area as a center of prostitution, drug use and loitering. According to a memorandum by state officials, the buildings "generally present a shabby front entrance" to Times Square, and are "developed to only a fraction of their theoretical capacity."<sup>495</sup> The owners sued to prevent the takings, but in April 2002 the trial court sided with the Times and its developers.<sup>496</sup> On appeal, the Appellate Division upheld the trial court's ruling, and allowed the condemnations to go forward.<sup>497</sup> The New York Court of Appeals refused to stay the condemnations.<sup>498</sup> **Update:** In February 2003, the U.S. Supreme Court declined to hear the case.<sup>499</sup>

<sup>493</sup> David W. Dunlap, "Blight to Some Is Home to Others; Concern Over Displacement by a New Times Building," *The New York Times*, Oct. 25, 2001, at D1.

<sup>494</sup> Gideon Kanner, "Feeding 'Times'," *The National Law Journal*, Jan. 7, 2002, at A29.

<sup>495</sup> David W. Dunlap, "Blight to Some Is Home to Others; Concern Over Displacement by a New Times Building," *The New York Times*, Oct. 25, 2001, at D1.

<sup>496</sup> "Below Market Rate Lease to Newspaper for New Headquarters Use Was Not 'Waste'; West 41st Street Realty, LLC v. City of New York," *New York Law Journal*, Apr. 4, 2002, at 17.

<sup>497</sup> See In re Application of West 41st Street Realty LLC, 744 N.Y.S. 2d 121, 126 (N.Y. App. 2002).

<sup>498</sup> In re Application of West 41st Street Realty LLC, 749 N.Y.S. 2d 476 (N.Y. 2002).

<sup>499</sup> West 41st Street v. New York State Urban Development, 2003 U.S. LEXIS 1159 (Feb. 24, 2003).



The Times, which has taken a strong editorial position against such redevelopment boondoggles that swindle individuals out of their property,<sup>500</sup> has taken a decidedly different corporate stance in the case of its own windfall. As Michael Golden, vice chairman and senior vice president of The Times Company, said in February 2001, "It's our responsibility to all of the stakeholders in this company to be as competitive as we can be."<sup>501</sup>

### New York City

One of the more unusual eminent domain situations we have seen involves the efforts of the Lower East Side Tenement Museum at 97 Orchard Street in Manhattan to acquire the nearly identical building next door, 99 Orchard Street. The Tenement Museum, a private, nonprofit museum that first opened in 1988, attempts to recreate for visitors the experience of the millions of poor immigrants who passed through the area after arriving on Ellis Island in the early 20th century. The museum claims that it must have more space to accommodate an elevator for the handicapped and to double the number of visitors to the museum. The problem for the museum is that the owners of No. 99 do not want to sell their building.<sup>502</sup> So the museum



The community rallied on April 28, 2002 to protest the proposed transfer of a property to The Lower East Side Tenement Museum.

has asked the Empire State Development Corporation (ESDC) to work on its behalf and condemn No. 99 for the expanded museum facilities.<sup>503</sup>

The building next door is indeed a former tenement building, but it has been newly renovated as a modern, 15unit apartment building and has a thriving restaurant on the ground floor. Lou Holtzman and his wife, part-owners of the building, live in one of the apartments. Holtzman grew up in the building and helped his mother run a small business there. His family has owned it since 1910. He believes that using eminent domain to convert actual housing that is not blighted into a fake re-enactment of urban blight from a century ago is not a valid "public use," and has vowed to fight the museum and ESDC.<sup>504</sup>

<sup>500</sup> See, e.g., Nicholas D. Kristof, "Bush and the Texas Land Grab," *The New York Times*, July 16, 2002, at A17.
 <sup>501</sup> David W. Dunlap, "Blight to Some Is Home to Others; Concern Over Displacement by a New Times Building," *The New York Times*, Oct. 25, 2001, at D1.

<sup>502</sup> Clyde Haberman, "NYC: Your Tired, Your Poor, Your Building?," *The New York Times*, Feb. 13, 2002, at B1.
 <sup>503</sup> Verena Dobnik, "Tenement Museum Wants to Expand, Oust Residents of Former Tenement Next Door," *AP Wire*, Apr. 21, 2002.

<sup>504</sup> Clyde Haberman, "NYC: Your Tired, Your Poor, Your Building?," *The New York Times*, Feb. 13, 2002, at B1.



After a hearing on the Tenement Museum's application to have 99 Orchard Street condemned, the ESDC allowed the application to lapse in May 2002 without any comment. However, the agency did not give Holtzman any assurance that the building will not be condemned at some point in the future. The Tenement Museum still wants the building,<sup>505</sup> so property rights advocates nationwide will be closely following the developments in this case.

#### New York City

The New York Stock Exchange (NYSE), a private corporation, was looking for a location in lower Manhattan on which to build a new headquarters for its operations. NYSE envisioned a gleaming 900-foot skyscraper above its new stock-trading floor, and eventually decided on a site across the street from the company's current location. Inconveniently for NYSE, this location was occupied by several residential and commercial properties. Among them were two office buildings owned by J.P. Morgan Chase, an apartment building owned by Rockrose Development and two other properties, both owned by the Wilf family.<sup>506</sup>

Rather than let the trifling matter of private ownership stand in the way of its plans, NYSE decided its financial interests would be best served by hinting to the City that it might be "forced" to leave Manhattan altogether if it could not enlist the City's help in acquiring the needed properties.<sup>507</sup> Not surprisingly, the New York City Economic Development Corp. complied with NYSE's wishes, and in January 2001 began the process of condemning the apartment building at 45 Wall Street. In support of its actions, the agency touted the "public benefit" that would be derived from enhancing Manhattan's position as a worldwide financial center, as well as the theory that NYSE's departure from the city's financial district would be detrimental to the city and state economy.<sup>508</sup>

The tenants' association of 45 Wall Street challenged the development agency's public use determination, but in October 2001 a state appeals court agreed with the agency's findings, citing the familiar platitudes of public benefit, increased tax revenues and economic development. Amazingly, the court found that the "proposed project will incidentally confer a private benefit," even though the agency's sole rationale for supporting the condemnation was to facilitate construction of NYSE's new facility (which is anything but incidental to the overall project).<sup>509</sup>

<sup>505</sup> Denny Lee, "Neighborhood Report: Lower East Side; A Tenement Owner Gets a Reprieve as a Museum Peers Over His Shoulder," *The New York Times*, Aug. 11, 2002.

<sup>506</sup> Eric Herman, "NYSE Building Site May Cost City More," *Daily News (New York, NY)*, Dec 22, 2000, at Business 93.
 <sup>507</sup> Andrew Rice, "NYSE's Chairman Unplugs His Plans for a New Exchange," *The New York Observer*, Dec. 3, 2001, at 1.
 <sup>508</sup> See *In re Application of Fisher*, 730 N.Y.S. 2d 516, 516-17 (N.Y. App. 2001).
 <sup>509</sup> *Id.* at 516-17.

to convert actual housing that is not blighted a century ago is not a valid "public use." In the wake of the September 11, 2001 terrorist attacks, the NYSE project stalled. The Giuliani administration was unable to find a developer willing to build a huge skyscraper in lower Manhattan. City officials are still holding onto some of the properties originally requested by NYSE, in hopes that a new facility of some kind may eventually be built. Until NYSE decides what it wants to do, however, the city and its taxpayers are left holding the bag.<sup>510</sup> The redevelopment agency gave 45 Wall Street and the two office buildings back to their owners. The City will continue to pay up to \$1 million per month in rent until 45 Wall Street is fully leased. The 435 apartments had been fully leased when the building was condemned. In all, the City and its redevelopment agency lost \$109 million on this ill-fated deal.<sup>511</sup>

## North Hempstead

St. Luke's Pentecostal Church, led by Pastor Fred Jenkins, had been saving for more than a decade to purchase property and move out of the rented basement where it holds services. It bought a piece of property on Prospect Avenue to build a permanent home for its congregation. Before purchasing the property, the church obtained a list of exactly what it would need to do to get all the necessary permits for the building. After the purchase, the building department denied the permits because of insufficient parking, an issue never before mentioned.<sup>512</sup>

After successful litigation to acquire the parking variance, the North Hempstead Community Development Agency condemned the property for private retail development. Unbeknownst to St. Luke's and the previous owners, the building had been slated for redevelopment in 1994.<sup>513</sup> Nobody had bothered to tell St. Luke's during the discussions about the building permits or when it was struggling to get the parking variance. The head of the agency even testified against issuing the parking variance, but never mentioned that St. Luke's was only wasting its time and money because he planned to condemn the property regardless of the outcome of the parking situation.<sup>514</sup>

St. Luke's conducts extensive community outreach, including paying for members' funerals, helping the homeless, assisting parishioners with drug counseling, and providing rent money and heating oil to needy fam-

<sup>510</sup> Andrew Rice, "NYSE's Chairman Unplugs His Plans for a New Exchange," *The New York Observer*, Dec. 3, 2001, at 1.

<sup>511</sup> Charles V. Bagli, "45 Wall St. Is Renting Again Where Tower Deal Failed," *The New York Times*, Feb. 8, 2003, at B3.

<sup>512</sup> Stewart Ain, "Of Spiritual vs. Urban Renewal," *The New York Times*, Apr. 16, 2000, at 14LI 3.

<sup>513</sup> In the Matter of the Application of North Hempstead Community

*Redevelopment Agency*, 2002 N.Y. Misc. LEXIS 1488, at \*1-\*2 (Aug. 29, 2002). <sup>514</sup> Stewart Ain, "Of Spiritual vs. Urban Renewal," *The New York Times*, Apr. 16, 2000, at 14LI 3.

## New Rochelle Activism Defeats Plans to Condemn Neighborhood for IKEA

#### New Rochelle

In 2001, local residents achieved success in their effort to prevent IKEA from opening a huge superstore in their suburban community. The Swedish furniture company approached New Rochelle officials with the idea of leveling the City Park neighborhood in favor of a 309,000-square foot store. City Park contains a mix of older homes, small businesses and small industrial properties. In all, the IKEA proposal would have removed 34 homes, 29 businesses and 2 churches; it would have also displaced 160 residents and about 400 workers.<sup>1</sup> The City declared the neighborhood blighted, a first step toward eventual seizure of the neighborhood through eminent domain.<sup>2</sup> Outraged residents rallied to stop the plan from going forward, and at the public hearing devoted to the subject, 222 people spoke against the IKEA store, while only four spoke in favor.<sup>3</sup> The close-knit neighbors organized, holding demonstrations, picketing the Swedish Consulate and soliciting support from adjacent towns.<sup>4</sup> In the face of such vociferous community opposition, IKEA dropped its plans and announced it would no longer seek to locate in the fully occupied neighborhood, claiming it was due to excessive costs. Over time, City officials grudgingly admitted that their community was overwhelmingly opposed to the

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project.<sup>5</sup> The City Council eventually voted the IKEA plan down.<sup>6</sup> Finally, in late 2002, the City Council withdrew the blight designation,<sup>7</sup> so residents and business owners can sleep at last.

<sup>1</sup> Debra West, "IKEA Wants to Move In, But Neighbors Fight Moving Out," *The New York Times*, Mar. 7, 2000, at B1. <sup>2</sup> Ken Valenti, "Council Calls IKEA's Proposed Site Blighted," *The Journal News (Westchester County, NY)*, July 21, 1999, at 1B. <sup>3</sup> Debra West, "A Revolt Over Bookshelves and Bedroom Sets; In New Rochelle, IKEA Finds Itself in a Fight with Sophisticated and Highly Organized Opponents," *The New York Times*, Jan. 21, 2001, at 14WC1.

<sup>4</sup> Lynn Cascio, "Protestors March to Embarrass IKEA," *The Journal News (Westchester County, NY),* May 25, 2000, at 5B. <sup>5</sup> Debra West, "A Revolt Over Bookshelves and Bedroom Sets; In

New Rochelle, IKEA Finds Itself in a Fight with Sophisticated and Highly Organized Opponents," *The New York Times*, Jan. 21, 2001, at 14WC1.

<sup>6</sup> Elizabeth Ganga & Ken Valenti, "IKEA Drops Plan for Store," *The Journal News (Westchester County, N.Y.)*, Feb. 1, 2001, at 1A. <sup>7</sup> New Rochelle, N.Y. Resolution Rescinding Resolution No. 178 of 1999 Entitled "Resolution Finding the Fifth Avenue Industrial Area Appropriate for Urban Renewal and Designating Said Area as the Fifth Avenue Urban Renewal Area (Dec. 10, 2002). ilies. However, the church property was condemned for private retail development.<sup>515</sup>

When St. Luke's tried to object to the condemnation, the NHCDA successfully argued that St. Luke's opportunity to object had been lost in 1994, before the church had even bought the property. New York has a 30-day window for objecting to condemnations, and the window happens right after the agency approves a redevelopment plan, often long before the condemnation actually takes place.<sup>516</sup> St. Luke's then filed a federal lawsuit, along with other New York plaintiffs and represented by the Institute for Justice, challenging the New York procedures that allowed them to lose their property without proper notice of their opportunity to object. After title passed to the agency and during the federal lawsuit, St. Luke's discovered that the time limit had never applied, because the condemnation was under an exception to those particular procedures. St. Luke's then tried to reopen the condemnation, based on this misinformation. In August 2002, the New York state court denied St. Luke's motion to reopen. The court held not only that state eminent domain laws do not require the NHCDA to provide actual notice to the owners when a property is designated for condemnation,<sup>517</sup> but also that inadvertent failure to provide a condemnee with actual notice does not invalidate the taking.518

### Ossining

Cappelli Enterprises, a private developer, is planning to redevelop 4.5 acres along the Hudson River waterfront in Ossining. The land was formerly occupied by a small chemical plant and a bus parking lot, until the Village condemned those properties and transferred them to the developer. Cappelli Enterprises will build Harbor Square, a retail



Leslie Jenkins, Pastor Fred Jenkins, of St. Luke's Pentecostal Church, which lost the site for its permanent home when it was condemned for private development.

<sup>515</sup> Marni Soupcoff, "North Hempstead Bulldozes Constitutional Rights," *The Westbury Times (Mineola, NY)*, Feb. 22, 2002.

<sup>516</sup> Victor Manuel Ramos, "In North Hempstead: A Spiritual Homecoming Deferred; Redevelopment Claims Dream of Church's Building," *Newsday*, Feb. 4, 2001, at G17.

 <sup>517</sup> In the Matter of the Application of North Hempstead Community Redevelopment Agency, 2002 N.Y. Misc. LEXIS 1488, at \*6-\*7.
 <sup>518</sup> Id. at \*7.



and housing development. The centerpiece of Harbor Square will be a 180-unit upscale apartment complex.<sup>519</sup>

### Port Chester

Bill Brody bought several adjoining, dilapidated buildings in downtown Port Chester, and spent several years restoring them.<sup>520</sup> Eventually, Brody rented space to ten small businesses.<sup>521</sup> As Brody was improving his buildings, so were other local business owners, like Roqui Vallejo who built an auto repair shop in the area; Pablo Torres, a Dominican grocer; Robinson Plasencia, a Peruvian bakery; and Joan Bischoff, who owned Mediterranean Living, an imported home furnishings store.<sup>522</sup> By 2000, the area was thriving, with an eclectic mix of antique shops, Hispanic restaurants and grocery stores, specialty retail, small manufacturing, and apartment buildings. That's when the Village unveiled a plan to redevelop downtown Port Chester by using eminent domain to force property owners to sell their land to a private developer who wanted to turn the area into a big box shopping center.<sup>523</sup> The bait-andtackle shops in the marina would become a parking area, and the surrounding businesses would become a Costco and Stop & Shop.<sup>524</sup> In all, 171 residents and merchants would be forced to relocate.525

<sup>519</sup> Elsa Brenner, "Plan for Ossining Waterfront Is Scaled Down," *The New York Times*, Jan. 27, 2002, at K7.
<sup>520</sup> *Minnich v. Gargano*, 2001 U.S. Dist . LEXIS 372, at \*8 (S.D.N.Y. Jan. 18, 2001), *vacated*, 261 F.3d 288 (2d Cir. 2001).

<sup>521</sup> Laura Mansnerus, "Fairness of New York Condemnation Procedures at Issue in Property Owners' Lawsuit," *The New York Times*, Oct. 8, 2000, at A44.

<sup>522</sup> Al Baker, "Port Chester Merchants Angered By Relocation," *The New York Times*, June 18, 2000, at 14WC5
<sup>523</sup> See, e.g., Len Maniace, "A Day in the Life of Port Chester," *The Journal News (Westchester County, N.Y.)*, Apr.
23, 2002, at 1K; Len Maniace, "Living Here in Westchester," *The Journal News (Westchester County, N.Y.)*, Oct. 20, 2002, at 84X; Len Maniace, "Village May Get New Catering Hall," *The Journal News (Westchester County, N.Y.)*, Sept. 9, 2002, at 1B.

<sup>524</sup> Ron X. Gumucio, "G & S Seeks Funds," *The Journal News* (*Westchester County, N.Y.*), June 8, 2001, at 1A.
<sup>525</sup> Al Baker, "Port Chester Merchants Angered By Relocation," *The New York Times*, June 18, 2000, at 14WC5.

## Former Property Owner Loses Fight to Regain Land

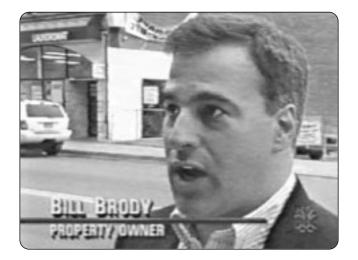
Domenick Vitucci owned a parcel of property on which he operated a business repairing and selling used trucks. In 1992, the New York City School Construction Authority condemned Vitucci's property for construction of a public school. However, some time later the City abandoned its plan to build the school. Instead, the City determined that the area would benefit from an expansion of the facilities of Blue Ridge Farms, a large-scale food production business whose land surrounded Vitucci's property, and which had long desired the land.

When the City tried to sell the property to Blue Ridge Farms, Vitucci sued, seeking to invoke his right under section 406(A) of the New York Eminent Domain Procedure Law. That provision states that when a condemning authority later abandons the project for which the property was acquired, the condemnor may not dispose of the property for private use within ten years of acquisition without first offering the former owner the right of first refusal to purchase it back. After a long and heated court battle, a state appellate court in late 2001 upheld a lower court's ruling that the City's urban renewal plan furthered a legitimate public purpose by creating jobs, providing local infrastructure and stimulating the local economy. According to the court, the property's sale to a private entity serves primarily a public purpose, the court held, notwithstanding that a private entity directly receives a substantial benefit, and therefore is not subject to the refusal rights set forth in EDPL 406(A).<sup>1</sup>

Given the court's interpretation of the statute, it's hard to imagine under what circumstances a former owner could buy his land back. In Vitucci's case, the City abandoned the original project and was selling the property to a private party. Apparently that's not enough. This case highlights a frequent problem with condemnations—the government agency claims some public-sounding purpose for the condemnation but after the agency gets the property, it abandons the original purpose and conveys the property to a private party. In many states, and now in New York, former owners are simply out of luck.

<sup>1</sup> See Vitucci v. New York City School Construction Authority, 735 N.Y.S. 2d 560, 562 (N.Y. App. 2001).

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William Brody bought his Port Chester buildings four years ago as an investment to support his wife and his three young daughters. He spent years renovating and restoring the structures, but just as he finished, the Village of Port Chester announced that it would condemn the buildings and give the land to a private developer to turn into part of a Stop & Shop parking lot.

Brody received a notice that the Village was condemning his buildings and handing them over to a private developer for part of the Stop & Shop and its parking lot. (The Village also condemned many other buildings, businesses and apartments for the project.) Brody wanted to argue that the taking was not for a valid public use, but discovered that he had missed a 30-day deadline he never knew about.<sup>526</sup> The Village had published its public use determination and authorization to condemn in the legal notices section of the newspaper.527 Brody had 30 days from the publication date to challenge the eventual taking of his property, although that fact was not mentioned in the notice. In any event, Brody did not see the notice and therefore did not challenge the future taking at that point.528 To add insult to injury, the Village also sent Brody a \$40,000 bill for sidewalk improvements to help out the new owners.<sup>529</sup>

Brody, along with other New York property owners and represented by the Institute for Justice, brought a federal lawsuit challenging the lack of notice under New York's eminent domain procedure laws. While he initially obtained a preliminary injunction against the taking, that injunction was reversed on appeal.<sup>530</sup> Then, the federal trial court held that Brody should have raised his claims in state court (even though the statute said he could not), and that he therefore could not challenge the procedures in federal court.<sup>531</sup> That decision is currently on appeal to the U.S. Court of Appeals for the Second Circuit.

#### Warwick

After the Grand Union grocery chain went bankrupt, drugstore giant CVS Pharmacy bought out the leases at a number of the grocery's former stores. The closure of Grand Union left Warwick's Main Street without a grocery store; the closest one was now a mile up the road. So Michael Newhard, the Mayor of Warwick, decided that he would force CVS to share its space with a new grocery store. When CVS refused, Newhard began proceedings to condemn the property. Coincidentally, the Mayor is one-fifth owner of another small pharmacy on Main Street, which his brother and sister run. He claims that his decision to condemn CVS was not motivated by his personal interests, but he had to admit that his family's drugstore would have failed

<sup>526</sup> See Minnich v. Gargano, 2001 U.S. Dist. LEXIS 14760, at \*19-20 (S.D.N.Y. Sept. 20, 2001).

<sup>528</sup> Minnich v. Gargano, 2001 U.S. Dist. LEXIS 14760, at \*7, 20 (S.D.N.Y. Sept. 20, 2001).

<sup>529</sup> Jessica Cohn, "Businesses Object to Sidewalk Project," *The Journal News (Westchester County, N.Y.)*, Mar. 9, 2000, at 1B.

<sup>530</sup> Brody v. Village of Port Chester, 261 F.3d 288 (2d Cir. 2001); "Port Chester Wins Eminent Domain Appeal," Westchester County Business Journal, Aug. 20, 2001, at 2.

<sup>531</sup> Minnich v. Gargano, 2001 U.S. Dist. LEXIS 14760, at \*16-17, 21-22 (S.D.N.Y. Sept. 20, 2001).



<sup>&</sup>lt;sup>527</sup> "Lights, Camera…," *Westchester County Business Journal*, July 9, 2001, at 1; see also *Minnich v. Gargano*, 2001 U.S. Dist. LEXIS 14760, at \*7 (S.D.N.Y. Sept. 20, 2001).

the same "blight study" to which the Village subjected the Grand Union building. In a grievous misinterpretation of American civics and historical tradition, the Mayor believes that "for the Village to be in charge of its destiny is truly American." Local property owners, on the other hand, are shocked that their town would trample on property rights by seizing property as a means of controlling who gets to do business there.<sup>532</sup>

#### Yonkers

In April 2002, Yonkers officials unveiled a plan to build a \$25 to 30-million baseball stadium as an anchor for the City's downtown redevelopment efforts. The new stadium development would include 100,000 square feet of privately owned restaurants, pubs and stores, and would serve as the home for a new minor-league baseball team. Amazingly, left out of the City's proposal is any explanation as to how Yonkers might enjoy better economic fortunes from having a baseball team. Several other cities in the immediate vicinity are struggling financially despite having teams that play in brand new ballparks. Under the Yonkers plan, the City would own the stadium, but lease it out to the team. The proposed stadium site comprises 12 acres of land, currently occupied by a city-owned parking lot and 19 businesses (including a restaurant, a bakery and several stores). The privately owned portion of the site makes up less than 25 percent of the total land, and the City plans to use eminent domain "if necessary" to force the current owners to sell.<sup>533</sup>

In May 2002, Mayor John Spencer announced that the merchants had until October to vacate their properties, or else the City would condemn them.<sup>534</sup> However, when the issue of property acquisition came up at the Yonkers City Council's November 2002 meeting, the Council's majority coalition blocked a measure that would have allowed the City to begin negotiations to buy the properties. Four out of five members did not want to authorize eminent domain and worried that authorizing the appraisals might later mean that they had authorized condemnation.<sup>535</sup> **Update:** In January 2003, the Council approved the appraisals after receiving legal assurance that doing so would not authorize eminent domain.

<sup>532</sup> Matthew Purdy, "Condemning a Drug Site (It's CVS)," *The New York Times*, July 31, 2002, at B1.
<sup>533</sup> Winnie Hu, "Minor League Ballpark Planned for Yonkers," *The New York Times*, Apr. 10, 2002, at B5.
<sup>534</sup> Norman MacLean, "Stormin' with Norman," *The Sports Network*, May 10, 2002.
<sup>535</sup> Rich Calder, "Delay in Negotiations May Imperil Yonkers Ballpark," *The Journal News (Westchester County, N.Y.)*, Dec. 3, 2002, at 1A.

| NORTH CAROLINA  |
|---|
| Benefiting Private Parties*   |
| Filed <b>1</b>  |
| Threatened None known   |
| Total 1   |
| Known Development<br>Projects w/Private<br>Benefit Condemnations* 1       |
| State Record of Condemnations Filed, for All Purposes: <sup>†</sup> 4,510 |

## OVERVIEW

Legend de la

**C** =1

'**L**=1

North Carolina municipalities rarely condemn property for private parties. From 1998 through 2002, there has been only one reported instance of a condemnation for private benefit. The airport that serves the Greensboro/Winston-Salem/High Point area condemned land for a new Federal Express cargo facility. The North Carolina Supreme Court unfortunately approved this condemnation, and it remains to be seen whether other municipalities will take this as a green light for private condemnation for private parties.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened. \*North Carolina Court Administrator's Office (includes condemnations for traditional public uses).



North Carolina

## Private Use Condemnation

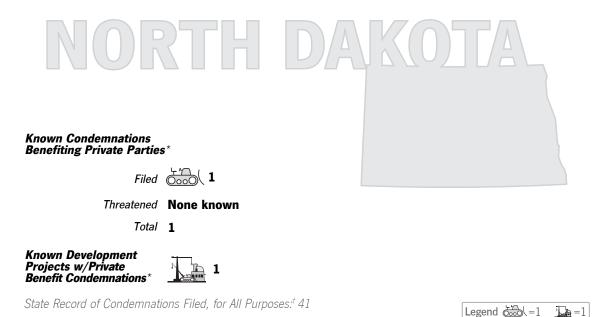
#### **Guilford County**

In 1990, the Piedmont Triad Airport Authority (PTAA) passed a master plan to expand the airport's air cargo facilities. The plan, revised in 1994, called for acquisition of property adjacent to the airport so that the new facilities would be adjacent to existing runways. PTAA would hold title to the property, but lease it to Federal Express Corp., which would pay the construction costs of the new cargo facility and use it as an operational hub. In 1998, PTAA condemned 2.3 acres owned by Kent Urbine. Urbine challenged the condemnation, arguing that it benefited only FedEx, and was not a "public purpose" as required under North Carolina law.

The North Carolina Supreme Court disagreed. According to the court, the purpose of the 1990 master plan had been the future expansion of cargo facilities, a valid public purpose. The taking was permissible, the court held, because it would result in an improved airport for the region, from which the public would receive the primary benefit. While FedEx receives a substantial benefit from the transfer of Urbine's land, its benefit is "incidental," according to the court, to the overall public benefit.<sup>536</sup>

This was a strange holding, as FedEx will be the only user of the additional cargo facilities. Neither passengers, nor shippers, nor other cargo companies will receive any benefit from the improved airport. One factor that does distinguish this case from many of the others cited in this report is the fact that the property will continue to be owned by the government, even though it will be paid for and used by a private party.

<sup>536</sup> See *Piedmont Triad Airport Authority v. Urbine*, 554 S.E.2d 331, 343 (N.C. 2001), cert. denied, 535 U.S. 971 (2002).



Overview

North Dakota has not seen any classic takings for private development in the past five years. The only similar condemnation involved a private farm obtaining access to water across another private party's land. While this was a condemnation for private use, it involves the somewhat unusual legal issues associated with water access in the western part of the country. Overall, then, North Dakota local governments do not use eminent domain to transfer property to private developers.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened.

<sup>†</sup>Court Administrator's office of the North Dakota Supreme Court (includes condemnations for traditional public uses). These figures include only statistics for 2000.



North Dakota

## Private Use Condemnations

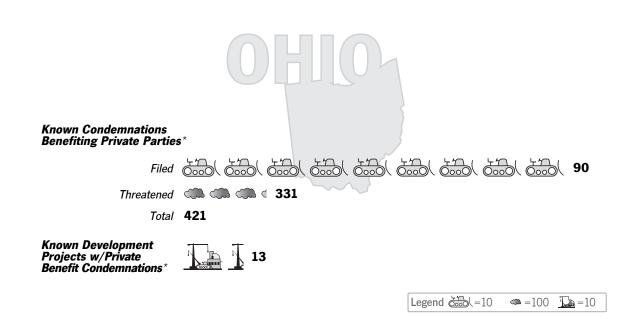
#### Ransom County

The Kaspari family owns a piece of farmland in Ransom County that is located between the Sheyenne River and another piece of farmland owned by Mougey Farms. In 1985, Mougey Farms leased the Kasparis' land for the 10-year term, so that it could deliver water for its irrigation needs from the river to the Mougey property. The parties executed a written easement allowing Mougey to run water through the irrigation system on the Kasparis' land to Mougey's land. The easement apportioned ownership of the irrigation system, and stipulated that the easement would terminate when Mougey no longer leased the Kaspari land.

At the end of the lease term, the Kasparis informed Mougey Farms that it would not renew the lease, nor continue to allow Mougey to pump water through the irrigation system to Mougey's land. Mougey sued, seeking to continue pumping water across the Kasparis' land by virtue of an implied easement, easement by necessity, or easement by condemnation. Under the broad North Dakota water use statute, "any person" may exercise eminent domain to acquire property for application of water to a beneficial use.<sup>537</sup> The court ruled that the statute was not applicable, and did not allow the acquisition of such property rights for a strictly private use. On appeal, however, the North Dakota Supreme Court reversed, holding that irrigation of farmland under a perfected water permit issued by the State Engineer is a beneficial use of water consistent with the "best interests of the people of North Dakota," and thus constitutes a valid public use. As a consequence, the court ruled, any person (including a private individual) may condemn the land of other private parties for such purpose.<sup>538</sup>

<sup>537</sup> N.D.C.C. § 61-01-04.
 <sup>538</sup> Mougey Farms v. Kaspari, 579 N.W. 2d 583, 590 (N.D. 1998).

## **CASTLE**



## 0 v e r v i e w

Ohio cities seem to be on a redevelopment rampage, condemning property for private development and designating perfectly nice areas as blighted in order to authorize condemnation for private development. Indeed, there have been at least 13 such projects in Ohio between 1998 and 2002, involving at least 90 properties condemned and an additional 330 properties threatened with private use eminent domain. In response to this aggressive land-grabbing by Ohio municipalities and private developers, citizen groups opposing eminent domain have sprung up around the state; there were at least five at the end of 2002. Even the legislature seems to be noticing the problem and has taken a first step toward reform by telling condemnors that they should actually have a plan and timetable in mind before taking property. It's a modest step, but at least it's in the right direction. The next few years should be telling, as greater grassroots activism takes hold and cases wend their way up through the courts.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened.



## LEGISLATIVE ACTIONS

The Ohio state legislature recently enacted a law that requires that the "public purpose" behind a state agency condemnation be achieved "in a defined and reasonable period of time." H.B. 426 also contains various provisions for improvements in the appraisal and valuation process.<sup>539</sup>

Ohio cities seem to be on a redevelopment rampage, condemning property for private development and designating perfectly nice areas as blighted in order to authorize condemnation for private development.

## Private Use Condemnations

### Akron

Ganley Toyota-Mercedes Benz wanted to expand. However, three homes, the Kathmandu Restaurant, the Quinn Furnace Co., an apartment building and other property stood in its way. The dealership recently threatened to relocate to the suburbs outside Akron unless the City helped it acquire the properties for an expanded lot. Ganley only opened in 1995 and was aware at the time of the properties adjacent to it, but it quickly became ready to oust its neighbors.<sup>540</sup> On December 11, 2001, the Akron City Council voted to create an urban renewal area encompassing all of the properties, as a first step toward condemning them in favor of the dealership. While the homeowners eventually sold their properties, the City began eminent domain proceedings against the furnace company. The other properties are still under threat.<sup>541</sup>

After witnessing the lengths to which Akron City officials have bent to please Ganley, other dealerships are now joining in on the act. Dave Walter Volkswagen warned that it might leave town unless the City helped it acquire property for an expansion. So the City bought the gas station next door and then entered into a purchase agreement with the dealership for the land. The only stipulation to the deal is that Dave Walter must stay within the Akron city limits.<sup>542</sup>

#### Cincinnati

Cincinnati city leaders dream of a glitzy new downtown area, but time and again they bungle planned redevelopment projects, leaving a string of relocations, condemnations and wasted funds in their wake. In 1998, retailing giant Nordstrom wanted to open a new department store in downtown Cincinnati. However, there was a problem with the location Nordstrom wanted: A Walgreens pharmacy already occupied that space. In order to accommodate Nordstrom, the Walgreens would have to be relocated. So, working together with Eagle Properties, the sole private developer of the new Nordstrom site, Walgreens agreed to move to another location one block away from its current store. Unfortunately, there was a slight problem there too. CVS Pharmacy (Walgreens' primary regional competitor) already operated a drugstore on the

<sup>539</sup> H.B. 426, 124th Sess. (Ohio 2001) (codified at Ohio Rev. Code Ann. §§ 163.52 & 163.59 (Anderson 2002)).
<sup>540</sup> "Should City Aid Land Deals for Private Business?," *Akron Beacon Journal*, Nov. 28, 2001, at A15; "What Should Be City's Role in Brokering Private Land Deals?," *Akron Beacon Journal*, Dec. 5, 2001, at A11.
<sup>541</sup> Julie Wallace, "Neighbors Will Divide \$464,000," *Akron Beacon Journal*, Oct. 1, 2002, at B1.
<sup>542</sup> Julie Wallace, "Akron Will Help Car Dealer Expansion," *Akron Beacon Journal*, Jan. 8, 2002, at D1.

## After two years, millions of dollars paid to the developers and various property owners, as well as small family businesses destroyed, Nordstrom announced in November 2000 that it was pulling out of the Cincinnati deal

chosen site and refused to consider moving. The City began the process of taking the CVS building so that Walgreens could move in and Nordstrom could avoid negotiating its own real estate transaction.

CVS sued to stop the condemnation but eventually settled with the City. Under the settlement, the City agreed that it would move Walgreens to a location across the street from the CVS, a compromise that required the City to condemn a number of other small businesses operating on four separate parcels there. Included among the displaced businesses was Kathman's Shoe Repair, which was forced by the City to close its doors after being in business for 95 years.

Finally, Walgreens was ready to build its new store across the street from CVS. All of the previously aggrieved parties were happy (except for the small businesses that didn't have enough clout to negotiate a new location for themselves). Then, the board of the Cincinnati Equity Fund dropped another bomb on the Nordstrom plan (those who have lost track, please note that this whole process was undertaken to free up space for a new Nordstrom store). Cincinnati's initial agreement with Eagle Properties (Nordstrom's developer), in which the City had agreed to loan the developer \$12 million, included a provision that required the City to leave vacant the very parcel that it had just handed to Walgreens, so that Eagle Properties could attract additional "upscale" retail to the corner adjacent to the new Nordstrom. The City's failure to honor this provision would scuttle the entire Nordstrom deal. Apparently nobody acting on behalf of the City had even bothered to read the agreement or bring up this fact to other City authorities.<sup>543</sup> It looked like the City would again have to shuffle the various pieces around to accommodate Eagle Properties.

But then, something peculiar happened. The Nordstrom did not get built as planned, and the vacant lot where Walgreens had originally stood began to languish and deteriorate. The site eventually took the form of an unsightly hole in the ground. After two years, millions of dollars paid to the developers and various property owners, as well as the destruction of small family businesses, Nordstrom announced in November 2000 that it was pulling out of the Cincinnati deal because of its declining profits.<sup>544</sup> The City eventually paved over the erstwhile Nordstrom site, so that the tract could at the very least operate as a City-owned parking lot until a new retailer comes along with another deal for this "can do" city.<sup>545</sup> The site is still a parking lot today.<sup>546</sup>

#### Cincinnati

The Contemporary Arts Center, a private museum, wanted to expand its exhibition space with a new building in downtown Cincinnati. With the City's help, the museum decided on a location that had been occupied by two businesses owned by the Batsakes family for 90 years. The Batsakes are third-generation Greek-Americans whose forbears started J&G Batsakes Dry Cleaners upon their arrival in America. The

 <sup>&</sup>lt;sup>545</sup> Robert Anglen, "Nordstrom Site to Become Parking Lot," *The Cincinnati Enquirer*, Nov. 24, 2000.
 <sup>546</sup> Ken Alltucker, "Consultant's Priority: Curing Downtown's Heart," *The Cincinnati Enquirer*, Jan. 15, 2003, at 1D.



<sup>&</sup>lt;sup>543</sup> Robert Anglen, "Walgreens May Snag Nordstrom Deal; Move the Drug Store or Lose Retailer, Loan Board Says," *The Cincinnati Enquirer*, June 24, 2000.

<sup>&</sup>lt;sup>544</sup> Lisa Biank Fasig & Robert Anglen, "Nordstrom Won't Build Downtown After All," *The Cincinnati Enquirer*, Nov. 23, 2000.



family later opened Batsakes Hat Shop, a world-renowned hatmaker that has dozens of famous clients and is the only shop of its kind on the continent. At the

time the Arts Center targeted the Batsakes property, descendants of the original family owners still ran both of these successful businesses. However, prominent international recognition and long-term roots in the local community did not help the Batsakes when faced with condemnation.

Citing the Cincinnati 2000 Plan, a downtown redevelopment plan adopted by the City in 1982, the museum claimed that the Batsakes properties were "blighted." In December 1999, the museum convinced Cincinnati officials to condemn both Batsakes properties for its planned expansion. The Batsakes responded by filing a federal lawsuit against the City, claiming that the City's blight determination in the 2000 Plan did not comply with the criteria outlined in the City's municipal code because the study did not include an expert review of the interiors and exteriors of the buildings, but rather a cursory "eyeballing" of area properties. An additional 1998 study on which the museum relied was never even approved by the City's planning commission or subject to public hearings, as required by the municipal code.<sup>547</sup>

Before a court decision, however, the Batsakes settled with the City. The Contemporary Arts Center got to build its new museum on the Batsakes property. The family's hat store moved to another nearby location, but the dry cleaning business shut down.<sup>548</sup> Although the Batsakes did eventually agree, under the pressure of an ongoing condemnation, to give up their property, Cincinnati saw another small local business close. Ken Million, a 20-year customer of Batsakes Dry Cleaners, wonders why the City is so insensitive to small business. "We're pumping multi-millions for large operations," Million says, obviously referring to Cincinnati's bungled attempt to bring a Nordstrom downtown. "Here are small business people who ask for nothing but to 'Leave us alone'."<sup>549</sup>

<sup>547</sup> Dan Klepal, "Hat Sellers Battle City's Ouster Order," *The Cincinnati Enquirer*, Feb. 11, 2000.

<sup>548</sup> Tom O'Neill, "Hats Off to Batsakes," *The Cincinnati Enquirer*, Feb. 13, 2001.

<sup>549</sup> Lisa Biank Fasig, "Batsakes Tossing in Towel; Dry Cleaner Ends Relocation Fight," *The Cincinnati Enquirer*, June 29, 2000.

## Local Activists in Several Ohio Cities Organize to Stop Their Local Governments from Abusing Eminent Domain

While officials in a number of Ohio cities continue to hatch redevelopment schemes that utilize eminent domain for the benefit of wealthy private developers, property owners in areas targeted for redevelopment are increasingly mobilizing into organized groups aimed at stopping these plans. Since 2001, grassroots coalitions of property owners and concerned citizens have sprung up in several suburbs outside Cleveland and Cincinnati. These activists are linked by a common problem: City bureaucrats are trying to take swaths of private land in choice locations and hand it over to developers and wealthier owners. All of these various plans are being pushed forward based on blight declarations, meaning that in the cities' estimation the tidy homes and businesses slated for condemnation constitute a "menace to the public health, safety, morals, or welfare"<sup>1</sup> in their present condition and use. When one thinks of "blighted" property, the image is usually one of buildings so deteriorated that they threaten to collapse-a feature not uncommon in pockets of this rust belt state. However, the properties targeted by officials in the situations listed here hardly meet that description.

In the Cleveland area, citizens in two different communities are mounting campaigns to stop redevelopment plans passed by the municipal governments. The City Council in Lakewood recently voted in favor of a redevelopment plan that would take homes for a large private development. In Willowick, City officials are working on a scheme to take nice waterfront cottages along Lake Erie so that developers can build upscale lakefront condominiums and houses.

## **CASTLE**

Around Cincinnati, property owners in several suburban cities are also mobilizing to stop attempts to condemn their prime land for private redevelopment. Seventy-seven families and several businesses in Norwood have organized in their fight to keep the nice properties they own that are located where the City wants to expand a nearby shopping mall. Evendale wants to take 130 businesses and two homes so that its bureaucrats can remake the city's commercial core in an image more to their liking. Enterprising residents in that City have started an elaborate website (www.blightedevendale.com) to get their message out. The City of Newport, a Cincinnati suburb located just over the Ohio River in Kentucky, is in the process of using the threat of eminent domain to help a private developer wipe out one of the City's wealthiest neighborhoods, so that even wealthier residents can enjoy the panoramic hillside views of downtown Cincinnati.

Fortunately, these suburban Ohio eminent domain abuses are not going unchecked. The various groups have become increasingly vocal and organized, running newspaper announcements, utilizing the Internet, speaking at City Council meetings, and demonstrating against the planned condemnations. With the help of the Castle Coalition, these Ohioans are learning that community activism can make a difference. Their efforts could serve as a template for similar resistance movements nationwide, where property owners have not yet gotten the message that with eminent domain abuse, everyone is at risk. As an advertisement by the Lakewood group states, "If Lakewood bureaucrats can manufacture reasons to take our homes and businesses, they can find a way to take yours too."

<sup>1</sup> Ohio Rev. Code Ann. § 725.01 (Anderson 2002). This statute and others contain similar definition of "blight" for redevelopment purposes. Individual Ohio cities may also use local definitions of blight.

### Cleveland

The Rathskeller, a century-old drinking establishment that caters to a blue-collar clientele, was forced by the City to give up its location in downtown Cleveland, so that private developer MRN Ltd. could turn the location into upscale retail stores and restaurants as part of the redevelopment of East 4th Street. Nick "Red" Hillman, the Rathskeller's owner, wanted to be included in the City's redevelopment plans, but was told that he would have to give up his location unless he agreed to make his bar upscale, so that it would be a fitting establishment for the patrons of the upscale retail shops being planned. According to Hillman, he would have had to pay three times his normal rent, so he could 'fit in' with the rest of the area's renovations. After the Cleveland City Council declared the area around East 4th Street to be blighted, Hillman and other area business owners were forced to make a choice-either finance costly repairs on their buildings and change their clientele or risk losing the building through eminent domain. Hillman felt he really had no choice, and decided to move to a new location.550

#### Evendale

In 2001, Evendale officials came up with a scheme to pass an ordinance establishing an urban renewal area along Reading Road. Claiming that redevelopment is essential to revitalizing Evendale's commercial core, the City commissioned a blight study and adopted language governing the publication of notice so that property owners affected by the urban renewal plan would have an opportunity to speak at public hearings on the matter.<sup>551</sup> However, the City ignored its own notice requirements, publishing a tiny notice in the back of the local newspaper that contained only a vague description of the affected properties.552 To make matters worse, the few owners who attended the hearings were surprised months later when they learned that the resulting blight study recommended that the best way to improve the Reading Road corridor would be to "[d]emolish, redevelop, upgrade or renovate underutilized, outdated and/or deteriorated buildings."553 The owners were sur-

<sup>550</sup> Tom Breckenridge, "The Future of 4th Street Draws on its Past; Developer Out to Revive Once-Lively District," *The Plain Dealer (Cleveland, OH)*, July 9, 2000, at 1B.

<sup>551</sup> Evendale, OH, Ordinance No. 01-32 § 6 (passed by the Evendale Council on May 3, 2001).

<sup>552</sup> See "Notice of Public Hearing of the Evendale Council," *The Cincinnati Enquirer*, June 28, 2001.

<sup>553</sup> Summary Report by KZF Design, presented to the Evendale Community Improvement Corporation, Sept. 2002, available at http://www.blightedevendale.com/legal.htm.



prised because nobody at the hearings had used this language, and the first draft of the blight study did not contain it. Apparently, the City had just added the language after the fact to fit its redevelopment agenda. Not surprisingly, the Evendale Council passed the urban renewal plan, giving the City the power of eminent domain to take private properties and hand them over to other private owners.

## the City ignored its own notice requirements, publishing only a tiny notice in the back of the local newspaper that contained only a vague description of the affected properties.

The Evendale plan declared "blighted" 130 properties owned by 90 different owners in the Reading Road corridor. The owners demanded that the City reevaluate their properties, in light of the fact that the City had given only minimal notice of the public hearings on the matter, whereas the City's standard practice has been to send owners a certified letter notifying them of any pending action affecting their property. Facing a deluge of public pressure, the City relented and agreed to reconsider the condition of affected properties in the Reading Road corridor.<sup>554</sup>

So far, Evendale officials have not moved forward with any plans to condemn the properties along Reading Road. The targeted owners are nervous, however, that the City's underhanded tactics have already devalued their properties and left them vulnerable to the threat of eminent domain. According to Bruce Hassel, who owns A to Z Discount Printing on Reading Road, the owners are outraged. "What they're doing is they look at parcels and say, 'We could have something better here and that gives us the right to transfer ownership from one person to another if we think we're going to like [the future use] better," says Hassel, "[and] that's wrong." In the meantime, the owners have banded together to fight the City and take it to court, if necessary, to prevent it from taking their beloved homes and businesses.<sup>555</sup> The Castle Coalition has been helping the Evendale businesses oppose the possible condemnation of their property.

#### Huron

The City of Huron owned a five-acre piece of property along the shores of Lake Erie. Unbeknownst to the City, the parcel was encumbered by an easement held by the Ohio Department of Transportation, restricting access to the nearest main roadway for safety reasons. After determining that it no longer needed the

<sup>554</sup> Jenny Callison, "'Blighted' Properties to Get 2nd Look," *The Cincinnati Enquirer*, Oct. 30, 2002, at 3C. <sup>555</sup> Susan Vela, "Group Promotes Fight Against Eminent Domain," *The Cincinnati Enquirer*, Dec. 15, 2002, at 2B.

The houses lack two-car attached garages and second bathtubs and their yards are a little too small. No modern family could possibly want a historic, well-maintained house without a two-car attached garage. land, the City divided it into two parcels and sold them. A Wendy's restaurant went up on one parcel, while Carl and Lucille Hanson bought the other so they could relocate, consolidate and expand their local business. During negotiations between the City and the owner of the Wendy's, the City made a warranty that the restaurant would have direct access to the main road via a driveway. However, after the Wendy's was completed the DOT informed the restaurant owner that the driveway violated the DOT's easement right. So the Wendy's owner demanded that the City uphold their deal by condemning a portion of the Hansons' adjacent property for a driveway leading to the Wendy's.

In April 1999, the Huron City Council resolved that it was necessary to condemn the part of the Hansons' land that was needed for the Wendy's driveway. At trial, the court ruled in favor of the Hansons, finding that the City's purpose for taking their property was to satisfy its liability to provide the Wendy's with access to the main road. The Ohio Court of Appeals upheld the trial court's ruling, stating that the City abused its discretion when it determined that the condemnation was necessary for a "public purpose" because satisfying a contractual liability to one party by appropriating the property of another party is not a valid public use.<sup>556</sup>

#### Lakewood

In the West End section of Lakewood, CenterPoint Properties is currently trying to assemble land for a \$100-million development with 200 condominiums, along with restaurants, retail stores and a theater. To do so, CenterPoint must acquire 66 houses, five large apartment buildings and a number of small businesses. Jim Saleet and his neighbors are quite contented with their well-maintained colonial homes in Lakewood and have no interest in moving. Mayor Madeline Cain and other City leaders pushed for passage of a redevelopment plan that designated the targeted area as blighted. The designation will allow the City to use eminent domain to force out any owners who are unwilling to sell their properties to CenterPoint.

One would think Mayor Cain would be a little more respectful of the owners' desire to stay put, given that her family had to sell their home under threat of eminent domain for an elementary school when she was a child. According to Cain, "I vividly remember the trauma that began when they first talked about buying the land.... I remember the trauma in my family. I've lived through it, and I don't wish that on anybody." Anybody, it appears, other than the dozens of families whose homes she is in favor of taking out of concern for "the future of this community."<sup>557</sup>

After a contentious public meeting at the Lakewood City Hall, in which 200 residents packed the auditorium

<sup>556</sup> See *City of Huron v. Hanson*, 2000 Ohio App. LEXIS 3358, at \*20 (July 28, 2000).
 <sup>557</sup> V. David Sartin, "Plans Aim to Revive Neighborhoods; Lakewood Targets West End for Development," *The Plain Dealer (Cleveland, OH)*, Dec. 11, 2002, at B1.



to voice their opposition to the City's scheme to hand their homes and businesses over to CenterPoint Properties,<sup>558</sup> the City Council in December 2002 approved the redevelopment plan and the finding of blight.<sup>559</sup> As there were no structural problems with the houses, the City relied on terms like "economic and functional obsolescence" to find blight. Translation: The houses lack two-car attached garages and second bathtubs and their yards are a little too small. No modern family could possibly want a historic, well-maintained house without a two-car attached garage. Saleet and other residents and businesses of the West End, however, vow that this is only the beginning of their fight to keep the bureaucrats and developers off their property. The Castle Coalition has been working with the owners in opposing the condemnation of their homes.

#### Norwood

Walgreens operated a store on a prominent Norwood street corner, but the pharmacy giant wanted to build a new 18,000-square foot store a block away on a piece of land large enough to accommodate a drive-thru window and sizeable parking lot. So, rather than trifling with the expense and hassle of negotiating with the 10 parties who currently owned the land, Walgreens simply asked the City to condemn the land for its benefit. The land Walgreens wanted was occupied by a number of small businesses that served the local working-class community, including the Village Thrift Store, Norwood Christian Books & Gifts, and the Humble Abode used furniture store. Walgreens found an enthusiastic ally in Norwood Mayor Joe Hochbein, whose aggressively pro-development beliefs were matched only



The business of Nick Motz in Norwood, OH, is slated for blight designation/urban renewal for construction of a privately owned shopping center.

by his penchant for official misconduct, as demonstrated by his pleading no contest to a felony charge of election falsification.<sup>560</sup> Mayor Hochbein mounted a public relations campaign to portray the existing businesses as run-down and undesirable. With the threat of condemnation hanging over their heads, the targeted property owners all eventually vacated their premises.<sup>561</sup> In the end, the Norwood City Council never officially authorized eminent domain, but the threat of eminent domain turned out to be just as effective.

## Rather than risk losing the development and the tax revenue it would add to the City's coffers, the Norwood City Council is considering tagging the area with a "blight" designation, which would allow the City to use eminent domain to force out any recalcitrant owners.

<sup>558</sup> V. David Sartin, "Lakewood Leaders Find that the Best Plan for West End Is in the Eye of Beholder," *The Plain Dealer (Cleveland, OH)*, Dec. 13, 2002, at B2.

<sup>559</sup> V. David Sartin, "Lakewood Moves to Revitalize," *The Plain Dealer (Cleveland, OH)*, Dec. 17, 2002, at B4.
<sup>560</sup> Susan Vela, "Norwood Mayor to Step Down," *The Cincinnati Enquirer*, Dec. 10, 2002, at 1B.
<sup>561</sup> Ken Alltucker, "Corner Braces for Walgreens; Businesses Prepare to Be Booted," *The Cincinnati Enquirer*, Aug. 10, 2000, at C3.



## Euclid City Officials Try a Novel Approach in Dealing with Property Disputes— Simple Politeness

The City of Euclid, in suburban Cleveland, has been trying to help a private developer consolidate properties along Lake Erie for a marina and luxury condominium development. The K&D Group urged the City to condemn the six remaining houses on its behalf, but City officials were reluctant to do so. The City was determined to make the development happen, but not by sacrificing the rights of its citizens. City Law Director Patrick Murphy went so far as to warn the City Council that seizing private property for a private use "constitutes a flagrant abuse of power." Mayor Paul Oyaski and City Councilman Daryl Langman wrote a letter to each of the remaining owners in August 2002, which stated, "On behalf of the City of Euclid, we respectfully ask for your cooperation in this project so that its success is assured... We wish to meet with you at your convenience to assist you and the developer in reaching a satisfactory resolution."1

As of September 20, 2002, the plan was going forward contingent on an agreement with Dennis Weltman, the last homeowner yet to sell to the K&D Group. Under the proposed agreement between Weltman and the developers, Weltman can remain in his lakefront home, while selling an adjacent rental house and vacant lot to the developers. The condominium development will go up around Weltman's house.<sup>2</sup> It is amazing how easy it is to be nice and yet how infrequently cities attempt it.

<sup>1</sup>Thomas Ott, "Euclid Tries Polite Approach in Property Dispute," *The Plain Dealer (Cleveland, OH)*, Aug. 26, 2002, at B3. <sup>2</sup>Thomas Ott, "Developers Offer to Let Holdout Keep House," *The Plain Dealer (Cleveland, OH)*, Sept. 20, 2002, at B3.

## Norwood

The City of Norwood wants to take the homes of 77 families whose crime is that they live in homes that occupy a choice location along Interstate 71, where the City would prefer to see a \$125-million expansion to the adjacent 50-acre Rookwood upscale retail development. The proposed Rookwood Exchange would add 140,000 square feet of shops and restaurants, 350,000 square feet of office space, 200 luxury condominiums and a parking garage.<sup>562</sup> The homes targeted for demolition under the plan are tidy and well kept. However, City leaders consider the homes to be eyesores, compared to the Crate & Barrel, Cheesecake Factory and snarling traffic that would replace them.

Rather than risk losing the development and the tax revenue it would add to the City's coffers, the Norwood City Council is considering tagging the area with a "blight" designation, which would allow the City to use eminent domain to force out any recalcitrant owners. The developers involved with the Rookwood project have been trying to persuade owners in the area to sell their property. However, at least 20 owners have vowed to fight as long as they must to prevent their City and developers from taking their homes away.<sup>563</sup> They don't believe that because they live close to a major highway, they must forfeit their homes to make way for the City's preferred use of their land. Furthermore, they are insulted by the proposed blight designation of their nice homes. As of December 2002, the developers had agreements to purchase the homes of 60 percent of the targeted owners. The rest of the owners have dug in for what may be a lengthy court battle to stop the City if it tries to take their homes under its flimsy blight rationale.<sup>564</sup> The Castle Coalition has been helping the Norwood homeowners oppose the possible condemnations.

## Ohio City

In 2001, the City began taking steps to condemn a Family Dollar discount store located on the site where a private developer wanted to build 10 large townhouses and 34 condominiums, as part of the City's plan to redevelop its commercial district. Family Dollar, which said that its targeted store was one

<sup>562</sup> Susan Vela, "Norwood Homeowners Balk at Selling," *The Cincinnati Enquirer*, Sept. 29, 2002, at 3B.

<sup>563</sup> Susan Vela, "Owners Dig In to Keep Homes," *The Cincinnati Enquirer*, Oct. 27, 2002, at 1B; Susan Vela, "Development Decision Nears in Norwood," *The Cincinnati Enquirer*, Jan. 24, 2003, at 4B.
<sup>564</sup> Susan Vela, "What Is Blight?," *The Cincinnati Enquirer*, Dec. 23, 2002, at 1A.

of its best performing stores in northeast Ohio, refused to sell for anything less than the cost of the business, which it estimated to be around \$2 million. The retailer was willing to negotiate for a new store at another location within the redevelopment, but the City insisted that the discount chain was not the type of store the new project wants to attract.<sup>565</sup> After a protracted fight with the City, Family Dollar agreed to close the store so that the redevelopment project could proceed. In return, the City offered generous tax abatements and other incentives to offset the developer's \$1.3 million tab from paying for the relocation of Family Dollar.<sup>566</sup> While in the end the parties reached an agreement, Ohio City taxpayers are footing quite a large bill just to move their working class neighbors out of the way.

## Shaker Heights

Sean Tucker and his wife have a company, Shaker Development Corp., that owns an apartment building on a 2-acre parcel of land in Shaker Heights. The building provides 27 families with affordable housing. The City wants to take the Tuckers' property and sell it to developers for 157 luxury townhouses and loft condominiums as part of a \$33-million redevelopment of Shaker Towne Center and the surrounding area. The owners of the neighboring properties all sold to the City. After the Tuckers rejected the City's offer to buy their land, the Shaker Heights City Council voted in October 2002 to condemn the property.<sup>567</sup> **Update:** In January 2003, City officials voted to purchase Tucker's building.<sup>568</sup>

## Toledo

In 1999, the City of Toledo condemned 83 homes to make room for expansion of a DaimlerChrysler Jeep manufacturing plant. Even though the homes were well maintained, Toledo declared the area to be a slum. After threatening to leave town otherwise, Chrysler asked for and received \$232 million in state and municipal aid for its new plant. Using \$28.8 million loaned to the City by HUD, Toledo paid for relocation of the property owners and used eminent domain to acquire the homes of those who resisted its offers. Toledo had hoped to repay the loan through increased tax revenue from the expected 4,900-person Chrysler workforce. However, the new plant that Jeep built was fully automated, assembling cars by laser-guided robots without much human participation. In total, the new plant employs only 2,100 workers.<sup>569</sup>

## Willowick

Local officials in Willowick want to bulldoze four blocks containing 30 homes along the shores of Lake Erie and replace them with new luxury homes and condominiums. The City's plan calls for the use of eminent domain to take the homes, many of which are cottages that date back to 1919. The City claims that the area is blighted because the sewers are outdated, the streets are too narrow a majority of the homes are in disrepair.<sup>570</sup> No blight designation has yet been made by the City as of March 2003, but the affected property owners are nervous and angry. At a recent public meeting, a local lakefront resident received loud applause after she declared, "We will not go down without a fight, and I speak for everyone who lives along the lake."<sup>571</sup>

<sup>565</sup> Mya Frazier, "Ohio City Retail Store in Dispute Over Buyout," *The Plain Dealer (Cleveland, OH)*, July 7, 2001, at 1C. <sup>566</sup> David Bennett, "City Aid Would Speed Fries & Schuele Project; Developers, Family Dollar Reach Deal on New Home for Discounter, Await Tax Abatement OK," *Crain's Cleveland Business*, Nov. 11, 2002, at 14.

<sup>567</sup> Rosa Maria Santana, "Property Owners Are Holdouts on Shaker Heights Project," *The Plain Dealer (Cleveland, OH)*, Oct. 27, 2002, at A13.

<sup>568</sup> Rosa Maria Santana, "Purchase Paves Way for Shaker Towne Centre Plan," *The Plain Dealer (Cleveland, OH)*, Jan. 4, 2003, at B4.

<sup>569</sup> Gideon Kanner, "The New Robber Barons," The National Law Journal, May 21, 2001, at A19.

<sup>570</sup> Kristin Anderson, "Willowick Wants to Bulldoze 30 Lakefront Homes," WKYC-TV.com, Aug. 10, 2002, available at http://www.wkyc.com/news/morelocal/willowick/020810lakefronthomes.asp.

571 Michael Scott, "Willowick Debates How to Make Best Use of Lakefront," The Plain Dealer (Cleveland, OH), Dec. 10, 2002, at B4.

| OKLAHOMA  |
|---|
| Known Condemnations<br>Benefiting Private Parties*                  |
| Filed the transfer to 23  |
| Threatened None known   |
| Total <b>23</b>   |
| Known Development<br>Projects w/Private<br>Benefit Condemnations* 3 |
| Legend $\frac{4.2}{6000} = 10$ $\ll = 1$ $\frac{1}{100}$            |

0 v e r v i e w

Oklahoma has seen several private condemnations in the last five years, including one that will transfer property from one private shopping mall to another. Perhaps alarmed by this type of activity, three bills were introduced in the Oklahoma legislature in 2001 that would provide greater protection for property owners threatened with condemnation. So far, however, none have passed.

## LEGISLATIVE ACTIONS

The Oklahoma legislature is considering a number of different measures that, if passed, could substantially affect the state's eminent domain laws. Senate Bill 1614 takes aim at pretextual takings where the "public purpose" is window dressing to mask the true private purpose behind the taking. The text of S.B. 1614 states that "[i]n no case shall private property be taken by eminent domain for purposes which appear on the face to be for a public use, but are false in fact."<sup>572</sup> Senate Bill 504 prescribes the pre-condemnation procedures that a condemning authority must undertake.<sup>573</sup> House Bill 1893 provides that if the jury award in a condemnation proceeding exceeds by 10 percent the highest offer by the condemnor, then the court may reimburse the owner reasonable attorney fees, as set by the court.<sup>574</sup> All of these bills are dormant, but S.B. 1614 and H.B. 1893 have been referred to committee.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened.

<sup>572</sup> S.B. 1614, 48th Leg. 2nd Sess. (Okla. 2002).

<sup>573</sup> S.B. 504, 48th Leg. 1st Sess. (Okla. 2002).

<sup>574</sup> H.B. 1893, 48th Leg. 1st Sess. (Okla. 2001).



## Private Use Condemnations

### Muskogee

Four landowners are challenging an attempt by the Board of County Commissioners in Muskogee to condemn their land for right-of-way easements that benefit a private power plant. In September 2001, the Commissioners voted to condemn the properties so that Energetix LLC could build a pipeline linking the Arkansas River to the power plant it is constructing six miles away. The owners believe that the condemnations are illegal, because the only stated public purposes behind the Commissioners' finding of "necessity" are that Energetix will pay taxes, employ workers and give to charities. Also, the completed plant will not sell electricity to the public, but only to other energy marketers. The trial court ruled against the owners.<sup>575</sup> The case is on appeal to the Oklahoma Court of Appeals.

## Warr Acres

Town officials are seeking to condemn 30 acres of land through eminent domain, so that it may sell the site to a major retailer. The parcel is currently occupied by a number of businesses, the largest of which is the Westgate Shopping Center, home to several discount retail stores. In total, there are 18 affected properties. Salt Creek LLC, the owner of Westgate, filed a lawsuit in federal court against Warr Acres and the Warr Acres Redevelopment Trust Authority in September 2001, claiming that the Neighborhood Redevelopment Act, which allows Warr Acres to condemn businesses if the town determines that the area is blighted, violates state law. Warr Acres town officials believe that attracting another large retailer to town is necessary to prevent the Town from having to raise its sales tax.<sup>576</sup> In June 2002, the district court refused to throw out the case, which is still pending.577

<sup>575</sup> See *Muskogee County Board of Commissioners v. Lowery,* No. CJ-01-2125, slip. op. at 1-3 (Muskogee County, Okla. Dist. Ct. Sept. 18, 2002).

<sup>576</sup> Ben Scott, "Warr Acres Feels Tax Loss; Store Closing Impact Continues," *The Daily Oklahoman*, Oct. 22, 2001, at Today II 1.

<sup>577</sup> Gregory Potts, "Suit Against Warr Acres to Proceed," *The Daily Oklahoman*, June 22, 2002, at Today II 1.

## Not a Public Use After All

Moshe Tal's company, Tal Technologies Inc., once owned a small parcel of land on the edge of the Bricktown Canal waterway, adjacent to a newly-constructed minor league baseball stadium. In 1995, Tal submitted a plan to build a parking/hotel/retail development on his property. At the time, city officials encouraged his redevelopment plans but warned that the City planned to acquire the land.<sup>1</sup> The City eventually condemned Tal's property, along with others.<sup>2</sup> The City was bound to use land that it acquired by condemnation for public purposes only. It therefore transferred the land to Oklahoma City Urban Renewal Authority (OCURA), which could sell or lease the land to private interests. OCURA asked for redevelopment proposals, and Tal and two other developers advanced proposals.<sup>3</sup> In 1998, OCURA chose a plan submitted by one of the other two developers that included a 26-screen movie theater, an IMAX cinema, shops and restaurants. The City then sold the land to the other developer.<sup>4</sup> Tal then launched a series of lawsuits. His attempt to void the condemnation and recover his land, based on the private use, was unsuccessful in the Oklahoma courts, and the U.S. Supreme Court declined review.<sup>5</sup> Tal's taxpayer lawsuits challenging the project were similarly unsuccessful.<sup>6</sup>

<sup>1</sup> Charolette Aiken, "Bricktown Investment Group Proposes \$160 Million Mall," *The Saturday Oklahoman*, Nov. 4, 1995, at News 1.

<sup>2</sup> See Steve Lackmeyer, "City Ready to End Battle Over Bricktown Parking," *The Daily Oklahoman*, June 10, 1997, at News 1.

<sup>3</sup> Steve Lackmeyer, "3 Developers Vying to Build Bricktown Lot," *The Daily Oklahoman*, July 18, 1997, at News 1.

<sup>4</sup> Steve Lackmeyer & Jack Money, "Council OKs Theater Project by One Vote," *The Daily Oklahoman*, July 22, 1998, at News 1.

<sup>5</sup> Pat Taylor, "Outside View: A Question of Eminent Domain," United Press International, Apr. 1, 2002; *Tal Techs., Inc. v. Oklahoma City*, Case No. 94,045 (Okla. Ct. App. July 31, 2001) (unpublished), *cert. denied*, 535 U.S. 987 (2002).

<sup>6</sup> See Oklahoma ex rel. Tal v. Oklahoma City Urban Renewal Authority, 19 P.3d 268 (Okla. 2000), cert. denied, 534 U.S. 814 (2001), later proceeding at 61 P.3d 234 (2002).

# CASTLE

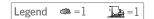


#### Known Condemnations Benefiting Private Parties\*

| Filed      | None known |
|------------|------------|
| Threatened | C 2        |
| Total      | 2          |
| nment      | -+         |

Known Development Projects w/Private Benefit Condemnations\*

State Record of Condemnations Filed, for All Purposes:<sup>+</sup> 323



## OVERVIEW

Oregon cities rarely use eminent domain. News reports show only one condemnation for a largely private development project in Hillsboro. Even in that project, the City apparently tried to mitigate the private nature of the taking by including a City civic center within the residential, retail and office space. That condemnation case began in late 2002. Other cities seem to have refrained from condemning property for private parties.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened. <sup>†</sup>Oregon Judicial Department's Office of Court Administration (includes condemnations for traditional public uses).



## Oregon cities rarely use eminent domain.

## Private Use Condemnations

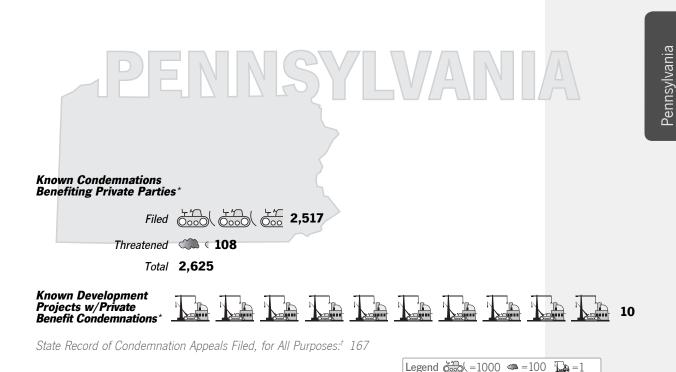
#### Hillsboro

The City of Hillsboro has teamed up with private developer Specht Development to build a new, \$33.7 million civic center. Part of the facility will serve as City Hall, but most of the planned five-story development consists of residences and offices, with retail shops and other businesses occupying the ground floor and street-level storefronts. The developer and the City will jointly own the civic center, while the developer will manage the 113 affordable-rate apartments and 27 market-rate apartment units, as well as the commercial space. In order to gain ownership of a choice site in the middle of the Hillsboro business district, the City would have to remove the two stable, thriving businesses that already operate there. Terrance Hall owns the building from which he runs a law office, while the Christian Science Reading Room occupies the building next door.<sup>577</sup> In October 2001, the City Council was set to condemn both properties, but decided at the last minute to delay the resolution after both owners vowed to challenge the takings. Among the deficiencies in the City's development plan was that the City did not even bother to do a feasibility study looking at the need for the residential, retail and office space in the development. Also, the City made no formal offers to negotiate with either owner before threatening condemnation and made no provision to provide space in the new civic center for occupancy by existing businesses.<sup>578</sup> In September 2002, the City Council finally voted to begin eminent domain proceedings. Both Terrance Hall and the Christian Scientists plan to take the City to court to protect their right to stay put.<sup>579</sup>

<sup>577</sup> "Community Snapshot; Owners Argue Against Taking Properties for New City Hall," *The Oregonian (Portland, OR)*, Oct. 4, 2001, at B2.

<sup>578</sup> William E. Dunn, "My Turn; Condemnation for City Building Bad Policy," *The Oregonian (Portland, OR)*, Oct. 11, 2001, at West Zones 13.

<sup>579</sup> David R. Anderson, "Hillsboro Negotiates Deal to Build Civic Center," *The Oregonian (Portland, OR)*, Sept. 4, 2002, at C2.



## 0 v e r v i e w

Pennsylvania has been a hotbed of eminent domain controversy over the past five years. There have been takings for private use, threatened takings for private use, bills for legislative reform, and an appellate court case holding that a City unconstitutionally delegated its power to a private developer. Pittsburgh and other cities threatened major condemnation projects, and local groups organized and demonstrated against eminent domain abuse. With all the controversy and news coverage, as well as the court decision, it is possible that Pennsylvania cities will actually think twice about taking property for private business in the coming years.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened.

<sup>†</sup>Pennsylvania Commonwealth Court, which releases a breakdown of case filings and disposals (includes condemnations for traditional public uses). Because the Commonwealth Court is an appellate court, this number reflects only those eminent domain cases in which a party appealed from the Court of Common Pleas.



# LEGISLATIVE ACTIONS

The Pennsylvania state legislature has considered several bills in the past five years that affect the state's rules regarding condemnation of private property for redevelopment purposes. Not surprisingly, the one that made almost no changes in the law is the one that made it through. The bill that would have helped potential condemnees the most was House Bill 507, which Rep. William Robinson introduced to the House floor in February 2001. If passed, H.B. 507 would have granted landowners a number of protections against overreaching redevelopment agencies, including prohibiting government from selling any property taken through eminent domain to another private party for a 10-year period following condemnation. It would also have given condemnees the right to seek compensation for lost business goodwill and lost profits due to forced relocation.<sup>580</sup> Rep. Robinson says that H.B. 507 was written in response to the heavy-handed tactics of Pittsburgh's redevelopment authority during its attempt to revamp that city's Hill District.581

Another bill that got mired in the House Urban Affairs Committee took aim at the state's blight designation rules. House Bill 615, introduced by Rep. Darryl Metcalf, would have made cities wait two years after rejecting a previous plan before trying again to declare an area blighted. If a blighted area was not redeveloped within 10 years, the blight designation would automatically be terminated. The bill also would have allowed business owners displaced by eminent domain to seek compensation for lost goodwill and lost profits.<sup>582</sup>

A third bill that actually became law amends the state's redevelopment laws to include a provi-

<sup>580</sup> See H.B. 507, 185th Sess. (Pa. 2001).
<sup>581</sup> "Bill Would Revamp Eminent Domain Process," *AP Wire*, Nov. 5, 2001.
<sup>582</sup> See H.B. 615, 185th Sess. (Pa. 2001).

# **CVS, Victim and Beneficiary of Eminent Domain for Private Use**

CVS, the largest pharmacy chain in the nation, has seen both sides of the coin when it comes to eminent domain abuse. In two cases over the last five years, local redevelopment agencies tried to condemn CVS store locations for the benefit of CVS competitors.

As part of a convoluted 1999 deal to condemn private property for a Nordstrom department store, Cincinnati began the process of condemning a CVS for a Walgreens (CVS's chief regional competitor) that had been condemned for the Nordstrom, which in turn was never built. CVS sued to stop the condemnation of its store, but eventually got to keep the land under a settlement by which the City moved Walgreens to a location across the street from the CVS. In 2002, Warwick, New York, began condemning a CVS store. After the Grand Union grocery store chain went bankrupt, CVS opened up in the former Grand Union location in downtown Warwick. The town's mayor, who is part-owner of a competing local pharmacy, operated by his brother and sister, decided to condemn the CVS, supposedly so that City officials could lure another grocery chain to open in the Grand Union location. As of early 2003, the Warwick condemnation is still under negotiation.

One would think, after these two bitterly-fought battles to keep its stores from being condemned for private use, that CVS would refrain from trying the same tactic to take others' land for its own benefit. However, as cases from Pemberton Township, New Jersey, and Ambridge, Pennsylvania, demonstrate, CVS may want to keep its own stores but doesn't see that other people might want that as well. At the chain's request, Pemberton officials threatened to condemn a solo obstetrician's medical practice and a clothing store unless the owners of the properties agreed to sell. In the Ambridge case, CVS convinced the Borough Council to condemn four homes and five businesses, none of whose owners wanted to move, and none of which were vacant or dilapidated, just because CVS wanted to have a more central location than its other store 10 blocks away.

Oh well, in the case of CVS, at least the score is even.

Sources: All of these cases appear in this report in the sections for their respective cities.

# **CASTLE**

sion requiring developers to obtain written consent from the condemning authority before selling or leasing any part of the redevelopment to a private party. H.B. 1952 was signed into law on September 25, 2002.<sup>583</sup> Because the condemning authorities generally condemn the property specifically to transfer it to a private party, this provision will provide little restraint.

# Private Use Condemnations

#### Ambridge

In September 1999, the Borough of Ambridge condemned nine properties to help a private developer assemble the half-acre of land it needed to construct a new CVS Pharmacy. The Gustine Company wanted the land so that it could build a CVS "mega drugstore" more centrally located than the current CVS store 10 blocks away. The targeted properties consisted of four homes and five businesses, none of which were vacant or dilapidated, and none of whose owners wanted to move.<sup>584</sup> After trying unsuccessfully to purchase the parcels, the developer asked the Borough to act on its behalf in taking the property through eminent domain. The Borough Council complied, after voting to declare the area blighted because of "lack of measurable reinvestment, business growth, and the continuing demise of the downtown business base."<sup>585</sup> In June 2000, the buildings were demolished and the property given to the developer on a 20-year lease under which Gustine will pay the City a mere \$100 annually.<sup>586</sup>

# "That's what eminent domain is all about. It's the misfortune of the few for the benefit of the many."

#### Coatesville

Dick and Nancy Saha bought their 48 prime acres of rural Pennsylvania farmland more than 30 years ago. They restored the 250-year old farmhouse on the property, and raised their five children there. Today the Sahas' cherished family land has additional homes on it for their children and grandchildren. However, the Town of Coatesville wants the Sahas' land for part of the Coatesville Regional Family Recreation Center, a proposed \$60-million, 230-acre "funplex" featuring go-karts, batting cages, a golf course, miniature golf, bowling and ice skating. The entertainment mecca would also have a privately owned, 270-room hotel and conference center. Coatesville has already bought out the Sahas' neighbors, but the Sahas refuse to sell. Even though their land is actually located in neighboring Valley Township, Coatesville condemned the property, under a state law that allows certain cities to take land in a neighboring municipality, as long as the targeted property touches the condemning city's border.

Town leaders in Valley Township opposed Coatesville's actions, but were ultimately powerless to stop the condemnation. Coatesville City Manager Paul G. Janssen, on the other hand, sees nothing wrong with destroying an extended family's rural homestead for upscale private development. Janssen says, "That's

<sup>583</sup> See H.B. 1952, 185th Sess. (Pa. 2001).

<sup>584</sup> John Hanna, "CVS Proposal Angers Residents," *Pittsburgh Post-Gazette*, Mar. 31, 1999, at W1.
<sup>585</sup> Letter from Timothy S. Brown, Borough Manager of Ambridge, Pa., to William Barlamas (Sept. 21, 1999) (on file with author).

<sup>586</sup> "Business Briefs from Across Pennsylvania," AP Wire, June 26, 2000.



what eminent domain is all about. It's the misfortune of the few for the benefit of the many." Since they became targets of a town where they do not even reside, the lives of their whole family have been turned upside-down. The Sahas have spent \$125,000 of their retirement savings on billboards, a website and lawyers. Fortunately, the family is not alone in its indignation: Many of their neighbors have rallied to support the family in opposing the condemnation of their home.<sup>587</sup>

In January 2002, a Chester County judge upheld the Town's condemnation, but the Sahas are still fighting. A temporary gag order effective May 10, 2002 prevents the family from speaking about the situation. As of February 2, 2002, Coatesville has spent \$1,852,095 in pursuit of the project, and ground has not even been broken.<sup>588</sup> The case is on appeal.

## Conshohocken

The Montgomery County Redevelopment Authority entered into a contract with the Greater Conshohocken Improvement Corporation (GCIC), a private developer, whereby the County would acquire properties within a certain area through eminent domain and convey them to GCIC for development. The agreement contained a provision that gave GCIC control of the timing and manner of the condemnations and prohibited the County from condemning properties within the redevelopment area except at the specific request of GCIC.

In March 1995, GCIC offered to purchase 110 Washington Street, but the owner rejected the offer. Shortly thereafter, GCIC requested that the County condemn the property, and pursuant to their agreement the County began eminent domain proceedings against the property. In a separate agreement, the developer agreed to post a security bond to cover acquisition costs for 110 Washington Street. The owner filed objections to the County's actions, alleging that: (1) the County had unlawfully delegated its eminent domain power to GCIC; (2) the County thus

<sup>587</sup> "Chester County Family Fights to Save its Land from Development," *AP Wire*, May 3, 2002.
<sup>588</sup> Numbers taken from information provided on the Saha family website, http://www.saveourfarm.com.

# Pittsburgh Mayor's Plan to Take Properties for Redevelopment at Fifth & Forbes Is Derailed

In 1999, the City of Pittsburgh proposed a plan to redevelop the Fifth and Forbes district of downtown Pittsburgh. The project was endorsed by Mayor Tom Murphy and other city leaders and would have transferred ownership of the entire district to Urban Retail Properties, a Chicago developer. While the plan called for preserving some of the historic storefronts in the area, it did not call for preserving any of the small businesses in the area. The 64 buildings and 125 current businesses would have to make way for a movie theater complex and a giant Nordstrom department store, which would serve as anchors for the project.<sup>1</sup> The plan recommended that the City use eminent domain to consolidate the land needed, but only as a "last resort." However, owners of many of the targeted properties, who knew they did not want to move, understood that this meant that the City would condemn their businesses for transfer to the developer.<sup>2</sup>

For nearly a year, business owners rallied, circulated petitions, and spoke in every forum they could think of to object to the proposed confiscation of their businesses. Among those who were committed to their locations were George Harris, Bonnie Klein and Patty Maloney. Harris owns a florist shop, now in operation for 100 years. Klein and her husband run a camera repair store, and Maloney and her family operate a card and gift shop, which has already been forced to relocate once for a development plan. Members of the community like Bernie Lynch were shocked by the City's plans to take property for a pri-



President of Pittsburgh's Golden Triangle Community Development Corporation Bernie Lynch worked with the Institute for Justice to successfully defend property owners against the City's abusive use of eminent domain.

CASILIE

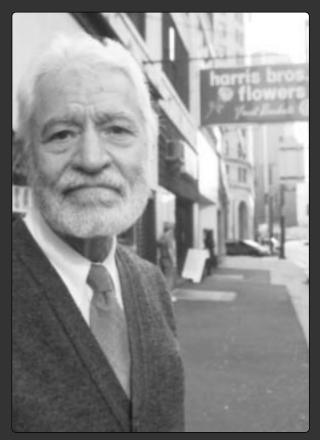
LOUWNIOWN

# The Mayor has said that the project will go forward without eminent domain. And of course, that's what the owners have wanted all along.

NEWS FER FACTOR/FORDER

vate developer.<sup>3</sup> They joined with the owners to form a new community development corporation, which then put forward an alternate redevelopment plan that did not involve condemnation.<sup>4</sup> The Institute for Justice promised to represent the owners if the City did decide to condemn their businesses and worked closely with them in opposing the proposed condemnations.

After an entire year of controversy about the project and condemnations, Nordstrom abruptly pulled out of the project, taking with it the developer and movie theater. Murphy agreed that the project should be shelved.<sup>5</sup> The



Pittsburgh wanted to condemn George Harris' century-old flower shop for a private developer's mall.

owners breathed a sigh of relief, and the City went back to the drawing board.

Finally, in March 2002, another planning group, formed after the demise of the Urban Retail project, announced the Market Square Plan for Fifth and Forbes, a development featuring retail stores, office buildings, new apartments, a hotel and public marketplace, and parking facilities. Three members of the mayor's thirteen-member task force that came up with the new plan recommended that eminent domain be completely off the table, a move lauded by Fifth and Forbes property owners.<sup>6</sup> The Mayor has said that the project will go forward without eminent domain.<sup>7</sup> And of course, that's what the owners have wanted all along.<sup>8</sup>

<sup>1</sup> E.g., Tom Barnes, "Fifth/Forbes Clears a Big Hurdle," *Pittsburgh Post-Gazette*, Nov. 24, 1999, at A1. <sup>2</sup> Tom Barnes, "Downtown Group Ends Fifth and Forbes Talks Without a Firm Position," *Pittsburgh Post-Gazette*,

Nov. 14, 2000, at C3.

<sup>3</sup> E.g., Dan Fitzpatrick, "Lay of the Land," *Pittsburgh Post-Gazette*, Dec. 19, 1999, at F1; Tom Barnes, Fifth/Forbes Property Owners Hire a Lawyer," *Pittsburgh Post-Gazette*, Nov. 15, 1999, at A1.

<sup>4</sup> E.g., Patricia Lowry, "A Blueprint for Downtown," *Pittsburgh Post-Gazette*, April 27, 2000, at E1.

<sup>5</sup> Tom Barnes & Dan Fitzpatrick, "Nordstrom, Urban Retail, Theater Out and Murphy's Ready to Compromise; Downtown Plans Start Over," *Pittsburgh Post-Gazette*, Nov. 23, 2000, at A1.

<sup>6</sup> Tom Barnes, "Brand New Plan for Fifth–Forbes; Stores, Offices, Housing in a \$363 Million Mix," *Pittsburgh Post-Gazette*, Mar. 8, 2002, at A1.

<sup>7</sup> Tom Barnes, "URA Targets Fifth-Forbes Buildings," *Pittsburgh Post-Gazette*, Dec. 12, 2002, at D3.
<sup>8</sup> Ann Belser, "Udin Urged to Abandon Eminent Domain," *Pittsburgh Post-Gazette*, May 23, 2000, at C2. acted in bad faith when it condemned the property; and (3) the amount of the security bond posted by GCIC was inadequate.

The trial court rejected the owner's arguments, except that it ordered GCIC to post an additional security bond. The owners appealed, and on February 13, 2001, the Commonwealth Court of Pennsylvania reversed the earlier decision, concluding that eminent domain powers are inherent in sovereignty and thus cannot be delegated or bargained away. The court held that this condemnation was void because it was being controlled not by the government, but by a private individual pursuing his own economic interest.<sup>589</sup> The Pennsylvania Supreme Court declined to review the case.<sup>590</sup>

#### Hazleton

Michael Greco owned five contiguous properties adjacent to the historic Markle Building, which developers recently converted into a modernized extended-stay hotel. Greco demolished the vacant buildings that occupied his land, and leased the parcel to the City for a parking lot.<sup>591</sup> In December 2001, the Hazleton Redevelopment Authority condemned Greco's lot to make way for "further development" of the area around the new hotel.<sup>592</sup> Greco challenged the condemnation, alleging that the City was trying to take his land for the benefit of the Markle Building's owners. However, the trial court ruled in favor of the City, and approved the taking of Greco's land.<sup>593</sup>

"Eminent domain is the last resort." In other words, the Agency will use it only if the businesses don't agree to sell "voluntarily."

#### Homestead

The Redevelopment Authority of Allegheny County undertook a redevelopment plan aimed at improving the old business district in the Town of Homestead. The plan called for acquiring 39 properties, (including 18 structures and 21 vacant lots) so that it could sell the land off to private developers. Jim Laux stood to lose two businesses and other property if the redevelopment authority got its way. "This is a slap in the face. This doesn't make sense. I just don't want to be the one to go. You're throwing out people who have stayed with the borough in bad times," said Laux.

The Homestead Council initially rejected the plan, asking the redevelopment authority to come back with an assurance that no viable businesses would be condemned.<sup>594</sup> The following month, however, the council

- <sup>589</sup> See In re Condemnation of 110 Washington Street, 767 A.2d 1154, 1160 (Pa. Cmwlth. Ct. 2001).
- <sup>590</sup> In re Condemnation of 110 Washington Street, 788 A.2d 379 (Pa. 2001).

<sup>591</sup> Steve Mocarsky, "Markle Building Development at 'Full Speed," *The Times Leader (Wilkes Barre, PA)*, Nov. 4, 2001, at B1.

<sup>592</sup> Steve Mocarsky, "Drugstore Complex Will Replace Historic Site; the Former Hazleton House Hotel, Thought to Have Lodged Teddy Roosevelt and Thomas Edison, Will Soon Be Demolished," *The Times Leader (Wilkes Barre, PA)*, May 13, 2002, at 3A.

<sup>593</sup> See *In re Condemnation of Greco Land*, No. 8094-C-2001 (Luzerne County, Pa. Ct. of Common Pleas 2002). <sup>594</sup> Jim Hosek, "Redevelopment in Limbo for Old Business District," *Pittsburgh Post-Gazette*, Nov. 20, 2002, at S4.



# Home Depot Decides to Include Local Pittsburgh Pizzeria in its Plans Rather than Try to Have it Condemned

In 1998, Home Depot announced plans to build an \$8 million, 131,000 square foot store and garden center on the former site of an old Sears store in the East Liberty neighborhood of Pittsburgh. However, a number of local small businesses would have to be displaced in order to accommodate the Home Depot and adjacent parking lot. These businesses included a bar, a dry cleaner, a nail salon, and Vento's Pizza, a popular pizzeria that had been in the area for over 50 years.<sup>1</sup> The Pittsburgh Urban Redevelopment Agency (PURA) hoped to avoid using eminent domain for the project, and promised to find suitable, nearby locations for the displaced businesses. The relocation effort was a success, except in the case of Vento's Pizza. Vento's objected to PURA's plan to relocate the pizzeria from its prominent location on Highland Avenue to a less traveled side street. A bitter local controversy followed, pitting proponents of the redevelopment against a fiercely loyal pizza constituency.

Although the battle over Vento's threatened to derail the entire project, Home Depot saw an opportunity in East Liberty to spread some community goodwill. It began looking for ways to include the pizzeria in the development. Eventually, Home Depot reached an agreement with Vento's, whereby Home Depot would purchase the Vento's property and build the pizzeria a store within the new development. In January 1999, Vento's closed its doors, and its building was demolished. Soon thereafter, construction began on the new Home Depot. In February 2000, the East Liberty Home Depot opened, along with a gleaming new location for Vento's Pizza in the parking lot.<sup>2</sup> Perhaps Home Depot will remember this experience the next time and refrain from enlisting the government to condemn private property on its behalf.

<sup>1</sup> Tom Barnes, "Home Depot to Oust Smaller Businesses," *Pittsburgh Post-Gazette*, Mar. 9, 1998, at A11.

<sup>2</sup> Lawrence Walsh, "This Store's Opening Is Simply Grand; Home Depot Plays to Big, Enthusiastic East Liberty Crowd," *Pittsburgh Post-Gazette*, Feb. 11, 2000, at B1. approved the plan, after the head of the redevelopment authority claimed that no viable businesses would be taken. But the plan still allows the redevelopment authority to exercise eminent domain over any of the properties, and while it will "consult" with the Council, it can condemn without council approval. According to the authority, "Eminent domain is the last resort."<sup>595</sup> In other words, the authority will use it only if the businesses don't agree to sell "voluntarily."

## Philadelphia

The City of Philadelphia has undertaken a massive urban redevelopment project known as the Neighborhood Transformation Initiative (Initiative).596 The Initiative project combines traditional public use condemnations-the condemnation of abandoned properties and buildings not fit for habitation-with the acquisition of other properties to make them more desirable for developers. The Initiative calls for the City to use eminent domain to seize thousands of dilapidated properties, and will eventually lead to the demolition of 14,000 abandoned homes, renovation of 2,500 buildings, and acquisition of the 31,000 vacant lots in north and west Philadelphia.597 Backers of the five-year, \$295-million plan hope to create an "urban prairie," with vast tracts of open land within Philadelphia's city limits that can be sold to private developers, who will be given clear title to the land. The assumption by those in favor of the project is that these open spaces will spur massive population regrowth within the city. To jumpstart private investment in the project, the local housing authority also plans to build several thousand new apartments for the elderly and poor.

<sup>595</sup> Jim Hosek, "Council OKs Old Business District Plan Despite Fears," *Pittsburgh Post-Gazette, Dec. 18, 2002, at S6.* 

<sup>596</sup> Press Release, Mayor's Office of Communications, Official Signing of NTI Legislation (Mar. 13, 2002) available at http://www.phila.gov/mayor/jfs/mayorsnti/ news/index.html.

<sup>597</sup> Neighborhood Transformation Initiative Five Year Action Plan (Fiscal Years 2003-2007), available at http://www.phila.gov/mayor/jfs/mayorsnti/ vacantlots/pdfs/nti\_fiveyearplan.pdf.



Critics of the Initiative view the entire project with skepticism, pointing out that the already cash-strapped city will have to underwrite construction costs in some of the most blighted areas of town, hoping to create a private market that critics believe simply does not exist in Philadelphia. Unlike other East Coast cities such as New York and Washington, which have robust real estate markets and severe urban housing shortages, Philadelphia's population decrease over the years has left a large supply of affordable houses close to Center City, many of which are in little demand even without the Initiative. Additionally, these skeptics point out that Philadelphia's notorious government bureaucracy and patronage systems, which will be charged with overseeing the acquisition, clearing and sale of many thousands of lots, are not equipped to handle such a large undertaking, while private developers will expect to move fast and without red tape.<sup>598</sup> And, of course, time will tell if the project is used solely to remove derelict, abandoned, or uninhabitable property or if it used to take properties in good condition in order to transfer them to private parties.

**Update:** The implementation of the Initiative has left something to be desired. The City began its first round of 2,500 to 3,000 condemnations in December 2002 but neglected to notify the affected owners. Rich Sparks owned two lots, and had already developed plans to build homes on both of them. Once he found out about the condemnation of his properties, he convinced the City to withdraw its attempt to take his land. Sparks fears that the City's Initiative will stall, rather than encourage, new development in north Philadelphia.<sup>599</sup>

Heinz gave an ultimatum: Either condemn the Pittsburgh Wool property and hand it over to Heinz for its expansion or else the company might consider closing its plant and moving its operations to Ohio.

#### Pittsburgh

The Pittsburgh Wool Co. was a 170-year old business that had been owned by the Kumer family for three generations. The company occupied the same building for over 115 years, on land adjacent to a ware-house and distribution center for H.J. Heinz Co. There had been good relations between the two neighbors. Forty years ago, when Heinz needed to expand, someone from Heinz walked over and reached an agreement with Roy Kumer. The companies then worked together to make sure there was no disruption in the wool company's business.

Times changed, and in 1998, when Heinz wanted to expand again, the food industry giant approached PURA officials, not the Kumers. Heinz gave an ultimatum: Either condemn the Pittsburgh Wool property and hand it over to Heinz for its expansion, or else the company might consider closing its plant (which employs 1,300 people) and moving its operations to Ohio.<sup>600</sup>

<sup>598</sup> Michael Powell, "Raze of Sunshine in Philadelphia?; City Pins Renewal Hopes on Clearing Vast Areas of Blight, Seeking Development," *Washington Post*, Mar. 19, 2002, at A3.

<sup>599</sup> Earni Young, "Blight Plan to Take Up to 3,000 Properties," *Daily News (Philadelphia, Pa.)*, Oct. 1, 2002, at Local 7;
Miriam Hill, "Blight Plan Snags Grays Ferry Initiative," *The Philadelphia Inquirer*, Jan. 10, 2003, at B1.
<sup>600</sup> Geoff Becker, "Pittsburgh City Council Approves Taking Wool Company Property," *AP Wire*, Aug. 3, 1999.



# ...only three years after bullying Pittsburgh Wool off its property, Heinz sold the four buildings it had abandoned when it acquired the Pittsburgh Wool land to a Cleveland developer for \$5 million.

In August 1999, the Pittsburgh City Council and PURA bowed to Heinz, with both bodies voting to authorize the use of eminent domain to seize the Pittsburgh Wool property for Heinz's expansion.<sup>601</sup> The Kumers did not want to move. Pittsburgh Wool was the last remaining wool pulling company in the United States. It could not relocate, because its equipment was built into the building. It also leased space to four other small businesses that did not want to move.602 The Institute for Justice offered to represent the Kumers in the event the City initiated eminent domain proceedings. The Kumers tried to negotiate directly with Heinz rather than with the City. Heinz officials initially refused, saying PURA told them not to get involved in the negotiations.<sup>603</sup> In late August, 1999, however, Heinz officials did enter into direct negotiations with the Kumers, and the Kumers reluctantly agreed to sell the property.604 Pittsburgh Wool and the four other small businesses on the site had to relocate, and Pittsburgh Wool had to close its wool pulling operation.<sup>605</sup>



For three generations the Kumer family operated the Pittsburgh Wool Company. The Kumers and the H.J. Heinz Company had been amicable neighbors for many years until 1999 when H.J. Heinz went to the City and not to the Kumers to acquire the wool company's land. Jeff and Roy Kumer wanted to continue their family business, not be pushed aside for Heinz.

The Kumers were criticized for seeking what some perceived as too-high compensation for their riverfront location and the loss of their family business. But only three years after bullying Pittsburgh Wool off its property, Heinz sold the four riverfront buildings it had abandoned when it acquired the Pittsburgh Wool land to a Cleveland developer for \$5 million. The developer is converting the warehouses into 350 upscale apartments, which will eventually become the centerpiece of a \$65-million waterfront development bearing the Heinz name.<sup>606</sup> When asked why Heinz previously mounted such an effort to acquire the Pittsburgh

#### <sup>601</sup> *Id.*

<sup>602</sup> Dan Fitzpatrick, "Pittsburgh Wool Co. Battles H.J. Heinz for North Side Land," *Pittsburgh Post-Gazette*, May 15, 1999, at B1.

<sup>603</sup> Tom Barnes, "Pittsburgh Mayor to Enable Heinz to Take Over Local Wool Company," *Pittsburgh Post-Gazette*. Aug. 12, 1999.

<sup>604</sup> Tim Molloy, "Agreement Reached to Move Wool Company, Let Heinz Expand," *AP Wire*, Aug. 26, 1999.
 <sup>605</sup> Patricia Lowry, "Wool Factory's Final Run for Posterity," *Pittsburgh Post-Gazette*, Jan. 9, 2000, at B1; Timothy McNulty, "Wool Company Building Deal Behind Schedule," *Pittsburgh Post-Gazette*, Jan. 31, 2000, at C1.
 <sup>606</sup> Michael Yeomans, "Developer Buys Heinz Buildings; Historic Structures to Become 350 Upscale Apartments," *Tribune-Review (Pittsburgh, Pa.)*, Aug. 3, 2001.



Wool site when the company apparently had land to spare all along, a Heinz spokesperson explained that Heinz's own land was unsuitable for its expansion needs. The Heinz expansion needed to be on the side of the factory where finished goods end up, and "It didn't make sense to have it at the other end."<sup>607</sup> The Kumers are no doubt comforted by this explanation.

# ...the City disclosed that its legal fees for the matter have topped \$1 million.

## Pittsburgh

In 1995, Pittsburgh Mayor Tom Murphy unveiled a \$40-million urban renewal project to revitalize a threeblock area surrounding the Federal-North intersection. The redevelopment would include an office and research building for Allegheny General Hospital, as well as restaurants and retail stores. Among the properties earmarked for condemnation to make way for the project is the Garden Theater, an adult movie theater owned by George Androtsakis. The Garden is Pittsburgh's only remaining adult theater, and city planners wanted to replace it with a live performing arts venue. Androtsakis tried to convince Pittsburgh officials to allow him to relocate his business to a vacant building next door to his current space, but the city would not consider his offer. Further, Androtsakis was unable to find a replacement location, due to zoning restrictions in other parts of the city that prohibit adult establishments.<sup>608</sup>

In 1997, PURA offered to buy the Garden Theater for \$250,000. When Androtsakis refused the offer, PURA began condemnation proceedings against his property. Androtsakis decided to challenge the City in court.<sup>609</sup> This was the first time PURA had actually used eminent domain to take property for private use, although the agency frequently has used the threat of condemnation to pressure unwilling owners to sell.<sup>610</sup> The case has been tied up in state courts ever since, and recently the City disclosed that its legal fees for the matter have topped \$1 million.<sup>611</sup> In April 2002, an Allegheny County Common Pleas Court judge gave PURA the right to seize the Garden. Androtsakis has appealed that decision.<sup>612</sup>

<sup>607</sup> Patricia Sabatini, "If Heinz Has Vacant Space, Why Pittsburgh Wool Fuss?" *Pittsburgh Post-Gazette*, June 1, 2001, at C14.

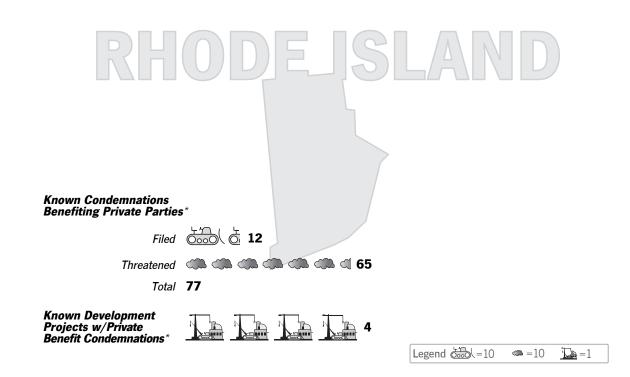
- <sup>608</sup> "Adult Movie Theater Owner Fights City Urban Renewal Plan," AP Wire, Oct. 15, 1999.
- <sup>609</sup> "Legal Bills Mount in Effort to Evict X-Rated Theater Operator," AP Wire, Dec. 7, 1999.

<sup>610</sup> Editorial, "Eminent Mistake; Don't Change a Balanced Law on Taking Private Property," *Pittsburgh Post-Gazette*, June 5, 2000, at A10.

<sup>611</sup> Tom Barnes, "Legal Fees Soar in N. Side URA Fight," *Pittsburgh Post-Gazette*, Nov. 8, 2001, at B3.

<sup>612</sup> "Owner of Garden Theater Appeals Decision Allowing Property Seizure," *Pittsburgh Business Times Journal*, June 14, 2002, at 5.





# 0 v e r v i e w

Rhode Island is surprisingly aggressive about authorizing condemnations for private parties. Over the governor's veto, the state legislature authorized an economic development zone with, of course, the power of eminent domain. Smithfield has been condemning property for the benefit of two enormous businesses, Dow Chemical and Fidelity Investments. Some other cities have approved projects that might involve condemning property for private parties, but, according to news reports, no other cities actually went through with a private condemnation from 1998 through 2002. One city, Warwick, actually refused to condemn property for a private developer.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened.



Rhode Island

# LEGISLATIVE ACTIONS

In June 2002, the Rhode Island General Assembly voted to override Gov. Lincoln Almond's veto of a bill creating the first municipal economic development zone in the state's history. The 80-acre urban renewal area, located in the Arctic section of West Warwick, provides for a redevelopment authority with the power to condemn properties within the zone for private development.<sup>613</sup> Update: Within six months of the bill's passage, the Town Council in West Warwick had already considered requesting that the legislature double the size of the Arctic renewal zone, so that the Town could accommodate a \$100-million development proposal put forth by developer Nicholas E. Cambio. The proposed expansion could have led directly to the seizure of homes and displacement of Arctic residents. However, in February 2003 the Council backed off of its plan, opting instead to work within the borders of the zone already authorized by the General Assembly.<sup>614</sup>

The Rhode Island legislature also recently considered, but ultimately rejected, another change to the state's eminent domain laws. Introduced in 2001, House Bill 5330 would have provided business owners with additional compensation in situations where the business closes due to condemnation of the property on which it operates.<sup>615</sup> The measure died before making it out of the House Judiciary Committee.

The CRA would appraise the homes, but if the residents decided not to sell at the prices determined by the CRA, their homes would be condemned.

# Private Use Condemnations

#### Cranston

Under a plan first proposed by the Cranston Redevelopment Agency (CRA) in 2001, a tidy, middle-class Cranston neighborhood consisting of 65 households in 31 buildings along Garfield Avenue was slated for demolition to make way for a huge, privately owned shopping plaza and office park development. The CRA would appraise the homes, but if the residents decided not to sell at the prices determined by the CRA, their homes would be condemned. The project's cost to the City would be an estimated \$7.25 million for the acquisition of the buildings and other improvements. Also, the CRA recommended borrowing money to pay for the project, to be offset by the supposedly increased tax revenue from the project.

The CRA's eminent domain-based redevelopment scheme left many of the targeted residents fearful and angry. Many residents want to stay in their homes. Floyd Kohler, an 80-year old man who has lived in his Garfield Avenue home almost 50 years, could not believe that his city would destroy perfectly adequate, non-blighted houses at a time when there is a statewide shortage of affordable housing. Under the CRA plan, Kohler and his neighbors would simply be left out in the cold. Some residents might be willing to

<sup>613</sup> R.I. GEN. Laws § 44-18-30C (c) (3) (2002); Katherine Gregg & Liz Anderson, "Legislature Overrides Veto of State Budget," *The Providence Journal*, June 13, 2002, at A1.

<sup>614</sup> Zachary R. Mider, "Council Won't Seek to Enlarge Arctic Zone," *The Providence Journal*, Feb. 7, 2003, at C1. <sup>615</sup> See H.B. 5330, 2001-02 Sess. (R.I. 2001).

# **Out With the Old**

Cranston, Rhode Island, was planning to condemn the homes of many elderly residents until the City ran out of money. Anyone reading about eminent domain abuse will wonder why so many of the situations and cases seem to involve elderly residents. There are two reasons. First, predatory cities and developers look for areas of older neighborhoods in good locations. Older neighborhoods are usually less expensive to condemn, and good locations make the retail, commercial and residential projects profitable. Such neighborhoods often have many elderly residents-people who bought their homes when prices were lower and stayed. Second, many cases involve elderly residents because they are often the ones who have no interest in selling. If they didn't like their home, they would have moved 20 years ago, so they have no intention of moving now, especially not to make way for some other private residence or business.

Many of the situations in this report involve the condemnation or threat to condemn elderly homeowners. Bristol, Connecticut, condemned the homestead of the Bugryn family, four elderly siblings, because their houses and woods produced less tax revenue than the planned industrial park. Bremerton, Washington, condemned the house of Lovie Nichols, an elderly widow who had lived there for 55 years. The City condemned the property for a sewer plant extension. However, Nichols refused to move and stayed in her home until the City evicted her two years later in order to transfer her property to a local car dealer. One project in downtown Detroit removes a number of elderly homeowners, including several in their 80s who have lived there for 50 years or more. New London, Connecticut, is trying to remove Charles and Wilhelmina Dery, both in their 80s. from the house they have occupied together for more than 50 years; Wilhelmina was born there. Riviera Beach, Florida, is planning to remove thousands of residents, including many elderly homeowners.

Some elderly owners have managed to hold on to their homes. In 1998, a court told Vera Coking, who had lived in her Atlantic City house for more than 35 years, that a State agency could not take her home to give it to Donald Trump. Elderly residents of Ogden, Utah, convinced their City Council not to take their homes for upscale residential and commercial development, and officials in Eagan, Minnesota, decided not to condemn the home of a local great-grandmother for private business development after she invited them all to her home for a tour. And of course, elderly residents throughout the country still live under the threat of condemnation for private parties.

Sources: All of these cases appear in this report in the sections for their respective cities. ...the agency voted unanimously not to use eminent domain, after a closed-door meeting with landowners revealed that the extent of Bulfinch's efforts to negotiate over the 18 months had been to offer them an across-the-board price and then imply that the owners had no choice but to accept or else the City would condemn their land.

move, but they bristled at the notion that the City was acting as the real estate agent for the developer and that they would not be able to negotiate the amount of compensation.

Even though the mayor and City Council continue to back the proposed Garfield Avenue redevelopment, the City's own financial woes and lack of replacement housing have forced the City Council to move the project to the back burner for now. According to Councilwoman Paula McFarland, the City's budget deficits, which have pushed the City's bond rating to junk status, make the project unfeasible. She and other Council members withdrew their support from the plan in April 2002, but hope to rekindle it when the City is in better financial shape.<sup>616</sup>

#### Smithfield

The state Economic Development Corporation (EDC) condemned 12 privately owned properties totaling 40 acres to make way for the expansion of facilities for Dow Chemical and Fidelity Investments. On one of the lots, Joseph Mollo Jr. runs the Breezy Hill Farm Garden Center. Mollo's

<sup>616</sup> "Agency Hopes to Raze Neighborhood For Redevelopment," *The Providence Journal*, Sept. 14, 2001, at C1; Mark Arsenault, "Neighbors Bristle At Proposal To Raze Homes," *The Providence Journal*, Sept. 18, 2001, at C1; Mark Arsenault, "Garfield Ave. Land Taking Should Be Shelved, Says McFarland," *The Providence Journal*, Apr. 22, 2002, at B1.



family has owned the 11-acre parcel since 1911, and in addition to the profitable garden center, Mollo owns two homes on the property and rents out part of his land. Mollo had no intention of moving; his business did well at his current location, which has better traffic access than any nearby alternate location. Mollo had planned to take the State to court to prevent this unjust taking,<sup>617</sup> but now he thinks the only fight he could win might be the battle for higher compensation.

Another of the properties targeted by the EDC for the Dow/Fidelity expansions is Tina's, a thriving pub which owner Gerald Porcaro does not want to sell. Porcaro has no desire to move, but the EDC has given him little choice. Porcaro estimates that it would cost him at least triple the EDC's estimate to relocate up the street and fears that he will have to permanently close Tina's as a result of the condemnation.

In December 2002, the EDC informed Porcaro that he must vacate his property by the end of the month. That meant that he would have to lose out on revenue for New Year's Eve, college bowl season, and Super Bowl Sunday. For Mollo, time may be on his side as he continues his legal battle to get full value for his 11-acre spread. The EDC has given him until May 2003 to vacate the land, and he is seeking another six-month extension. As of December 26, 2002, neither Mollo nor Porcaro had agreed to settle with the EDC.<sup>618</sup>

#### Warwick

In late 2000, the City entered into an agreement with the Bulfinch Companies, a private developer, to develop Warwick's station district area with hotels, a conference center, office and retail buildings, restaurants and a movie theater, along with a new Amtrak station.<sup>619</sup> Under the terms of the agreement, the City would assist Bulfinch in acquiring 70 acres of property for the development. Bulfinch would first have six months to negotiate with the current property owners, and if, by that time, no agreement could be reached, Warwick would take the land using eminent domain. Bulfinch then would buy the property from the City.<sup>620</sup>

The negotiation period lapsed without Bulfinch acquiring a single property in the redevelopment district. So Bulfinch asked the Warwick Station Redevelopment Agency to start condemning land on its behalf, because the owners "insisted" on getting more than fair market value for their land. However, on October 30, 2001, the agency voted unanimously not to use eminent domain, after a closed-door meeting with landowners revealed that the extent of Bulfinch's efforts to negotiate over the 18 months had been to offer them an across-the-board price and then imply that the owners had no choice but to accept or else the City would condemn their land. Michael Grande, chairman of the redevelopment agency, has been critical of Bulfinch, insisting that the company must negotiate in good faith before the agency will consider using eminent domain. The project is still in development, and Bulfinch is still the preferred developer,<sup>621</sup> but the City has not authorized eminent domain.

<sup>617</sup> "Landowner to Fight Condemnation of Property for Business' Expansion," AP Wire, May 5, 2002.

<sup>618</sup> Neil Shea, "A Look Back A Look Ahead—Two Residents, State Locked in Land Battle," *The Providence Journal*, Dec. 26, 2002, at 1C.

<sup>619</sup> "Station District Developer Envisions 'Transit Village'," *The Providence Journal*, June 6, 2000, at 1C.
 <sup>620</sup> Michael Smith, "Deal Puts Station District in Motion," *The Providence Journal*, Oct. 6, 2000, at 1C.
 <sup>621</sup> "Agency Declines to Wield Landtaking Authority," *The Providence Journal*, Nov. 7, 2001, at 1C.



Although there are apparently no actual condemnations during the five year period, there were threats to condemn seven homes for largely private purposes.

# SOUTH CAROLINA

| Known Condemnations<br>Benefiting Private Parties*                |            |  |
|---|------------|--|
| Filed   | None known |  |
| Threatened  |            |  |
| Total   | 7          |  |
| Known Development<br>Projects w/Private<br>Benefit Condemnations* | 1          |  |

# Legend $\overleftarrow{coo} = 1$ $\overleftarrow{c} = 1$

# OVERVIEW

South Carolina did not condemn any private property for private use in the past five years, according to news reports. Its one ongoing lawsuit over public use involves the condemnation of land owned by the State of Georgia within South Carolina. However, during that dispute, Jasper County officials announced that they could condemn property for economic development and gave as an example the condemnation of private properties for a BMW auto plant in Greer<sup>622</sup> that began producing cars in 1994.<sup>623</sup> This comfort with condemning property for economic development does not bode well for South Carolina citizens. Although there are apparently no actual condemnations during the five year period, there were threats to condemn seven homes for largely private purposes.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened. <sup>622</sup> "Georgia, S.C. Battling Over Savannah Port Project," *Atlanta Business Chronicle*, Nov. 30, 2001, at 4A. <sup>623</sup> Jim Clarke, "BMW Opens First North American Plant, Says Quality Will Be Key," *AP Wire*, Nov. 14, 1994.



South Carolina

# PRIVATE CONDEMNATIONS

#### Greenville/Spartanburg

The Greenville-Spartanburg International Airport wants to build a second runway, possibly in the next 13 years. The airport's executive director says the second runway is needed to attract a major aviation user like UPS or Federal Express. So, in October 1998, the airport voted to acquire seven homes as a buffer zone for the someday-to-be-built runway. It sent out an appraiser in November 1998, who told the owners that once he gave them offers, they would have 60 days to negotiate and 90 days to move. Among the homeowners are Irby and Clara Hendrix, who were 89 and 92 when they received this alarming news. Another family member, 77, lives with them. Other family members live nearby. The Hendrixes had lost their previous home only a few years earlier to Duke Power for utility service. Also threatened were Joan and Elmer Cassell, who abandoned their remodeling plans. The Cassells have spent 23 years developing their trees and gardens and worry that they won't be able to replace their current home. The director of the airport admits that the Hendrixes land might in fact be used as a private industrial park. As of June 1999, there had been no developments, and the elderly residents were nervous and unsure how to plan for the future.<sup>624</sup> No further news reports reveal the outcome of this situation.

<sup>624</sup> Deb Richardson Moore, "Homeowners Feeling Squeezed, Peeved by Airport Growth," *Greenville News*, June 2, 1999, at 1A.

# Two States Fight over Public Use: South Carolina and Georgia Face Off over Seaport

The main condemnation controversy in South Carolina revolves around one County's attempt to condemn public land-5,880 acres owned by the State of Georgia Department of Transportation (GDOT)-for private development. Officials in Jasper County want to build "Global Gateway", a giant \$1.2-billion shipping terminal on the South Carolina side of the Savannah River that will compete with a rival terminal Georgia is building on its side of the river.<sup>1</sup> The terminal would be owned by a private shipping company, and the development would also include other privately owned industrial and commercial business enterprises.<sup>2</sup> Georgia challenged the condemnation, arguing that Jasper County did not have a valid "public purpose" in taking its land for use by private commercial interests. However, in April 2002 a South Carolina state circuit judge ruled in favor of the County.<sup>3</sup> Georgia appealed the decision, and the case is currently before the South Carolina Supreme Court. Georgia vows that it is willing to go all the way to the U.S. Supreme Court to prevent its neighboring state from condemning its property for private use.<sup>4</sup>

 <sup>1</sup> Bruce Smith, "Company's Move Eliminates Jasper Site for Global Gateway," *AP Wire*, Sept. 22, 2000.
 <sup>2</sup> "County Council Takes Step to Create a Port in Jasper," *AP Wire*, Nov. 18, 2000.
 <sup>3</sup> Tony Bartelme, "Judge Boosts Jasper County Terminal Plan," *The Post & Courier (Charleston, S.C.)*, Apr. 4, 2002, at 1A.

<sup>4</sup> Jingle Davis, "Georgia Fights S.C. Plan for a Private Seaport," *Atlanta Journal-Constitution*, Apr. 21, 2002, at 1C.

# CASTLE

# SOUTHDAKOTA

# OVERVIEW

South Dakota has remained almost entirely free of eminent domain controversy. There have been no reports at all of state or local governments condemning property for private use. South Dakotans then do not have to fear the abuse of eminent domain for private parties.

Indeed, the only dispute was between the state government and a railroad company that wanted to condemn land. The railroad's eminent domain power comes from the State but is largely governed by federal law. South Dakota passed a statute that placed additional requirements on railroads seeking to condemn. Under the new law, before condemning, railroads must get approval from the governor or another state body that the condemnation would be "for a public use consistent with public necessity." South Dakota also required railroads to secure financing prior to condemnation. The Dakota, Minnesota, and Eastern Railroad sought to condemn property for an extension, but could not acquire the financing without being able to guarantee the land, and after South Dakota's new law, it couldn't acquire the land without having the financing. It sued the State in federal court, alleging violations of the U.S. Constitution's Interstate Commerce Clause and also that the South Dakota law was preempted by federal law. The federal court held that South Dakota could not impose its financing requirements and some other requirements, but it could still require approval of the public use from the state. According to the court, the State had a legitimate interest in protecting landowners and ensuring public use.<sup>625</sup>

<sup>625</sup> See Dakota, Minnesota & Eastern Railroad v. South Dakota, 236 F. Supp. 2d 989, 996-1004, 1022 (D.S.D. 2002).



| While the cities have mostly acquired land<br>only with threats, the willingness of<br>Tennessee cities to bully owners into<br>selling does not bode well for the future. |
|--|
| TENNESSEE<br>Known Condemnations<br>Benefiting Private Parties*  |
| Filed $$   |
| Threatened CAR CAR CAR 37  |
| Total <b>66</b>  |
| Known Development<br>Projects w/Private<br>Benefit Condemnations*  |
| Legend $\underbrace{4}_{000}$ = 10 $\underbrace{10}_{10}$ = 1  |

# $0 \vee e R \vee i e W$

Tennessee cities seem willing to use eminent domain for the benefit of private parties. Both Knoxville and Memphis have threatened owners with eminent domain in order to get them to sell their land "voluntarily" for private redevelopment projects. Both cities have created redevelopment plans that call for large-scale private development on other people's property, and Knoxville has condemned at least three properties to transfer them to private developers. While the cities have mostly acquired land only with threats, the willingness of Tennessee cities to bully owners into selling does not bode well for the future. On the other hand, a case arising in Tennessee opened the door for some potential condemnees to challenge the public purpose of the condemnation in federal court.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened.

# Private Use Condemnations

#### Carter County

The Nave family has owned a home in rural Carter County for over 150 years. Many years ago, the Naves built a 1/10-mile private driveway connecting a nearby public thoroughfare and their garage. The driveway was private, but in 1995, the County designated it as a public road. Even after the mistake was revealed, the County continued to designate the road as public at the request of the Naves' neighbors, who wanted to use the driveway. The Naves filed suit in federal court, alleging that the proposed taking was unconstitutional because it would benefit a private party, while serving only a superficial public purpose. The federal trial court dismissed the Nave claims as unripe, holding that at the time the family filed the case, no actual taking for private use had taken place. In September 2000, however, the U.S. Court of Appeals for the Sixth Circuit reversed the lower court's decision and allowed the Naves an opportunity to prove their case.<sup>626</sup>

#### Knoxville

Pursuant to its 1998 Historic Market Square plan, the City of Knoxville is undergoing a downtown redevelopment that will eventually create a "shoppertainment" district featuring retail shops, restaurants and residences. City officials hope to avoid using eminent domain to condemn properties, wherever possible, by allowing current property owners to retain ownership of their buildings as long as the buildings comply with the plan.<sup>627</sup> Owners will then be encouraged to lease their ground floors to Market Square Development LLC (MSD), which will manage the premises and attempt to attract regional or national chain stores to the redeveloped area. If the buildings do not comply with the plan, they will then be condemned. In total, there are 36 privately-owned properties in the Market Square area that would be subject to the redevelopment plan.<sup>628</sup>

#### Knoxville

In September 2002, the Knoxville Community Development Corp. (KCDC) condemned three properties for the Stephens Square retail redevelopment. Before KCDC took his land, Alfred Nance had planned to build a youth center on his property and had already obtained the building permits. KCDC also condemned a property that Lonzo Stephens had previously leased to several small businesses. The owners of those businesses are the very ones partnering with KCDC on the Stephens Square project. With the City's help, they managed to swipe the property from their former landlord, who loses not only the property itself but also the income he derived from his tenants.<sup>629</sup>

#### Memphis

After the 2000-2001 season, the NBA's Vancouver Grizzlies relocated to Memphis. While the Grizzlies agreed to play temporarily in the Pyramid Arena, the City's agreement with the team called for the City to build a new arena. The team eventually settled on a 15.5-acre site near the historic Beale Street entertainment district to house the new arena and surrounding parking lots. The main section of the proposed site consists mostly of vacant land and parking lots, but the outer section is bustling with churches, housing, and the thriving Beale Street attractions. Most of the owners agreed to sell under the threat of eminent

626 See Montgomery v. Carter County, 226 F. 3d 758 (6th Cir. 2000).

<sup>627</sup> Scott Barker, "Market Square Proposal Gets Mixed Reviews; Some Owners Unconvinced," *The Knoxville News-Sentinel*, May 18, 2001, at A8.

<sup>628</sup> Scott Barker, "Wraps Are Off Trendy Plan for Market Square," *The Knoxville News-Sentinel*, May 17, 2001, at A1. <sup>629</sup> Ed Marcum, "HOPE VI Leaving Some in Despair; Property Owners Upset at Acquisition Process," *The Knoxville News-Sentinel*, Sept. 23, 2002, at B1.



domain,<sup>630</sup> but the Gibson Guitar Co. did not. Gibson built its headquarters on this location in the mid-1990s, after the City sold the land to the guitar maker as part of a previous redevelopment effort. The 6.5acre parcel of Gibson land targeted by the City for condemnation was Gibson's employee parking lot.<sup>631</sup> Eventually, Gibson agreed to sell the property to the City, but only after the City promised to build Gibson a new employee parking lot and rent garage parking for the company. Memphis taxpayers are left footing the \$1.3-million bill for the land swap.<sup>632</sup>

"Here, I find they can take my land and give it to someone else to profit from. I'm the one who has been down there 20 years. I have seen the potential, and now I can see it being ripped right out from under me."

#### Memphis

The Memphis Housing Authority (MHA) plans to buy or use condemnation proceedings to acquire a sprawling six-square mile area consisting mostly of vacant lots and dilapidated buildings in North Memphis. The MHA wants to convert the area into a mixed-income community that would be owned by a private developer. The new development, to be called Uptown Memphis, would cost a total of \$200 million taken from local and federal funds. Some area property owners were upset because they planned to develop the property themselves. Bob Gilbert, the owner of the historic old Knox Drugstore, was dismayed at the prospect of losing his property: "Here, I find they can take my land and give it to someone else to profit from. I'm the one who has been down there 20 years. I have seen the potential, and now I can see it being ripped right out from under me."<sup>633</sup> The MHA needed 26 properties for the initial project. Fourteen owners contested the takings,<sup>634</sup> but as of July 5, 2002, only three were still in court.<sup>635</sup>

<sup>630</sup> Deborah M. Clubb, "City Pays COGIC \$1.8 Million for Lots Near Arena," *The Commercial Appeal (Memphis, TN)*, Mar. 7, 2002, at B1.

<sup>631</sup> Deborah M. Clubb, "Despite Talks, Gibson Guitar Holds Strings to Arena Site," *The Commercial Appeal (Memphis, TN)*, April 11, 2002, at B1.

<sup>632</sup> Deborah M. Clubb, "City Will Pay \$1.3 Million to Get Back Gibson Land," *The Commercial Appeal (Memphis, TN)*, May 25, 2002, at A1.

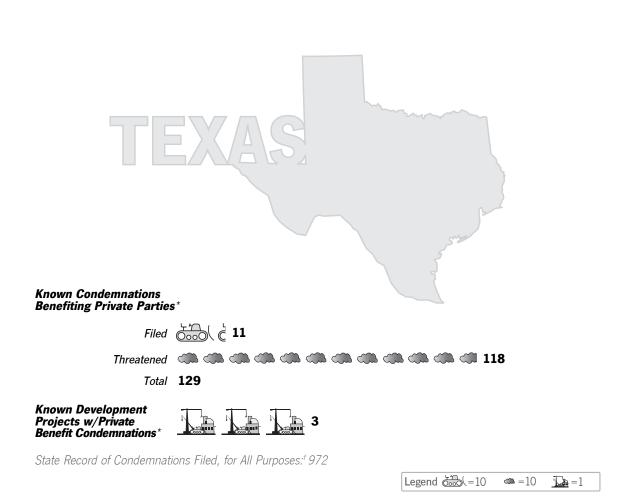
<sup>633</sup> Shirley Downing, "City To Hear Owners on Plan To Condemn, Redevelop Greenlaw," *The Commercial Appeal (Memphis, TN)*, Oct. 23, 2001, at A1.

<sup>634</sup> Shirley Downing, "Owners Contest City Taking of Property," *The Commercial Appeal (Memphis, TN)*, Dec. 1, 2001, at B2.

<sup>635</sup> Deborah M. Clubb, "Vacant Hurt Village to Vanish," *The Commercial Appeal (Memphis, TN)*, July 5, 2002, at B1.







# $0 \vee e R \vee i e W$

The spectacle of the condemnation of homes in Hurst, Texas, for a shopping mall in 2000 seems to have shocked most of the remaining Texas cities into refraining from condemning property for the benefit of private parties. Hurst actually forced families to move out of their homes while one of the spouses in two of the condemned families lay in the hospital dying. Since then, only Dallas has ventured to condemn homes for a private development–in that case, a private arts center with no timeline for being built.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened. †*Texas Judicial System Annual Report (1998-2002),* Texas Office of Court Administration (includes condemnations for traditional public uses).



# Private Use Condemnations

#### Dallas

Leigh Bass owned an historic 97-year-old building near downtown Dallas that her late husband bought for her. She lived in a loft on the top floor of the building, and leased out the rest to several other residents and businesses. Dallas City officials determined that the building stood in the way of the proposed performing arts center in the City's Arts District, so they condemned the property and forced Ms. Bass and the other residents out. It appears that the proposed center will be privately owned or run, but the facts are a bit murky.<sup>636</sup> In fact, Dallas has no plans on the horizon to build the arts center any time soon, and the City's own property management director admits that it may never get built. The City has not even proposed a financing structure for the arts center, or decided whether to use public or private funds to build it. However, the City wants to own the building now, even though it has no immediate plans either to demolish or restore it.<sup>637</sup> It continues to sit vacant.

#### Hurst

The City of Hurst agreed to let its largest taxpayer, a real estate company, expand its North East Mall and thus increase the City's sales and property tax revenues. There happened to be 127 homes in the way, but that wasn't a problem. The City agreed to condemn the homes if the owners did not sell. Under the threat of eminent domain, almost all of the homeowners sold their property. Ten condemnees refused to sell and took the City to court.<sup>638</sup> The Lopez, Duval, Prohs and Laue families had each owned their homes for approximately 30 years. Some of the other families had been there for more than a decade.<sup>639</sup>

A Texas trial judge refused to stay the condemnations while the suit was ongoing, so the residents lost their homes.<sup>640</sup> Leonard Prohs had to move while his wife was in the hospital with brain cancer. She died only five days after their house was demolished. Phyllis Duval's husband also was in the hospital with cancer at the time they were

<sup>636</sup> See Dallas Center for the Performing Arts Foundation website, www.dallasperformingarts.org.

<sup>637</sup> Selwyn Crawford, "Dallas Begins to Empty Building that It Now Owns; Tenants Forced to Leave 97-Year-Old Structure; Plans Unclear for Property Some Say Is Worth Preserving," *The Dallas Morning News*, July 9, 2002, at 13A.
<sup>638</sup> "10 Residents Under Siege by Proposal for Big Mall," *The New York Times*, May 18, 1997, at A16.

<sup>639</sup> Jennifer Packer, "Fighting for Home; Settlement Allows Mall Expansion, to the Sorrow of Residents," *The Dallas Morning News*, July 2, 2000, at 1S.
<sup>640</sup> "Texas Judge Clears Way for Expansion of Mall," *The New York Times*, May 24, 1997, at A9.

# Arlington City Council Votes to Limit Its Own Condemnation Powers

Usually cities try to maximize their eminent domain powers, but the Arlington City Council in April 2001 voted unanimously to adopt a higher standard for votes needed to condemn personal property for "public purposes."<sup>1</sup> The law change, which was first suggested by Councilman Ron Wright, requires a supermajority of votes on the council before land may be condemned. Prior to the vote, the City could take property with only a simple majority vote among the council's nine members. Wright began pushing for the change out of concern over recent condemnations approved by the City, such as the takings in the early 1990s to make way for the Ballpark in Arlington. He was surprised at the amount of support he received from the City Council, especially given that Mayor Elzie Odom and a few on the Council initially criticized the proposal. Even though this change in the law is mainly symbolic, in that a condemnation will now need only one more vote, the City has nonetheless demonstrated that it takes private property rights seriously. So far, Arlington is the only major City in Texas to adopt such a supermajority requirement.<sup>2</sup>

 "Arlington City Council," Fort Worth Star-Telegram, April 11, 2001, at Metro 5.
 J. Taylor Rushing, "Council Members Agree to Support Supermajority Condemnation Votes,"

*Fort Worth Star-Telegram*, Mar. 21, 2001, at Metro 4.

# **CASTLE**

# No Good Deed Goes Unpunished: Plano Family Threatened with Taking After Years of Giving

Todd Moore and his family once owned 1.700 acres of farmland in a rural area outside Dallas that now encroaches upon the sprawling suburbia of Plano. Over the years, the Moore family has generously given chunks of their land to Plano, including the original 661 acres for Oak Point Park, which is already the largest park in the city and has won national awards for park management. Apparently, however, they haven't been generous enough to satisfy Plano City officials. Now that the city is overrun with housing developments, it wants to condemn the rest of the Moores' land. so that all those newcomers to the city can enjoy the enhanced property values and quality of life all the extra open space may bring them. The Plano City Council has approved the use of eminent domain to take the land, out of fear that the Moores might sell out to a developer first. According to City Councilman Shep Stahel, if somebody were to develop the land, it would result in two small subdivisions sticking down into the park, and "[t]hat's inconsistent with a nature preserve." For his part, Todd Moore is amazed at the City's lack of gratitude: "It's beyond me why they would want to condemn land from a family that's always given."1 Welcome to the world of eminent domain.

<sup>1</sup> Wendy Hundley, "Talks Falter, So City May Condemn Land; Owner Is Upset by Tactic Used to Enlarge Park," *The Dallas Morning News*, July 7, 2002, at 1P. A Texas trial judge refused to stay the condemnations while the suit was ongoing, so the residents lost their homes. Leonard Prohs had to move while his wife was in the hospital with brain cancer. She died only five days after their house was demolished. Phyllis Duval's husband also was in the hospital with cancer at the time they were required to move. He died one month after the demolition.

required to move. He died one month after the demolition. Of the ten couples who challenged the City, three spouses died and four others suffered heart attacks during the dispute and litigation.<sup>641</sup>

During litigation, the owners discovered evidence that the land surveyor who designed the roads for the mall expansion had been told to change the course of one access road so that it would run through the houses of the eight owners challenging the condemnations.<sup>642</sup> However, as litigation does, the case moved slowly, and the exhausted owners finally settled in June 2000. Until the time of settlement, however, they had received no compensation at all for the loss of their homes or disruption to their lives.

#### Rowlett

The Raney family owns a nine-acre farmstead behind the Rowlett City Hall. Within the next few years, the Bush Turnpike extension will pass by the land, and a light rail station will be built in the immediate vicinity, making the Raney property extremely valuable to potential developers. However, City officials are claiming that they need the land for a park and other future municipal government expansion. The City has told Larry Raney that if he rejects its offer to purchase his land for \$370,000, it will force a sale through eminent domain. Raney, however, does not believe that the City wants his land for government purposes. He wonders about the City's sudden desire to put a large park right in the center of town because the City's own master plan shows upscale residential development on the site. Raney simply is not interested in selling the family's property, and vows that he will challenge any attempt by the City to take his land and sell it to other, more favored developers.<sup>643</sup>

 <sup>641</sup> Eric Felten, "Kiss Your House Good-Bye," *Readers Digest*, Mar. 2001.
 <sup>642</sup> Kendall Anderson, "Hurst Accused of Altering Road Plan; City Denies Changing Course to Allow for Condemnations," *The Dallas Morning News*, June 26, 1997, at 1G.

<sup>643</sup> Stephen Terry, "City May Force Sale of Land Near Main," *The Dallas Morning News*, Oct. 24, 2002, at 6T.





#### Known Condemnations Benefiting Private Parties\*

Filed None known

Known Development Projects w/Private **Benefit Condemnations\*** 

State Record of Condemnations Filed, for All Purposes.<sup>+</sup> 468

## Legend cool = 1 cool = 1

# 0 v e r v i e w

Utah has done fairly well in avoiding the use of eminent domain for private parties. Its municipal leaders actually seem to care about whether their actions will require condemning their constituents' property. At least four projects were rejected by cities specifically because they could involve the use of eminent domain to take people's property for private commercial or residential development. The possibility of eminent domain brought owners out in droves to object, and government officials listened. Although Salt Lake City approved numerous redevelopment projects and designations of areas as blighted, there are no reports of condemnations for later private development. Indeed, only one city, Riverton, reported any significant threat of condemnation for private use.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened.

<sup>†</sup>Utah State Courts caseload summaries, accessible online at http://courtlink.utcourts.gov/stats/index.htm (includes condemnations for traditional public uses).

# Private Use Condemnations

#### Ogden

Two different projects that might have condemned homes for private use generated significant public opposition. In early 2000, the Ogden City Council declared a portion of the city blighted, but the decision brought 130 people to the City Council meeting to complain about the possible use of eminent domain to take their homes and a church.<sup>644</sup> News stories do not report any further developments. Then, in 2002, there were plans for a project that would have included residential and commercial development along the Ogden River. However, the City Council voted it down, primarily because it would require the condemnation of 150 homes. The residents of the area were overwhelmingly against the project. Several elderly homeowners were not impressed by the proposal to remove them from their houses and put them into lowincome apartments after completion of the project.<sup>645</sup> Other Ogden citizens were enthusiastic about the plan and angry that it had been scuttled. But, as one of the Council members explained, "I don't know anybody speaking in favor [of the project] whose homes would be taken through eminent domain."<sup>646</sup>

# "I don't know anybody speaking in favor [of the project] whose homes would be taken through eminent domain."

#### Riverton

Riverton's redevelopment agency did not have the power of eminent domain until 1999, when the agency requested authorization to assemble land for a redevelopment project. Part of the project was to widen a road, but the other part was for a shopping center. When it first requested the eminent domain power, the City's planning director explained that the City Council had taken a position never to use eminent domain to condemn homes, but it could condemn other property.<sup>647</sup> The City apparently granted the power and then authorized eminent domain initially for seven properties with another group scheduled soon (including three operating businesses).<sup>648</sup> A few weeks later, three property owners had refused to sell, although it appears their primary objection was compensation. Although most homeowners in the second group were willing to move, several did not. Eight months before, the planning director said there would be no eminent domain against homes. In March 2001, he was hoping not to have to condemn homes.<sup>649</sup> Things sure change quickly once an agency has the power of eminent domain.

#### Salt Lake City

Salt Lake City has at least seven areas that have been designated as blighted and are thus subject to condemnation. Owners within the areas have expressed concern about the possibility of condemnation in the

<sup>644</sup> Don Baker, "Ogden Steps Toward Redevelopment," *The Deseret News*, Feb. 9, 2000, at B2.

<sup>645</sup> Kristen Moulton, "Torrent of Opposition Hits the Ogden River Project," *The Salt Lake Tribune*, March 25, 2000, at B1.
<sup>646</sup> Kristen Moulton, "Ogden Council Blistered Over Decision to Kill Parkway Project," *The Salt Lake Tribune*, March 6, 2002, at C2.

<sup>647</sup> Jim Urquhart, "Riverton RDA Seeking Power of Eminent Domain to Deal with Blight," *The Enterprise (Salt Lake City, UT)* July 19, 1999, at 5.

<sup>648</sup> "Salt Lake County Dateline Briefs," *The Deseret News*, March 9, 2001, at B2.

<sup>649</sup> John Keahey, "Riverton Gearing up for Retail Development," *The Salt Lake Tribune*, March 27, 2001, at B2.



future for private redevelopment projects.<sup>650</sup> However, news reports do not reveal whether eminent domain was exercised to acquire property for any of the projects.

# Residents instead believed the blight designation would decrease the value of their homes and businesses and would discourage further development.

### South Salt Lake City

The City Council of South Salt Lake City twice rejected redevelopment designations when residents and businesses in the area objected that they feared the use of eminent domain. The City originally proposed two separate redevelopment designations in the 3300 South area. One would predominantly cover businesses, and the other had mostly residences. City leaders hoped that residents and businesses would be enthusiastic about the financial incentives within redevelopment areas and the redevelopment of empty lots and decrepit buildings.<sup>651</sup> Residents instead believed the blight designation would decrease the value of their homes and businesses and would discourage further development. Although the owners weren't opposed to redevelopment projects that did not use eminent domain, they strongly opposed a project that gave eminent domain power to the City. Owners sent letters and appeared at council meetings to voice their objections. Bowing to the will of their constituents, the City Council voted against both projects.<sup>652</sup>

<sup>650</sup> Rebecca Walsh, "Blight Survey Finds Plenty Wrong with Salt Lake's Gateway," *The Salt Lake Tribune*, Apr. 17, 1998, at D1; Rebecca Walsh, "S.L. City Council Declares Northern Gateway Blighted," *The Salt Lake Tribune*, Aug. 14, 1998, at C3.

<sup>651</sup> Josh Loftin, "3300 S. Projects Run into Hurdles," *The Deseret News*, Dec. 4, 2000, at B1.

<sup>652</sup> Josh Loftin, "Retailers Cheer Vote Against RDA in South S.L.," *The Deseret News*, Apr. 15, 2001, at B3; John Keahey, "S. Salt Lake Redevelopment Project Dies," *The Salt Lake Tribune*, April 11, 2001, at D2.



| Known    | Condemn    | ations     |
|----------|------------|------------|
|          |            |            |
| вепетіті | ing privat | e Parties* |

| Filed      | None known  |
|------------|---|
| Threatened | ୍ରାର କ୍ରାର 15 |
| Total      | 15  |
| _          |   |

Known Development Projects w/Private Benefit Condemnations\*

Legend  $\underline{\leftarrow}$  =1  $\underline{\leftarrow}$  =1

# OVERVIEW

1

Vermont's use of eminent domain for private parties in the past five years has been minimal to nonexistent. Although the state apparently has a history of demolition for urban renewal, eminent domain seems to be used sparingly these days, fortunately for Vermont residents and businesses. Indeed, there was only one reported mention of a possible future use of eminent domain for private development in Winooski, but apparently that never materialized. Thus, the threat to Vermonters of having their homes taken away for another private party are slim, though, as everywhere, greater in redevelopment areas.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened.

Vermont

# When the City Council approved the project, it recognized that if it could not purchase all of the land, it could use eminent domain.

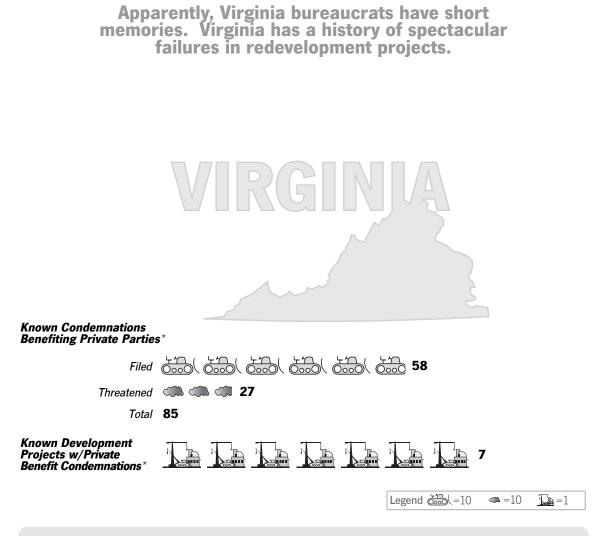
# Private Use Condemnations

## Winooski

Winooski has been trying to redevelop its downtown in a large project that could include housing, offices and commercial space. When the City Council approved the project, it recognized that if it could not purchase all of the land, it could use eminent domain.<sup>653</sup> The City sought to include 15 historic homes within the project area, which would make it possible later to use eminent domain if the owners would not sell. In October 2000, the project was still in development and no move had been made to take the homes. At least one owner expressed a willingness to sell.<sup>654</sup> The bulk of the project will be built in a space that was cleared for urban renewal 30 years ago.<sup>655</sup> As of November 2002, the project was still seeking financing.<sup>656</sup> There has been no further news mention of the fate of the homes.

<sup>653</sup> Emily Stone, "Council Endorses Downtown Project," *The Burlington Free Press*, April 12, 2000, at 4B.
<sup>654</sup> Emily Stone, "15 Homes in Project's Path," *The Burlington Free Press*, Oct. 11, 2000, at 1B.
<sup>655</sup> "Up from the Asphalt," *The Burlington Free Press*, June 6, 2001, at 6A.
<sup>656</sup> "Funding Delays Winooski Project," *AP Wire*, Nov. 15, 2002.





# 0 v e r v i e w

Virginia regularly uses eminent domain to transfer land to private developers and also uses the threat of eminent domain to force people to sell. In the past few years, there have been at least 58 condemnations for private parties (almost all for one project in Hampton), threatened condemnations, and properties currently under threat of condemnation for other private parties. Apparently, Virginia bureaucrats have short memories. Virginia has a history of spectacular failures in redevelopment projects. And as the former home of James Madison and Thomas Jefferson, one would think Virginia would have greater respect for the private property rights guaranteed by the Founders in both the U.S. and Virginia Constitutions.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened.



# LEGISLATIVE ACTIONS

The Virginia state legislature has not considered any bills affecting the ability of government to take property. In April 2002, it did pass a law that allows either the property owner or condemning authority in a condemnation proceeding to request a pre-trial settlement conference, conducted by a neutral third party.<sup>657</sup> Also, a bill went before the legislature that would allow business owners whose property is condemned to seek compensation for lost profits and business goodwill, which currently are not compensable in Virginia. This measure did not pass but has been continued until the 2003 legislative session.<sup>658</sup>

# Private Use Condemnations

#### Arlington County

When the owners of the Gates of Arlington, a 465-unit privately owned rental community, recently announced their intent to sell the property to developer Clark Construction, the County decided that it needed to stop the sale. In May 2002, the County threatened to condemn the Gates if the owners refused to sell the property instead to Arlington Housing Corporation, Inc., a nonprofit development organization specializing in low-income housing.<sup>659</sup> The owners sold.<sup>660</sup>

In May 2002, the County threatened to condemn the Gates if the owners refused to sell the property instead to Arlington Housing Corporation, Inc., a nonprofit development organization specializing in low-income housing. The owners sold.

#### Chesapeake

The City of Chesapeake began working with a private developer to build a 20-acre retail complex along Battlefield Blvd., anchored by a Costco warehouse store, a large furniture store and a 200-room hotel. The problem for both parties was that two privately owned gas stations operated on the property. The Developer offered to pay the City \$2 million to cover acquisition of the properties through eminent domain, plus another \$2 million for road and infrastructure costs. However, the owners of the gas stations said they have no desire to sell or give up their locations. Both businesses had operated successfully at this location since long before the area began its retail boom.<sup>661</sup>

The Chesapeake City Council planned to vote on the measure in March 2002, but at the last moment the Council pulled the issue from its meeting agenda. City officials declined to specify why the vote was pulled

657 See H.B. 843, 2002 Sess. (Va. 2002).

658 See H.B. 291, 2002 Sess. (Va. 2002).

<sup>659</sup> Mary Shaffrey, "Eminent Domain Powers Invoked; Arlington Man Forced to Sell," *The Washington Times*, May 23, 2002, at B1.

<sup>660</sup> Frederick Kunkle, "Plans for New T.C. Williams Has Residents Seeing 'Green'," *Washington Post*, Dec. 26, 2002, at T2.

<sup>661</sup> "Chesapeake's Power Play Against Gas Station Owners," *The Virginian-Pilot*, Mar. 12, 2002, at B10.

back, but it might have had something to do with the local uproar caused by the City's efforts to force the gas station owners to give up their choice location in favor of another developer.<sup>662</sup> The proposal came up for a City Council vote two more times,<sup>663</sup> and each time was withdrawn at the last moment.<sup>664</sup> Citing the continual problems with getting the condemnations approved, the developer finally withdrew his plans to build a retail center on the site, and instead decided to pursue the development of an apartment complex that would not require taking the gas stations. At the end of 2002, all parties achieved their development goals without resorting to eminent domain for private use: the Battlefield Blvd. site was being redeveloped, and the two gas stations were at last free to operate without the threat of condemnation hanging over their heads.<sup>665</sup>

## ...the Ottofaros had no chance to get their house back, because the City bulldozed it immediately after undertaking the initial quick take action.

#### Hampton

In 2000, the City condemned 57 parcels of land totaling 107 acres to make way for the Power Plant, a sprawling \$129-million private retail-entertainment center adjacent to the Hampton Coliseum. While many owners reached agreements with the City prior to condemnation, the City eventually filed quick take actions against those who had not sold by April 2000. This process allowed the City to pay a deposit and immediately take over the land, while a court deliberated over the price. Among the owners displaced by the project was NDS Development Co., a small business whose 1.5-acre parcel was taken. The City agreed to pay for relocation of NDS to a business park across town.<sup>666</sup>

However, not all of the targeted landowners agreed with the City that taking their land for a private retail development served a valid public use. Kenneth Slater and James Hunsucker challenged the City's condemnation of their two parcels, only to later accept the amount awarded by juries.<sup>667</sup> Frank and Dora Ottofaro owned a two-bedroom house and two lots, which they rented out to supplement their income. The house stood in the path of the road that the City wanted to build leading to the Power Plant. The Ottofaros planned to fight the condemnation in court, under the theory that the City would not have undertaken to build the road across the Ottofaro property, but for the private development to which such road would provide access.

Unfortunately, the Ottofaros had no chance to get their house back, because the City bulldozed it immediately after undertaking the initial quick take action. This destruction of the subject of debate occurred even

<sup>662</sup> Robert McCabe, "Plan to Seize Gas Stations Pulled from City Agenda," *The Virginian-Pilot*, Mar. 13, 2002, at B1.
 <sup>663</sup> Robert McCabe, "Controversy Over Gas Stations Likely to Resurface Third Time," *The Virginian-Pilot*, June 5, 2002, at B6.

<sup>664</sup> Robert McCabe, "Resolution for Forced Sale of Gas Stations Withdrawn," *The Virginian-Pilot*, June 11, 2002, at B4. <sup>665</sup> Robert McCabe, "Work Begins on New Retail Complex in Chesapeake; Plan Calls for a Kohl's and a Few Other Shops at Battlefield Blvd.," Dec. 27, 2002, *The Virginian-Pilot*, at D1.

<sup>666</sup> Fred Tannenbaum, "Hampton Might Gather Land in Court; Property Is Needed for Power Plant," *Daily Press* (*Newport News, Va.*), May 20, 2000, at C1.

<sup>667</sup> Susan Friend, "Jury Awards \$170,000 to Couple; Hampton Took 2 Lots and House for Power Plant," *Daily Press* (*Newport News, Va.*), Aug. 17, 2001, at C5.



though the family was challenging the taking in state circuit court, and construction on the Power Plant would not begin for many months.<sup>668</sup> In May 2002, after the Ottofaros lost their fight before the trial court, the Virginia Supreme Court agreed to hear their appeal.<sup>669</sup> **Update:** In January 2003, the Virginia Supreme Court upheld the condemnations, emphasizing that the property was being used for a public road. The court explicitly declined to review the Ottofaros' claim that the property was condemned for the purpose of facilitating a commercial shopping center.<sup>670</sup>

Critics suggested that Hampton undertook an unreasonable risk when it committed \$25 million to a major retail development that would certainly cannibalize other local retail stores, on the dubious premise that out-of-towners would flock to this exciting "attraction." At the time, local boosters derided these critics as cynical naysayers. However, since Kmart went bankrupt in January 2002, the massive husk of its future Power Plant location has sat half finished, becoming both a visual eyesore and a structural danger.<sup>671</sup> As of this writing, the Kmart walls still stand unfinished, although the developer recently began construction on the entertainment portion of the Power Plant project, albeit with considerably scaled-back plans for luxury retail tenants.<sup>672</sup> The twin outcomes of this case, namely the condemnation of private property and the developer's continued inability to attract stable tenants, demonstrate eloquently how and why developments that utilize private use eminent domain, rather than free market approaches to property acquisition, so often result in failure and disappointment.

...the condemnation of private property and the developer's continued inability to attract stable tenants, demonstrate eloquently how and why developments that utilize private use eminent domain, rather than free market approaches to property acquisition, so often result in failure and disappointment.

#### Norfolk

City officials in Norfolk are trying to close down the Lafayette Motor Hotel, because they think that its pink outer facade is an eyesore to the surrounding Riverview neighborhood. The City came up with a plan to condemn the motel and turn the one-acre tract of land into a park, even though Norfolk already has plenty of parkland. Lal and Kay Mirpuri, who own the motel, believe that the City is only using the park as a cover for its true motive of clearing the property to improve sightlines for residents of a new 100-unit luxury water-front condominium development that is being planned for the vacant property adjacent to the motel.<sup>673</sup> On June 25, 2002, the Norfolk City Council voted unanimously to redesignate the area surrounding the

<sup>668</sup> Alison Freehling, "Hampton Removes Power Plant's Opponent; City Levels House, Family Plans to Battle in Court," *The Daily Press (Newport News, Va.)*, Dec. 21, 2000, at C4.

<sup>669</sup> Susan Friend, "Va. Court Will Hear Hampton Land Case," *Daily Press (Newport News, Va.)*, May 24, 2002, at C1. <sup>670</sup> See *Ottofaro v. City of Hampton*, 574 S.E. 2d 235, 237, 239-40 (Va. 2003).

<sup>671</sup> Jody Snider, "Unfinished Kmart Walls Get Safety Check; Structure's Future is Uncertain Since Firm Filed for Bankruptcy," *Daily Press (Newport News, Va.)*, Apr. 11, 2002, at C9.

<sup>672</sup> Jody Snider, "Adapting the Power Plant; Developer David Cordish Offers a Realistic Assessment of Ambitious Hampton Project," *Daily Press (Newport News, Va.)*, Mar. 2, 2003, at E1.

<sup>673</sup> Earl Swift, "Gritty Norfolk Motel Rankles City Officials," *The Virginian-Pilot*, June 14, 2002, At A1.



Lafayette Motor Hotel as high-density residential, as well as to convert the motel and street in front of it into a park. This is a first step in the City's effort to remove the motel through condemnation. The Mirpuris vow that they will put up a fight.<sup>674</sup>

# "I would not support using taxpayers' money to try to help with the relocation costs when there's no legal obligation."

#### Portsmouth

The Children's Museum of Virginia, located in Portsmouth, plans to expand at some point in the next two or three years. Although the private, nonprofit museum has begun raising funds to pay for the project, no definite plans have been finalized. However, this has not stopped the City from taking steps to condemn an adjoining building to make way for this as yet nonexistent expansion. This building contains four small business tenants, including an ice cream store and a hair salon. Members of the Portsmouth City Council made waves in early 2002 when they stated that since these businesses merely rent their space in the targeted building, the City would do nothing to help pay their relocation costs. According to Councilman Cameron C. Pitts, "I would not support using taxpayers' money to try to help with the relocation costs when there's no legal obligation."<sup>675</sup>

Christina Fulp, who owns the Mica II Salon, has poured over \$50,000 of her savings into her business, and recently signed a 10-year lease on the premises. Chelsea Hall has invested tens of thousands of dollars over the years in improvements to her ice cream parlor. Both businesses thrive because of their prime location, and are frequented by museum-goers. On March 12, 2002, the Portsmouth City Council approved permits for a soul-food restaurant and art gallery to open up in vacant spots in the targeted build-ing. However, in the same meeting, the Council voted unanimously to condemn the property, which allows the City to take ownership until the Children's Museum decides to expand (if the expansion ever occurs).<sup>676</sup> The prospect of an uncompensated move that could be forced by the City at any time convinced the soulfood restaurant to withdraw its application to move there.<sup>677</sup> Fulp, on the other hand, remains at her location and plans to fight for some financial assistance from the City if she should be forced out.

#### Roanoke

The City is working with Carilion Health System on a plan to turn an industrial riverfront area south of downtown into a 75-acre biomedical business park. In March 2001, the City Council slapped the area with a blight designation, which allows the City to condemn area properties and force owners to either sell or convert existing buildings to such uses as medical research, technology or multifamily housing.<sup>678</sup> The bio-

<sup>&</sup>lt;sup>677</sup> Louis Hansen, "Soul Food Restaurateur Withdraws Request for Move," *The Virginian-Pilot*, Mar. 27, 2002, at B12.
<sup>678</sup> Todd Jackson, "Council Approves Biomed Park," *Roanoke Times & World News*, March 20, 2001, at B1; Todd Jackson, "Blight Definition Fits Biomed Park Site, Report Says," *Roanoke Times & World News*, Feb. 8, 2001, at C1.



<sup>&</sup>lt;sup>674</sup> Christopher Dinsmore, "Norfolk OK's Changes to Spur Development Near Colonial Place," *The Virginian-Pilot*, June 26, 2002, at B10.

<sup>&</sup>lt;sup>675</sup> Harold Nedd & Janie Bryant, "Businesses May Lose to Expansion Plan; Shop Owners Told Not to Expect Any Relocation Help," *The Virginian-Pilot*, Jan. 29, 2002, at B1.

<sup>&</sup>lt;sup>676</sup> Janie Bryant & Harold Nedd, "Children's Museum Expansion; Portsmouth OKs Businesses, For Now; City Council Approves Plan to Forcibly Buy High St. Building," *The Virginian-Pilot*, Mar. 13, 2002, at B1.

medical park is planned in several phases over 15 years. The plan calls for the demolition of nearly all existing buildings. Some owners have sold or tentatively agreed to sell.<sup>679</sup> Many other owners not yet targeted for condemnation have already sold out to the City.<sup>680</sup> Roanoke City Mills, a wheat mill, occupies 17 parcels of land and has asked to be allowed to stay, but the City doesn't want that. Nor does the City want to pay for the actual cost of reopening the business elsewhere. Because that would be too expensive, the City wants to pay only the appraised value.<sup>681</sup> The mill owner worries that having to close down operations will destroy the business. The mill property will be targeted in a later stage of the project, and news reports do not indicate any further move by the City toward acquisition or condemnation.

#### Virginia Beach

The City of Virginia Beach and the Virginia Beach Redevelopment Authority entered into a contract with a private developer to develop oceanfront property owned by the City. Under the agreement, the developer would build a \$30-million, four-star hotel and retail complex, and the City would invest \$20 million to acquire the necessary land and build an 850-space parking garage. The City would lease a portion of the garage back to the developers for hotel customers and keep the rest for public parking. The City also committed to use eminent domain to acquire the land needed for the garage. That land was not owned by the City yet. In November 1999, the City filed suit to condemn a piece of oceanfront property that had been leased to five tenants, including the 47-year old Neptune's Restaurant, run by the Christopolous family, in order to build the garage. The City claimed it could collect \$49 million in taxes and rent from the complex in the first 25 years.<sup>682</sup>

In August 2000, a circuit court judge ruled that the City could not condemn the land because it would benefit the developer more than the public.<sup>683</sup> The Virginia Beach City Council then voted 10-1 to reaffirm their commitment to the project and directed the City manager to provide public parking on the site even if the development is not built.<sup>684</sup> In December 2000, the City moved forward with its plan, and again condemned the Neptune's property. Neptune's sued the City, claiming it held a lease on the property that was valid until 2006. On February 4, 2002, the City and Neptune's finally reached an agreement, whereby the City would pay the restaurant \$85,000, and allow Neptune's to stay on the property rent-free through September 2003. The Christopolous family was pleased with this resolution,<sup>685</sup> but not as pleased as they would have been if the City had just left them and their successful business alone.

<sup>679</sup> Todd Jackson, "Authority Pays \$275,000 for \$103,000 Lot; Half-Acre in Roanoke Biomed Park Fetches 2 ? Times Assessment Value," *Roanoke Times*, Oct. 23, 2001, at B1.

<sup>680</sup> Todd Jackson, "Research Park Takes Next Step; Some Landowners Have Tentatively Agreed to Buyouts, Spokeswoman Says," *Roanoke Times*, Sept. 7, 2001, at A7.

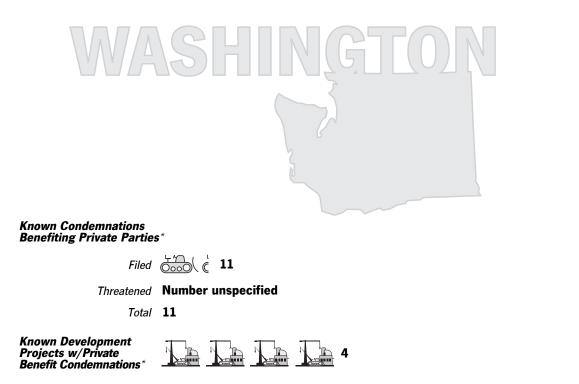
<sup>681</sup> Todd Jackson, "Council Approves Biomed Park," *Roanoke Times*, Mar. 20, 2001, at B1; Todd Jackson, "Mill May Grind out Barriers to Biomed Plans," *Roanoke Times*, Mar. 26, 2001, at C1.

<sup>682</sup> Katrice Franklin, "Beach Sues to Get Land for Hotel; City Officials Want Site Condemned to Pave Way for \$50 Million Resort," *The Virginian-Pilot*, Nov. 5, 1999, at B1.

683 See City of Virginia Beach v. Christopolous Family, L.C., 54 Va. Cir. 95 (Aug. 10, 2000).

<sup>684</sup> Katrice Franklin, "No Land Grab, Judge Reaffirms If 31st St. Plan Were for a Park, It Would Be a Different Story," *The Virginian-Pilot*, Aug. 26, 2000, at B1.

<sup>685</sup> Jason Skog, "Beach Restaurateurs Settle Suit with City, Will Operate Till 2003," *The Virginian-Pilot*, Feb. 5, 2002, at B7.



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# 0 v e r v i e w

The Washington Supreme Court may have finally made up its mind. Over the past two decades, it has issued some decisions rejecting condemnations for private use and some that seem to gloss over them, including one as recently as 1998. However, in 2000, the court issued an unequivocal statement prohibiting takings for private use. The results remain to be seen. Washington cities have continued to use eminent domain for private parties, kicking an elderly woman out of her home to make way for a car dealership, as well as condemning various smaller businesses for larger developers. It remains to be seen what will happen with a current plan by Lakewood to remove the homes of hundreds of moderate-income families for an amusement park. Given the latest ruling of the Washington Supreme Court, the bureaucrats of Lakewood must be hoping none of the homeowners take them to court.

\* These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened.



# Private Use Condemnations

### Bremerton

When the City condemned 22 homes in 1996 to make way for a sewer plant extension, all of the owners settled with the City and moved out except for Lovie Nichols, an elderly widow who refused to vacate her home of 55 years. In 1998, the City sent her an eviction notice. However, she was not informed at the time of the eviction that the City had already sold her property out from under her as part of an 11-acre land deal with a local car dealer. Ms. Nichols challenged the eviction on the grounds that the City never had a valid use for condemning her home. Complicating matters was the fact that a 1995 newspaper article had guoted Bremerton Mayor Lynn Horton saying that the City intended to generate revenue by reselling surplus parcels condemned for the plant expansion to private developers. But despite considerable evidence that the taking was pretextual and only for the purpose of transferring the property to private business interests, the Kitsap County Superior Court ruled in favor of the City.<sup>686</sup> In December 1999, the state Court of Appeals upheld the trial court's decision.<sup>687</sup> Lovie Nichols finally was forced to move out of her home after the Washington Supreme Court declined to review her case.688

Lovie Nichols was not informed at the time of the eviction that the City had already sold her property out from under her as part of an 11-acre land deal with a local car dealer.

#### Lakewood

The Town of Lakewood and a Kentucky-based developer were working to get a \$150-million, privately owned amusement park built on 80 acres of land currently occupied by hundreds of

<sup>686</sup> Gordy Holt, "Bremerton Woman Just Won't Budge; Grandmother IsFighting Condemnation of Her Home," *Seattle Post-Intelligencer*, Nov. 22, 1999, at A1.

<sup>687</sup> See *City of Bremerton v. Estate of Anderson*, 1999 Wash. App. LEXIS 2044, at \*20 (Dec. 3, 1999).

<sup>688</sup> *City of Bremerton v. Estate of Anderson*, 10 P.3d 407 (Wash. 2000); "Widow Will Lose Her Home, Land After All," *Seattle Post-Intelligencer*, July 18, 2000, at B3.

# Washington Supreme Court Says No to Condemnations for Private Use

In 1993, the Washington state legislature passed a law that gave mobile home park tenants a right of first refusal when a park owner decides to sell the mobile home park. Manufactured Housing Communities of Washington, an association of mobile home park owners, brought a declaratory judgment action against the State two years later, arguing that the act creates an unconstitutional taking of property for private use. The trial court and state Court of Appeals both upheld the constitutionality of the act. However, in November 2000 the Washington Supreme Court reversed the lower court rulings, and held the act to be unconstitutional.<sup>1</sup>

The high court held that giving the right of first refusal to tenants transferred a valuable right from one private citizen to another.<sup>2</sup> The court explained that the "eminent domain provision of the Washington Constitution provides a complete restriction against taking private property for private use." Moreover, the court held, "[t]his prohibition is not conditioned on payment of compensation.... Hence, this absolute prohibition against taking private property for private use...requires invalidation of the statute."3 This decision was in keeping with other Washington cases that similarly forbade the condemnation of property for the primary purpose of transferring the land to private business.<sup>4</sup>

 <sup>1</sup> See Manufactured Housing Communities v. Washington, 13 P.3d 183 (Wash. 2000).
 <sup>2</sup> See id. at 194-95.
 <sup>3</sup> Id. at 190.
 <sup>4</sup> In Re Petition of Seattle, 638 P.2d 549, 556-57 (Wash. 1981; Hogue v. Port of Seattle, 341 P.2d 171, 181-191 (Wash. 1959).

# CASTLE

families. City manager Scott Rohlfs indicated that the Town could buy the land and then lease it back to the park operators. Lakewood claimed that the amusement park was a "public purpose" that would lure development and spark urban renewal in depressed Lakewood neighborhoods.<sup>689</sup> It would also be the only large theme park in the Northwest U.S., with many exciting thrill rides. However, the longtime residents of 59 trailers in the Sunrise Village mobile home park were not thrilled. Neither were the approximately 150 other families who rent low-cost apartments or duplexes on the site, which is close to Army and Air Force bases. They all currently live on the 80-acre site and would be forced to move if the park is built. Most believe they would be forced to pay significantly higher rents elsewhere.<sup>690</sup> The whole project fell though when the Washington legislature denied a sales tax exemption the developer requested.<sup>691</sup>

# Washington's strict eminent domain statute explicitly forbids the taking of land for a public use and then selling the excess for private use.

#### Seattle

The state legislature approved the use of eminent domain for expansion of the Washington State Convention Center, conditioned on the center's ability to raise \$15 million in private funding for the project. The center selected a design that placed the new exhibition hall on the fourth floor, because this design would open up a large amount of street-level space that the City could sell or lease to bring in the required outside funds. The plan also called for the center to condemn nine properties: a 127-unit apartment tower, a condominium/garage structure, six parking lots and a rental car outlet. In return for certain easements, private developer R.C. Hedreen Co. agreed to purchase the extra ground floor space, which it planned to use for retail shops and parking for a new hotel to be built on adjacent land not subject to condemnation. After the center moved to condemn the nine properties, one owner accepted the center's purchase offer, but the other eight challenged the takings. In November 1998, the Washington Supreme Court ruled in favor of the center, holding that because the private use is merely incidental to the overall public nature of the project, the "public purpose" is valid.<sup>692</sup> However, in a stinging dissent, Justice Richard B. Sanders explained that Washington's strict eminent domain statute explicitly forbids the taking of land for a public use and then selling the excess for private use.<sup>693</sup>

#### Vancouver

In November 1999, the City filed suit to condemn the Monterey Hotel, an old three-story hotel in downtown Vancouver that housed mainly low-income people. A developer from just over the state line in Portand owned most of the block around the hotel, and City officials wanted to clear out the last property before the

<sup>691</sup> Joseph Turner, "Why Did Pierce Lose its Clout in Olympia?," *The News Tribune (Tacoma, Wa.)*, Apr. 28, 2002, at Front Page.

<sup>692</sup> See *State of Washington v. Evans*, 966 P.2d 1252, 1259 (Wash. 1998).
 <sup>693</sup> See *id.* at 1261-63.



<sup>&</sup>lt;sup>689</sup> Skip Card, "City May Condemn Land For Theme Park; Lakewood Needs Property for Amusement Center," *The News Tribune (Tacoma, Wa.)*, Feb. 3, 2000, At B1.

<sup>&</sup>lt;sup>690</sup> Skip Card, "Planned Lakewood, Wash., Theme Park's Neighbors Fear Being Forced Out," *The News Tribune (Tacoma, Wa.)*, Dec. 18, 2000.

developer could build a planned six-story residential, office and retail development with adjacent parking structure. The hotel's owners, R.K. and Geetaben Patel, challenged the condemnation, arguing that the City lacked a public use.<sup>694</sup> However, the trial court ruled in favor of the City. Just as the Washington Court of Appeals was about to hear the case, the Patels reached a settlement with the City and agreed to sell. However, in the meantime the planned development fell through, and the City currently has no specific plans for the building until a new developer shows interest in the area.<sup>695</sup>

<sup>694</sup> "Vancouver Files Suit to Condemn Old Hotel," *The Oregonian* (*Portland, Or.*), Nov. 25, 1999, at B5.
<sup>695</sup> "Vancouver, Hotel Owners Agree on \$750,000 Price," *The Oregonian* (*Portland, Or.*), Nov. 12, 2001, at C2.

#### Costco Leads Big-Box Beneficiaries of Eminent Domain

Costco, a popular Washington-based members-only shopping chain, turns up repeatedly in development projects that involve condemning property. Bill Brody's commercial building and many other businesses in Port Chester, New York, have been condemned for a Costco and a Stop & Shop. William and Bill Minnich have been forced to sell their family woodworking business in East Harlem after losing their ability to challenge the planned condemnation of their building for Costco and Home Depot. In California, according to a federal court, Costco requested the condemnation of its Lancaster shopping center neighbor, a 99 Cents Only Store. Cypress, California, filed condemnation proceedings against a Christian center in order to obtain the land for Costco. Planners in Kansas City, Missouri, had to condemn additional properties in an already-planned project area to get Costco to agree to remain in the project. With 400 stores, millions of members, and hundreds of millions in profits each year, one would think Costco could manage to erect its stores without having government condemn land on its behalf.

Sources: All of these cases appear in this report in the sections for their respective cities.



#### Washington, D.C. was the site of the original U.S. Supreme Court case that opened the floodgates of condemnation for private use.

# WASHINGTON D.C.

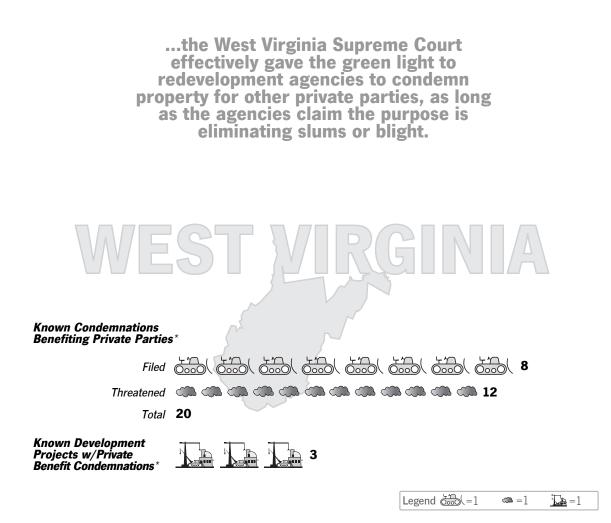
### OVERVIEW

Washington, D.C. was the site of the original U.S. Supreme Court case that opened the floodgates of condemnation for private use.<sup>696</sup> The Supreme Court permitted the condemnation of an area that actually was blighted (unlike most blight designations today), although the property would be transferred to another private party for development. The public use to be accomplished was the removal of slum and blight, and that was accomplished simply by razing the area. What happened afterwards, including transfer to a private party, was not important.

Although Washington, D.C., certainly saw its share of urban renewal programs many years ago, news reports reveal no exercises of condemnation for private parties in the past five years. The District seems to be focusing its energies on acquiring vacant property for transfer to private developers. Although it is possible some of these will be acquired through eminent domain,<sup>697</sup> so far there have been no reports of actual or even threatened condemnations.

<sup>696</sup> See *Berman v. Parker*, 348 U.S. 26 (1954).
<sup>697</sup> Neil Seldman & Jane Kaddouri, "And Rooms at the Inn," *Washington Post*, Feb. 17, 2002, at B8.





#### OVERVIEW

West Virginia has a deplorable history of using eminent domain for private purposes. The reported instances of abuse of eminent domain have mostly been in Charleston, where every few years the City seems to try to wipe out existing homes and businesses for some new project. Wheeling also has threatened the use of eminent domain in order to replace certain local businesses with other ones. In 1998, the West Virginia Supreme Court effectively gave the green light to redevelopment agencies to condemn property for other private parties, as long as the agencies claim the purpose is eliminating slums or blight. Luckily for the agencies, and unluckily for West Virginia citizens, blight designations in West Virginia never expire,<sup>698</sup> so the agency can condemn properties in a redevelopment area 15 or more years after the area was originally designated as blighted.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened. <sup>698</sup> see W. VA. CODE § 16-18-5 (2001).



# Private Use Condemnations

#### Charleston

Charleston has over the years undertaken a seemingly endless series of urban renewal projects. The City's current \$100 million East End redevelopment includes condemning properties in the 1300 block of Washington Street for a chain grocery store. The targeted properties consist of a Burger King, Nu-Way Cleaners, a two-story apartment building, four houses and two vacant lots.<sup>699</sup> However, with no grocery store lined up after years of planning, the residents and businesses of Charleston's East End remain in limbo about their future.<sup>700</sup> Community activists, including Romona Taylor-Williams, fear that the City's redevelopment projects will destroy local black communities, as they did during previous rounds of urban renewal.<sup>701</sup> At the request of activists, the Institute for Justice submitted testimony opposing the redevelopment plan.

Community activists, including Romona Taylor-Williams, fear that the City's redevelopment projects will destroy local black communities, as they did during previous rounds of urban renewal.

#### Charleston

The Charleston Urban Redevelopment Authority condemned four contiguous parcels of land in downtown Charleston on which the Courtland Company operated a commercial parking lot, so that it could sell the land to private developers. Courtland challenged the taking, and argued that since his property was not itself "slum and blighted," the authority was precluded from condemning it even though it was located within a redevelopment zone. The West Virginia Supreme Court disagreed, concluding that the authority had acted within its legitimate power.<sup>702</sup>

#### Wheeling

Wheeling's historic downtown consists mostly of attractive waterfront Victorian buildings. In October 2000, Congress passed the Wheeling National Heritage Area Act (WNHAA),<sup>703</sup> which designated most of downtown Wheeling as a National Heritage Area. The Act established the Wheeling National Heritage Area Corporation (WNHAC), a nonprofit entity responsible for managing the Heritage Area,<sup>704</sup> in hopes that redevelopment might restore the area to its former grandeur. Congress made clear its intent that any such redevelopment could occur only if property owners willingly consent to transfer ownership of their property to WNHAC.<sup>705</sup>

<sup>699</sup> Greg Stone, "East End and Eminent Domain; Washington Street Residents May Be Forced Out by Store," The Charleston Gazette, Mar. 9, 2000, at 1C.

<sup>700</sup> "East End If the Area Can Support a Grocery, a Company Will Buy Land and Build It," Charleston Daily Mail, Sept. 13, 2001, at 4A.

<sup>701</sup> Greg Stone, "CURA Appoints Blacks to East End Panel," The Charleston Gazette, May 22, 2002, at 1C. <sup>702</sup> See Charleston Urban Renewal Authority v. The Courtland Co., 509 S.E. 2d 569, 570 (W.Va. 1998).

<sup>703</sup> Pub. L. No. 106-291, § 157, 114 Stat. 922, 963 (2000).

<sup>704</sup> Wheeling National Heritage Area Act (WNHAA), Pub. L. No. 106-291, § 157 (d)(2)(B), 114 Stat. 922, 964 (2000). <sup>705</sup> WNHAA § 157 (5)(e)(5)(B)(i), 114 Stat. 922, 966 (limiting the ability of the WNHAC to acquire property only by "gift" or "purchase from a willing seller...") (emphasis added). This provision makes clear that acquisitions from unwilling sellers, i.e. through eminent domain, are not permitted.



However, Wheeling officials still tried to threaten unwilling sellers within the heritage area. In early 2002, WHNAC came up with a proposal to convert up to 90 percent of downtown Wheeling into a Victorianthemed outlet mall. The \$160-million plan, for which the State would pay about half, calls for the WNHAC to take properties away from their present owners and give them to other private retail businesses of the City's choosing. The measure potentially affects almost 200 businesses.<sup>706</sup> The Institute for Justice has been working with owners who oppose the condemnations that could result if the City moves forward with its plan of removing existing businesses.

#### ...using eminent domain to carry out the mission of the Heritage Area is "a misreading of the spirit and intent of the law in establishing the Heritage Area."

Apparently undaunted by the fact that this scheme violates federal law, state lawmakers enthusiastically support it. On March 9, 2002, the West Virginia Legislature approved the funding mechanism for the State's portion of the redevelopment project, voting to allocate \$19 million in video lottery proceeds to float bonds for each year up to 30 years.<sup>707</sup> Private developers pledged to come up with an additional \$75 million for the project, but no retail stores have yet committed to join the project.<sup>708</sup> Wheeling City leaders believe that the use of WHNAC to carry out condemnations for private use violates neither the letter nor the spirit of the WNHAA.<sup>709</sup> However, the Interior Department thinks otherwise, explicitly stating that using eminent domain to carry out the mission of the Heritage Area is "a misreading of the spirit and intent of the law in establishing the Heritage Area."<sup>710</sup>

The West Virginia Supreme Court is hearing an appeal on the validity of Wheeling's redevelopment plan. A circuit judge validated all aspects of the plan except for the use of money from private developers for condemnation of privately owned land.<sup>711</sup> The project is stalled, having missed its first deadlines for receiving the private funds while the parties wait for the high court's ruling on the legality of the plan.<sup>712</sup>

<sup>706</sup> Chris Stirewalt, "Wheeling Shopping Center Proposal May Revive Downtown," Charleston Daily Mail, Jan. 15, 2002, at 1A.

<sup>707</sup> "With Legislation Approved, Mall Developer Focuses on Obtaining Private Investment," AP Wire, Mar. 13, 2002.
 <sup>708</sup> George Hohmann, "Wheeling Seeking Retailers; No Stores Committed for Proposed State Project," Charleston Daily Mail, Feb. 9, 2002, at 1A.

<sup>709</sup> Sam Tranum, "Wheeling Buyouts Contested; Attorney Says City Cannot Use Power to Take Land for Mall," Charleston Daily Mail, May 17, 2002, at 1A.

<sup>710</sup> Letter from Charles P. Raynor, Associate Solictitor, U.S. Interior Department, to William Mellor (May 3, 2002) (on file with author).

<sup>711</sup> Toby Coleman, "High Court to Hear Grant Plan Appeal," Charleston Daily Mail, Feb. 21, 2003, at C7. <sup>712</sup> Charles Shumaker, "Wheeling Mall Gets Reprieve," The Charleston Gazette, Jan. 16, 2003, at C3.



#### Known Condemnations Benefiting Private Parties\*

 Filed
 None known

 Threatened
 Image: Image

State Record of Condemnations Filed, for All Purposes.<sup>+</sup> 111

Legend  $\overleftarrow{0}$  =1  $\overleftarrow{1}$  =1

# OVERVIEW

Wisconsin has refrained from condemning the homes and businesses of its citizens to make way for other private parties. Milwaukee had planned a project in 2001 that would have displaced dozens of local businesses, but the bankruptcy of the beneficiary of the planned condemnations—Kmart—scuttled that plan. Fortunately, this failed condemnation project is the only reported instance in Wisconsin between 1998 and 2002 of taking property for the benefit of another private party.

\*These numbers were compiled from news sources. Many cases go unreported, and news reports often do not specify the number of properties against which condemnations were filed or threatened. \*Circuit Court Automation Program, Office of Court Operations. Madison, Wisconsin 2001



...the purpose of creating the TIF district and condemning the businesses was just to give the property to Kmart. If Kmart won't use it, there's no reason to condemn.

#### LEGISLATIVE ACTIONS

A bill seeking to place severe limits on private condemnations (including for redevelopment purposes) recently failed to pass the Wisconsin Senate. Assembly Bill 455, which was introduced in July 2001, would have eliminated the condemnation authority of all non-governmental entities in Wisconsin. However, it did not win the necessary support among state lawmakers to become law.<sup>713</sup>

#### Private Use Condemnations

#### Milwaukee

In 2001, the City of Milwaukee created a tax-increment-financing district and authorized the Milwaukee Redevelopment Authority to begin eminent domain proceedings to acquire the 15 acres of land needed to build a 156,000-square foot Super Kmart store. Twelve buildings would be demolished and dozens of small local businesses removed to make way for the discount retail giant.<sup>714</sup> However, the City put an abrupt hold on all plans to condemn properties for the project when Kmart filed for bankruptcy protection in February 2002. Now it is not certain that the project will ever go forward. Though Kmart insisted it would complete the project, the City refused to take the property until Kmart's financial picture becomes clear.<sup>715</sup> In other words, the purpose of creating the TIF district and condemning the businesses was just to give the property to Kmart. If Kmart won't use it, there's no reason to condemn. A few months later, the City officially abandoned any plans to take land for Kmart.<sup>716</sup>

713 See A.B. 455, 95th Sess. (Wisc. 2002).

<sup>714</sup> Leonard Sykes, Jr., "Super Kmart Developers Hire Activist as Liaison for Project," *Milwaukee Journal Sentinel*, Oct. 8, 2001, at B5.

<sup>715</sup> Tom Daykin, "City Delays Purchase of Land for Kmart; Deal Became Questionable After Bankruptcy Filing," *Milwaukee Journal Sentinel*, Feb. 16, 2002, at D1.

<sup>716</sup> Tom Daykin, "City Abandons Plans to Buy Land for Kmart," *Milwaukee Journal Sentinel*, May 1, 2002, at D1.



Wyoming landowners are...safe from having their homes taken for scenic condominiums or small businesses demolished for larger ones.

# WYOMING

# OVERVIEW

Wyoming has no reported instances of the use of eminent domain for private development. The only eminent domain disputes in the state in the past five years involved the eminent domain power of rail-roads,<sup>717</sup> oil and gas companies,<sup>718</sup> and coal companies<sup>719</sup> to condemn property for rights-of-way and mineral access. None involved the type of private eminent domain abuse so common in most of the rest of the country. Wyoming landowners are therefore safe from having their homes taken for scenic condominiums or small businesses demolished for larger ones.

<sup>717</sup> Mead Gruver, "Senate Committee Kills Railroad Eminent Domain Bill," *AP Wire*, Feb. 19, 1999.
 <sup>718</sup> See *Wyoming Resources Corp. v. T-Chair Land Co.*, 49 P.3d 999 (Wyo. 2002).
 <sup>719</sup> "Coal Company Sues to Plug Oil and Gas Wells," *AP Wire*, Jan. 17, 2000.



# Glossary of Terms

**Amicus Brief:** A brief "amicus curiae" is a "friend of the court" brief. The parties in cases file their own briefs, discussing the facts and the law. Sometimes, individual people or organizations that are not parties to the lawsuit will have something to add that will help the court, like factual background or a different legal perspective. Those people can then submit an amicus brief that provides this additional information.

**Bad Faith:** This is a general legal term that refers to having improper motives for some action. In the context of eminent domain, if a court finds that that government acted in bad faith, it will refuse to allow the condemnation of property. For example, it would be in bad faith to condemn property in order for the head of the development agency to gain personal profit. This is an obvious example, but there are many, and more complex, varieties of bad faith.

**Blight:** Most states have a statutory definition of "blight." Generally it is in an area that has physical deterioration, but state definitions vary considerably. For example, a blighted area might have homes without electricity or plumbing, but it might also be an area that is "economically underutilized," that has inadequate parking or "inadequate planning", or too-small yards. Because the definitions vary so widely, it is important to look at state statutes to understand this term in one's own state. Courts usually hold that using eminent domain to eradicate blight is for public use, whatever the eventual use of the property, because clearing away the blight is a benefit to the public. Declaring an area to be blighted or a slum is often the first step a municipality will take toward condemning property and then transferring it to a private party. And in some states, property may be condemned and transferred to a private party only if the area is blighted or a slum. In recent years, some communities have been successful in challenging blight designations.

**Condemnation:** This is the general term that means forcible government acquisition of property for any reason. It includes eminent domain, where property is taken for a public use and just compensation must be paid. In some states, the term condemnation can also include taking land for tax delinquency or for building code violations. The government does not have to pay compensation when it condemns for tax delinquency. Whether it has to pay compensation in building code violation condemnations depends on the exact state or local statutes involved.

**Condemnee:** A condemnee is the person or business whose property is taken.

**Condemnor:** Condemnor refers to the government body or private party who files the eminent domain lawsuit seeking to acquire private property for "public use." Condemnors are usually government agencies. In most states, private utility companies can also be condemnors; they can condemn property only for electricity, water and other utility purposes. In a handful of states, private developers or development corporations have been given the government's power to condemn private property for private economic development.

**Defendant:** The person who gets sued. In condemnation cases, the defendant is usually the owner of the property being condemned. However, if an owner brings his own lawsuit to prevent a condemnation, the government can be the defendant.

**Development corporation:** Development corporations are usually private corporations that engage in property development. (Occasionally, a government agency will call itself a "development corporation.") They can operate on land the corporation or the local government owns and that has not been condemned. In a handful of states, private development corporations are authorized to condemn property. In other states, the government may transfer land to a development corporation after condemnation or just work with the development corporation in creating a development plan.

**Easement:** An interest in property that allows the use of the land by someone who does not have title to it. For example, one neighbor may grant another an easement to walk across the first person's property on the way home. A

landowner may also sell an easement, allowing another party to construct a road, access a water supply or dig for minerals.

**Economic development:** Some states allow condemnation and transfer to private parties only to eradicate slum or blight. Other states have statutes that allow local governments to condemn for "economic development." That means that the result of the new project will benefit the local economy, usually in the form of more tax dollars and jobs. If a state allows property to be condemned for economic development, there doesn't need to be anything wrong with the property or area to condemn it.

**Eminent domain:** Eminent domain is nearly identical to "condemnation." It means the power to take land and the process for taking it. The only difference between condemnation and eminent domain is that the term condemnation is a little broader. Eminent domain is not used to describe taking property that has numerous building code violations or tax delinquency. In this report, because we are not discussing condemnation of unsafe buildings, the terms condemnation and eminent domain are used synonymously. Up until the mid-20th century, government used its power of eminent domain for projects that have traditionally been treated as public uses, rather than for private economic development.

**Fair market value:** The amount that a willing buyer would pay a willing seller for a piece of property is considered its fair market value. In eminent domain situations, because there is no willing seller, appraisers make estimates of how much the property is worth. They use a variety of methods for making these estimates, including sales of comparable pieces of property. Fair market value does not include any increased value that will occur as a result of the development project. For example, if homes are getting condemned for a new shopping center, the property may be worth more because the developer wants it for a shopping center, but that increase is not included in the fair market value.

**Good faith offer and good faith negotiations:** Many states require that before a piece of property is condemned, the government must make a "good faith offer" to purchase the property. That usually means that the government must get a reasonable appraisal of the value of the property and offer to purchase it for that amount before condemning. Certain states require "good faith negotiations," which means that the government should try to negotiate with the owner about price before condemning.

**Goodwill:** Businesses usually have a base of customers who know them and people who identify them with a particular location. For example, a restaurant that has been in the same spot for 25 years has business goodwill in the form of regular customers and identification with that location. If the restaurant is forced out by eminent domain, it will probably lose business. The government does not compensate for that loss. If someone sells their 25-year old restaurant, however, one of the line items in the sale is business goodwill. The buyer pays for the fact that the business is well known and has many customers.

"Highest and best use": This term has two different uses in the context of eminent domain. When property is condemned and the parties are arguing about just compensation, the rule is almost always that the property must be valued at its highest and best use. So, if a piece of land is vacant but zoned industrial, it is valued as potential industrial land rather then potential residential land. The other way that governments sometimes use the term is that they will argue that property is not being used at its "highest and best use" and that it should therefore be condemned and redeveloped according to its full potential.

**Injunction:** An injunction is an order from a court requiring a person or entity to do or not do something. In eminent domain cases, owners often seek injunctions to prevent the government from taking their property or tearing down their buildings before a final court decision.

Just compensation: The U.S. Constitution and all state constitutions require that when the government takes property

by eminent domain, it must pay "just compensation." Although the features of compensation vary from state to state, generally it includes the value of land and buildings. Most states and the federal government also provide some compensation for relocation costs. Destruction of a business and loss of business goodwill are generally not included in just compensation. Just compensation does not mean that someone whose property is taken will get the full cost of the building of a new home or business or purchasing another site with the same features.

**Necessity of Taking:** The government may condemn property for public use. One offshoot of this doctrine is the requirement that a taking be "necessary" to achieve the public use. To use an extreme example, it is not necessary to condemn six blocks of homes in order to erect a small post office on one of those blocks. Sometimes, when owners challenge the public use of a condemnation, they also argue that the takings are not necessary. Generally, courts give even more deference to government findings of necessity than to government findings of public use. However, owners still sometimes win these claims.

Ordinance: This is a law passed by a local legislative body, like a city council, that is written down and on the books.

**Plaintiff:** The person who brings a lawsuit. In condemnation cases, the plaintiff is usually the government. However, if an owner brings his own lawsuit to prevent a condemnation, the owner can be the plaintiff.

**Pretextual taking:** When a government agency claims it is taking property for one purpose but the actual purpose is something else. If a taking is pretextual, many courts will refuse to allow it.

**Primary public benefit:** Many states hold that if a taking has a "primarily" public purpose, then "incidental" benefit to private parties doesn't make the taking unconstitutional. On the other hand, if the primary purpose of the taking is to benefit a private party, then the taking cannot be justified by only incidental public benefit. Unfortunately, courts have never defined either primary or incidental. Those terms are analyzed by the courts in each case based on the facts of each case.

**Private use:** Under federal law and in every state, property may be condemned for public uses but not for private use. However, there is no universal definition of "private use." Some state courts seem to find that everything is a public use and nothing is a private use. Other state courts will find that property cannot be condemned for ownership by private parties. Most states fall in between and try to weigh the evidence that the purpose of the project is public against the evidence that it is private. Private use thus gets determined on a case-by-case basis in court. In this report, however, we use the term private use as an ordinary person would—where the property will be owned and/or used by a private party rather than the government.

**Public purpose:** Although the federal and state constitutions require that takings be for "public use," many states have interpreted "public use" to mean "public purpose" or "public benefit." A public purpose is one that is justified by the beneficial effect it is expected to have on the public.

**Public use:** The U.S. Constitution and all but a handful of state constitutions have explicit language that says that property can be taken "for public use." In the few states that do not have such language in their constitutions, the state courts have read it in, so all eminent domain must be for "public use." Until the middle part of the 20th Century, public use was interpreted fairly literally—used by or available to the general public or owned by the government. Federal courts and the courts of many of the states now interpret "public use" to mean "having a public purpose or benefit."

**Quick take:** In many states, there is a specific procedure that allows the government to deposit with the court the amount it thinks the property is worth and then take possession of it very quickly. Sometimes there is no opportunity for a hearing before the government takes possession. For residences, there is usually a somewhat longer period

before the person must leave, but businesses in some states can be evicted very quickly. Once the government takes possession of a property through quick take, it can (and often does) demolish the buildings in question.

**Redevelopment:** Redevelopment means changing an area that has already been developed. In the context of eminent domain, redevelopment means removing the existing homes, businesses, and other buildings and replacing them with something else.

**Redevelopment agency:** Many states, counties, and municipalities have a particular agency that is in charge of redevelopment projects. The redevelopment agency is a government body, and it usually is responsible for conducting studies pertaining to redevelopment, overseeing the creation of a redevelopment plan, voting on the plan and supervising the implementation of the plan. The redevelopment agency is often the actual condemnor.

**Redevelopment area:** This is usually the same as a "blighted area." When a local government decides it is going to redevelop, it designates an area where the redevelopment will take place. In most states, an area must be blighted to call it a redevelopment area. However, the definition of blight can be very loose. Redevelopment areas often have access to special tax benefits, and cities can get state or federal money to use in redevelopment areas. The treatment of redevelopment areas is governed by both state and federal statutes.

**Redevelopment plan:** After a city has designated a blighted or redevelopment area, it then comes up with (or asks a private consultant to come up with) a plan for redeveloping the area. These large documents are then supposed to guide the course of future redevelopment.

**Slum:** Declaring an area to be a slum or "blighted" is often the first step a municipality will take towards condemning a property and then transferring it to a private party. Most states have a statutory definition of "slum." Generally, it is an area that has physical deterioration and crime, but state definitions vary considerably. Courts routinely hold that using eminent domain in slums is for public use, whatever the eventual use of the property, because clearing away the slum is a benefit to the public. The major cases in the 1950s that allow property to be condemned and given to private developers were cases involving slum clearance. These cases opened the door for the abuse of eminent domain we see today.

Statute: A law that was passed by the federal or state legislature and that is on the books.

**TIF (Tax Increment Financing):** TIF stands for Tax Increment Financing. This is a technique for financing development projects. Let's say an area is designated as a TIF district effective January 2000, and in 1999, it produced \$100 in property taxes, which went to the general city fund. In year 2001, the area produces \$150 in property taxes. Of that tax money, the city continues to get the amount in taxes that it got before the area became a TIF district, in this case \$100. All of the money above that amount, in this case \$50, goes to the redevelopment agency. That extra money can be used to pay for the current project, to pay back bonds that were issued for the project or to pay for new development projects; it all depends on how the particular locality sets up the project financing.

**Vacated:** When an appellate court vacates a lower court's judicial decision, the appellate court erases the first decision, usually because it thinks the lower court should have decided the case on different grounds. This is different than a reversal, where the appellate court merely disagrees with the lower court's interpretation of the same issue.

**Validation Action:** This is a special term used only in California. After a California municipality designates an area as blighted, people who live within that area can bring a validation action to challenge the blight designation and try to get a court to remove it. Citizens in other states can bring similar lawsuits, but they are usually just called "challenges to blight designations" or something similar.