

# THEY WANT TO ERASE US OUT



## THE FACES OF EMINENT DOMAIN ABUSE IN TEXAS



BY MATT MILLER  
EXECUTIVE DIRECTOR  
INSTITUTE FOR JUSTICE TEXAS CHAPTER  
JANUARY 2009

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EVERYTHING  
I OWN IS IN A  
DEMOLITION ZONE**

**-GIL KIMMELMAN**  
*EL PASO PROPERTY OWNER*

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# ★ INTRODUCTION ★

Thousands of Texans, from Houston to San Antonio to El Paso, now live under the threat of eminent domain abuse. These home and business owners have well-founded fears that their property may soon be taken from them to make way for private redevelopment projects cooked up by developers and city officials. The threatened homes and businesses are important parts of functioning communities, many of which have been there since the earliest days of Texas' history as an independent nation. Their only fault is that they are located on land coveted by developers and government officials.

How did these rightful property owners become the targets of eminent domain for private gain, and why is this happening now? The first question is easy to answer. The U.S. Supreme Court opened the eminent domain abuse floodgates after its infamous 2005 decision, *Kelo v. City of New London*, which upheld the use of eminent domain to take private property for private economic development. The High Court ruled that the mere potential that a development project might create more jobs and taxes was enough of a justification for such takings.

In her dissent in *Kelo*, Justice O'Connor predicted, "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more."

O'Connor was right. Hours after *Kelo* was decided, the city of Freeport, Texas, urged its attorneys to redouble their efforts to take a family-owned seafood business for a private marina development project. This so outraged the Texas legislature that Texas became the second state—out of 43 so far—to reform its eminent domain laws.

Unfortunately, the 2005 reform was riddled with loopholes. The Institute for Justice's Castle Coalition gives Texas a "C-" in its 50 State Report Card on eminent domain reform—its lowest grade above failing scores. Texas attempted to enact more substantive reform in 2007. House Bill 2006 would have closed the "blight" loophole and defined "public use" more accurately so it "allows a state, a political subdivision of the state, or the general public of the state to possess, occupy, and enjoy the property." Although it passed the State House of Representatives by a vote of 125 to 25 and the State Senate unanimously, House Bill 2006 was ultimately vetoed by Governor Perry.



Thus, Texans remain tremendously vulnerable to eminent domain abuse by ambitious cities and developers.

When we opened the Institute for Justice Texas Chapter in June 2008, we recognized that eminent domain abuse remains one of the principle issues we must address. We understood that what happened in Freeport was happening in El Paso, but within our first month of opening, we received calls from small property owners in Houston and San Antonio telling us that the same thing was happening to them. We visited each of those cities. We talked extensively to property owners who found themselves in the crosshairs of abuse. (All interviews are on file with IJ.) This only reconfirmed for us that the reforms of 2005 were not enough. The legislators who passed them had their hearts in the right place, but they left so many loopholes in the law that thousands of Texans continue to live under the threat of having their property taken for redevelopment.

As you will learn, each of these groups of Texans faces a unique set of circumstances, yet their stories are amazingly similar. In El Paso, a neighborhood called El Segundo Barrio (which has been called the "Ellis Island of the Southwest") is being targeted by a large consortium of developers and business owners who want to remake the U.S.-Mexico border area for the overwhelming benefit of private parties. In San Antonio, the city wants to expand its famed River Walk northward again, to be filled with private businesses owned by people other than the current land owners. In Houston, the threat is everywhere. One little-noticed part of the city's light rail plan allows the rail authority to condemn any property within a quarter mile of any light rail station to facilitate something called "transit-oriented development."

If this abuse can happen in El Paso, Houston or San Antonio, then it can happen anywhere in Texas. Eminent domain for private gain in Texas must be stopped. The goal of this report is to share with legislators and the media the real-world stories of these beleaguered home and business owners.

Like most redevelopment projects, what is happening across Texas shares three common themes:

***Location, Location, Location:*** Nobody would want this land if it were not valuable. In all three cases, the land has become a lot more valuable in recent years than it has historically been. This is largely due to changing development patterns and public policy that favors forced density over natural growth and favors the short term over the long term. That means old neighborhoods are hot again and dense urbanization is the latest fad.

***Unplanned = Undesirable:*** What exists today in all three neighborhoods is good and vital and essential. It is also organic and complicated and has a few rough patches. These are the kinds of authentic neighborhoods as championed by insightful individuals who understood the nature of cities. These kinds of neighborhoods are not only expected, they are desirable to maintain prosperous cities over the long term, rather than for the quick and



flashy buck. Like people, they tend to be full of personality and surprises. Unfortunately, developers and city officials do not like to look at these parts of town. They want everything to be created under their vision of how other people should live—an idea that has no foundation in American life or politics. They want everything to be shiny, planned and controlled, and they want the transformation to happen as quickly as possible under their central planning. That means existing natural growth must be wiped clean so it can be replaced by planned urban monoculture.

***The “Great Man” Theory of Redevelopment:*** Most redevelopment projects involve a single politically favored private developer or small group of developers working with the city to implement a massive redevelopment project. One business owner we met with nicely summarized this as the “Great Man Theory of Redevelopment.” The idea is that a single developer will swoop in and remake an area of the city into a glittering paradise of hip urbanism filled with condos, coffee shops and neighborhood markets.

These are powerful themes. They open the door for eminent domain abuse, a pattern that is followed nationwide. Architectural renderings are like catnip to municipal officials: show them a few pretty pictures, and they are often willing to go to extraordinary lengths to bring those visions to life.

The stories we heard in El Paso, Houston and San Antonio represent the other side of those pretty pictures and grand central plans. Architectural renderings—which all start to look the same after a while—are fantasy. The homes and businesses that are threatened by eminent domain abuse are filled with living, breathing human beings who have poured their love and toil into the land and buildings they currently occupy. These buildings represent the true foundation of their American Dreams. They do not appreciate being forced out to make way for some imaginary future.

The stories of the men and women who live and work in these neighborhoods illustrate why Texas continues to need strong eminent domain reform in 2009. An important postscript to the *Kelo* story that everyone should know is that now, more than three years after the U.S. Supreme Court decided that New London could take Susette Kelo’s home, the land the government took remains absolutely empty. The homes and small businesses that once provided a tax base to the city have been bulldozed. The only beings that remain in that humble-but-proud blue-collar neighborhood are a pack of feral cats that the city is having a hard time evicting.

It would be folly for us to allow developers and cities to demolish homes and businesses that represent the history and lifeblood of Texas. Our municipal officials have proven unwilling to restrain themselves because each seems to believe that their project is special and that eminent domain is okay in their case. The time has finally come for the Texas legislature—and Governor Perry—to give Texans the protections they deserve as citizens of our great state.





# ★ EL PASO ★

The city of El Paso has been called the poster child for eminent domain abuse in Texas. The city plans to take more than 100 acres of property between downtown and the Mexican border and hand it over to a powerful group of developers who wants to demolish everything that stands there today so they can rebuild it with luxury condos and upscale retail shops. Existing business owners and home owners have fought the city's plan to take their property. Their battle is ongoing.

Jerry Rosenbaum was out of town when he learned of the city of El Paso's plans to take his family's interstate bus business through eminent domain.

Jerry said, "My brother Marvin called me on the phone and told me, 'The city has a plan. They are going to use eminent domain to take our property.' And I said, 'Don't worry, we have the other property.' He said, 'No they got that one too.'"

Marvin was referring to a plan, known locally as the Downtown Plan, that had been unveiled on March 31, 2006, by the Paso del Norte Group, a group of powerful real estate developers and businessmen that is pushing an ambitious project to remake the face of El Paso's downtown border area.

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EL PASO PROPERTY OWNER



JERRY, LOUIS & MARVIN ROSENBAUM



Marvin described the meeting: "They said, basically, that whoever doesn't want to sell to the city will be taken over with the hammer of eminent domain. When I found out the details, I couldn't believe what I was hearing. I couldn't believe that the city would agree to fight against its own citizens to take over their property."

The Rosenbaums have operated their bus business for more than 40 years in an area of downtown El Paso known as El Segundo Barrio. Jerry and Marvin's father, Louis, started El Paso-Los Angeles Limousine Express in 1966. Louis's parents were forced out of Germany when the Nazis confiscated their family business during World War II. Like many businesses in the Segundo Barrio, the Rosenbaums serve the large population that flows back and forth between El Paso and Juarez, Mexico, on two foot bridges that terminate onto the district's streets.

"This area has been called the Ellis Island of the Southwest," said Marvin. "One of the most vibrant areas anywhere in El Paso is right along the border. El Segundo Barrio has two bridges coming in from Mexico that feed right into it. One is right on El Paso Street, and the other is on Stanton Street. Our business happens to be located right in the middle of those two streets and just one block from the bridge, so it is easy for people to get to us by just crossing the bridge and walking over a block or driving over a block."

Unfortunately for the Rosenbaums and hundreds of others business and home owners in the Segundo Barrio, the city has designated their neighborhood as a demolition zone. Businesses and homes in the zone will be taken by the city through eminent domain, demolished, and rebuilt into condominiums and high-end retail stores.

The Downtown Plan is quite explicit about its goals for the area. "Leading cities are redeveloping their downtowns and reaping the economic benefits of new businesses, increasing tax revenues, new jobs and renewed civic pride," reads the plan. It then promises that the demolition zone will be the future home of "upscale outlet stores and a wide range of other stores not found anywhere else in the area." Beyond the pipe dreams, what it doesn't describe is a place for the existing stores that thrive in the area. Those will simply be demolished, along with the homes in the area.

"They would kind of get an eraser and erase us out," said Bonifacio Atienzo, who owns a home in the demolition zone.

Bonifacio describes the Segundo Barrio like this: "If you have some food, you take it to the little old lady across the street. Or if she goes to Mexico, she brings something back to me because we are all family. Even if they're in a transition and they are here for five, six months, we get to know them because their children play in the same sidewalk. They play in the same street, so we're all family."

Jerry agrees: "It's vibrant. Children playing out in the streets. They still do that now in the Segundo Barrio. You don't see that all over El Paso."

El Segundo Barrio has had its ups and downs, but by any objective measure it is a thriving, diverse community. "Fifty-thousand Mexican shoppers cross those bridges on any

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EL PASO PROPERTY OWNER

EL PASO





given weekend. They march up and down our streets, shopping and buying merchandise that they cannot get in Mexico,” said Gil Kimmelman, who owns two stores in the demolition zone.

He said, “I love doing business with people from Mexico. It’s a different environment. That’s the market I have chosen to operate my business in—that’s what I do. I’ve been doing it all my life—since I was six years old.”

The city of El Paso doesn’t see El Segundo Barrio the way its residents do. In fact, the city has declared the area “blighted” in its tax increment reinvestment zone plan. That declaration, it happens, also allows El Paso to skirt Texas’ 2005 eminent domain reform which left the blight loophole in place.

Is El Segundo Barrio really a blighted area? No. It is actually a colorful and vibrant part of town that does brisk business every day of the week. Starr Western Wear sells \$5,000 cowboy hats in this supposedly blighted part of town. Gil sells Nike, North Face and many other premium brands there. Holland’s department store just spent over \$1 million renovating its facility.

“My properties are in fantastic shape,” notes Gil. “All according to code—electric, plumbing, you name it—it’s all to code. I’m not a health hazard. You’re not going to find rats in my businesses yet all of us are in the city’s demolition zone. It’s nuts.”

Bonifacio agrees, “My house has looked the same since my grandma lived here 40 years ago. I have a beautiful house surrounded by a lot of different types of housing. It’s like everybody who comes to my house doesn’t want to leave because they feel the vibes.”

Walter Kim came to El Paso in the mid-1980s after a large earthquake in Los Angeles. “One day I went into my market. All of the merchandise from the shelves was all falling down in the aisle,” said Walter. “One of my friends was here in El Paso. He called me, so I visited him over here. That caused me to come down here because there are no earthquakes down here.”

Walter is President of the El Paso Korean Chamber of Commerce. “Ninety-five Korean storeowners in downtown are going to lose their businesses. Like me, they’ve been here a long time.”

“Many years ago we went through the Mexican peso devaluation. At that time nobody—not even the bank—was trying to help us. The city? No. They said they were even having more problems than us. So, we had to survive 20 years without any help. Now they are trying to take us over by force.”



**SOO HEE AND WALTER KIM**  
EL PASO PROPERTY OWNERS

By Segundo Barrio standards, Walter, who has been here 22 years, is a relative newcomer. Many of the businesses have been family-owned for generations.

Why would someone want to tear down this nice little neighborhood?

"The city says they want to put high-end stores in downtown because we are too ugly and old-fashioned," said Walter.

To advance its plan for the future of the Segundo Barrio, the city has paid more than \$650,000 for a glossy, clip-art-filled plan that shows condos, high-end retail and an "arts walk," among other things, where existing businesses currently stand.

"What gives this cabal of real estate monopolists the right to deprive me of my property, take away the titles to my property for their economic benefit?" asks Gil. "Are the titles to our property—the deeds to our property—subject to the arbitrary whims of the local city council? I would rather have Al Capone come break my knees than surrender my property to the city for this. I'm going to be put out of business, not because I've made a mistake in my merchandising, in my pricing, in the way I was running my business. I'm being put out of business by the government."

Many in the community are justifiably skeptical that the del Norte group's plan would prove successful even if it were eventually implemented.

"What they want to build over here—it's not going to work," said Louis Rosenbaum. "I tell you why. First of all, we are a border town. Wages over here are lower. You can get a decent apartment over here for six hundred dollars—two rooms, baths, a yard, everything. Can you get one in Austin, or in Dallas, Los Angeles? In New York, for a hundred thousand dollars you can't live. Over here, you can live excellently."

He continued, "Since the city came up with this plan, there has been lots of protesting from the local people. The del Norte Group wants to build sky-high buildings, apartments like you see in Los Angeles. The city thinks they will get more money from taxes. That's the reason they go along with it."

Opponents of the plan, like Rosenbaum, have endured criticism from proponents of the takings. They have been called anti-development and have been accused of holding out for more money. Those charges don't ring true to Jerry.

"If money were the issue, then it's really no problem at all for the other side," he said. "All they would have to do is give us more money. So it doesn't make sense to say that we're 'holding out' trying to make more money because then the situation would be easily resolved. So that cannot be the reason. Maybe the reason is that we just don't like to be threatened with the government coming in and forcing us off our property."



Indeed, everyone we talked to said the same thing: they are in favor of redevelopment, but they want to see it done cooperatively rather than by force.

"Imagine I came to you to negotiate something," said Jerry, "and before I said a word, I took out a gun and placed it on the table in front of me. How would that make you feel? Would I be negotiating like a gentleman or like a thug? That's how it feels. Eminent domain is like a gun on the table."

"This is crazy. Everything I own is in the demolition zone. You are going to put me out of business," said Gil. "They are going to take 133 acres of downtown property and give it to rich developers for the economic benefit of the government because they say they are going to make more tax dollars."

Louis concluded: "After the Nazis confiscated my parents' business, we left the next day to Berlin. It was a small town we were living in. We were not compensated. Overnight—we left my school and my friends."

He said, "I stand up for the people in El Paso because they are going to be in the same boat. It's against the Constitution—what [city officials and the developers] are doing. I am not personally against eminent domain if it is for public need or necessity. I have no problem with that, but to take and give it to somebody else? If somebody else wants to buy it, let them buy it. They can buy anything they want. If anyone wants to come buy property here, they don't need eminent domain."



# GUN ON THE NEGOTIATING TABLE

## EMINENT DOMAIN AS A “LAST RESORT”

Echoing the seemingly comforting but, in fact, empty promise made by so many other government officials and developers nationwide, the mayor of El Paso vowed that eminent domain will be used only as a “last resort.” Claims of eminent domain as a “last resort” should be as comforting to a property owner as a thief uttering the threat, “Your money or your life.” The thief can say, “I gave them a choice. I only took their life as a last resort.” When cities can exercise this awesome threat into its “negotiations,” the rightful property owners lose all power to truly negotiate to preserve and protect what belongs to them.

So long as cities carry the trump card of eminent domain, there is no question as to where the property will end up: in the hands of whomever the government chooses. This is especially troubling when government rents out its power of eminent domain for private gain. Truly voluntary negotiation is impossible when one party has the power to get what it wants no matter what; if the government can take any property it wants, owners have no real power in negotiation.

With the threat of eminent domain, especially against property owners who lack the financial means to fight eminent domain in court, local officials can acquire almost any property they desire. In most cases, the threat of eminent domain plays an important role from the very beginning of negotiations. Cities know that most home and business owners will be unable to afford the tremendous legal costs associated with fighting eminent domain; this fact gives cities a strong incentive to threaten property owners with condemnation. People are told that if they do not sell, their home or business will be taken from them, and they will often get even less money. Cities plan projects on the assumption that there is no need to incorporate existing homes or businesses, because they can simply be taken. After cities design and pursue such projects, current owners are told to sell. If they do not, then eminent domain becomes a “last resort.” In practice, the power of eminent domain often makes voluntary sales less likely, because owners who would have sold if treated with respect will refuse to once they have been threatened.

The threat of eminent domain has one sure effect, and that is to drive down the quality of the buildings located under that cloud. For one elderly El Paso resident, living under the threat of eminent domain for years has taken its toll: “I’ve spent a lot of money to fix my doors and windows. A lot of money. I used to cut the grass every week, pull out the weeds, paint my walls. But now I’ve stopped doing that. What’s the point...if they’re going to kick me out?”

Eminent domain thus is not just abused when someone loses his property in court, but also when a property owner sells his home or small business under the threat of condemnation. To say in such cases that eminent domain has not been “used,” is patently false.





# ★ SAN ANTONIO ★

San Antonio wants to expand its famous River Walk. Like El Paso, San Antonio wants the businesses that are currently located in the River North neighborhood to disappear. Like El Paso, San Antonio has run into a lot more resistance than it expected. That resistance seems to have caused the city to rethink its plans—for the time being. Will the city change its mind again?

A committed group of business owners is keeping a close eye on things.

Cavender Cadillac is the oldest Cadillac dealership in Texas. Maybe that's why Billy Cavender was more than a little surprised when he saw that the city of San Antonio had replaced his dealership with a grocery store and market on its latest plan for the redevelopment of the River North area of the city.

He said, "They did an artist rendering of our facility with their future ideas of a marketplace taking our facility and creating high density in this area. I guess they thought we were going to be a grocery store—not a Cadillac dealership anymore. I think they want everybody to move down here and live in a condo and come to the new grocery store on 801 Broadway [where the dealership is currently located]."

How, exactly, would Cavender Cadillac be turned into a grocery store? The city wasn't threatening eminent domain—yet—but it wasn't taking it off the table, either. What it had done was pay a planning company in California for a glossy document that completely reimagines the entire River North area. "This area will be transformed," promises the plan, "from its current patchwork of parking lots and large buildings to a vital pedestrian-oriented park and civic district focused on the performing arts."



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SAN ANTONIO PROPERTY OWNER





# CAVENDER CADILLAC **BEFORE** PROPOSED REDEVELOPMENT





CAVENDER CADILLAC IS THE OLDEST CADILLAC DEALERSHIP IN TEXAS. MAYBE THAT'S WHY BILLY CAVENDER WAS MORE THAN A LITTLE SURPRISED WHEN HE SAW THAT THE CITY OF SAN ANTONIO HAD REPLACED HIS DEALERSHIP WITH A GROCERY STORE AND MARKET ON ITS LATEST PLAN FOR THE REDEVELOPMENT OF THE RIVER NORTH AREA OF THE CITY.



# CAVENDER CADILLAC AFTER PROPOSED REDEVELOPMENT





As the name implies, River North sits immediately north of San Antonio's famed River Walk tourist attraction. The area is currently home to dozens of businesses and hundreds of home owners. Those range from Billy Cavender's Cadillac dealership, to historic homes, to a Tex-Mex restaurant, to light industrial shops that have been there for more than 100 years.

A member of the Community Development Corporation (which initiated the plan) described the area to the *San Antonio Express-News* in October, 2007, as "a raw space where we can do what we want. There really isn't any development there." That would come as a shock to the thousands of people who live and work in River North today.

Billy Southwell worries about the future of River North, and about whether there's a place for his family's business in the city's plans.

He said, "Every one of the business owners in River North is pro-development, pro-improvement. We want redevelopment of this area, but this is way too heavy-handed. The city is cramming this down our throat. I swear at night sometimes I can hear a freight train in my dreams. A freight train running over us all. That's how it feels."

Billy Southwell's business, the Southwell Company, was started by his great-grandfather in San Antonio in 1866. They make everything from "rubber stamps to cast bronze signage." Ironically, they also make signs for the city. Like many other businesses in River North, the Southwell Company generates jobs—39 in their case—for the community. He

said, "We've been in this building almost 100 years. This building that we sit in today."

It's not clear what will become of the Southwell building under the new plan. The area is currently slated for luxury condos and large parking garages. Those garages are one of the greatest concerns of people in the area. They worry that the city will use eminent domain to take their property and build parking garages. While "public" in name, the garages will almost exclusively serve the adjacent condo towers.

Harper Huddleston has been involved in the River North mess from the beginning. He owns property along the river area and came to the city with a plan for a mixed-use development on his parcel—without city assistance and without taking anyone else's land to make the project work. Rather than welcoming Harper's plan to give the city exactly what it has been



**HARPER HUDDLESTON**  
SAN ANTONIO PROPERTY OWNER

asking for, San Antonio denied his request. Why? Because it might conflict with something the city wants to do nearby.

"Nobody gets to do anything unless you are a preferred developer—unless you are one of these people that get the benefits of better zoning," said Harper. As for public input about the plan? "I think they've largely ignored it."

Rather than solicit genuine public input, the city drafted the plan in private. "A consultant was hired by a non-profit private development company called the Downtown San Antonio Community Development Corporation," explained Harper. "There was no public bid process. There was no public input as to who was going to do the planning. It was just the architects and the CDC."

Since then, the city has held only a few tightly controlled public meetings on the plan.

"Everyone in attendance wanted to ask questions," said Billy Southwell. "We were not allowed to ask questions. We were told to put the questions on this little yellow form and hand it in. It's kind of obvious what the city is trying to do to your average businessman."

"They glossed over everything very quickly. They didn't get into the meat of it," noted Harper. "Perhaps if there had been more public input, the California architects would have known better than to turn Cavender Cadillac into a grocery store without talking to Billy Cavender first."

Billy Burkholder doesn't like what the California planning firm thinks of his business, either. He owns a spring manufacturing business. As you find with businesses all over River North, Ace Springs has been in the family for generations.

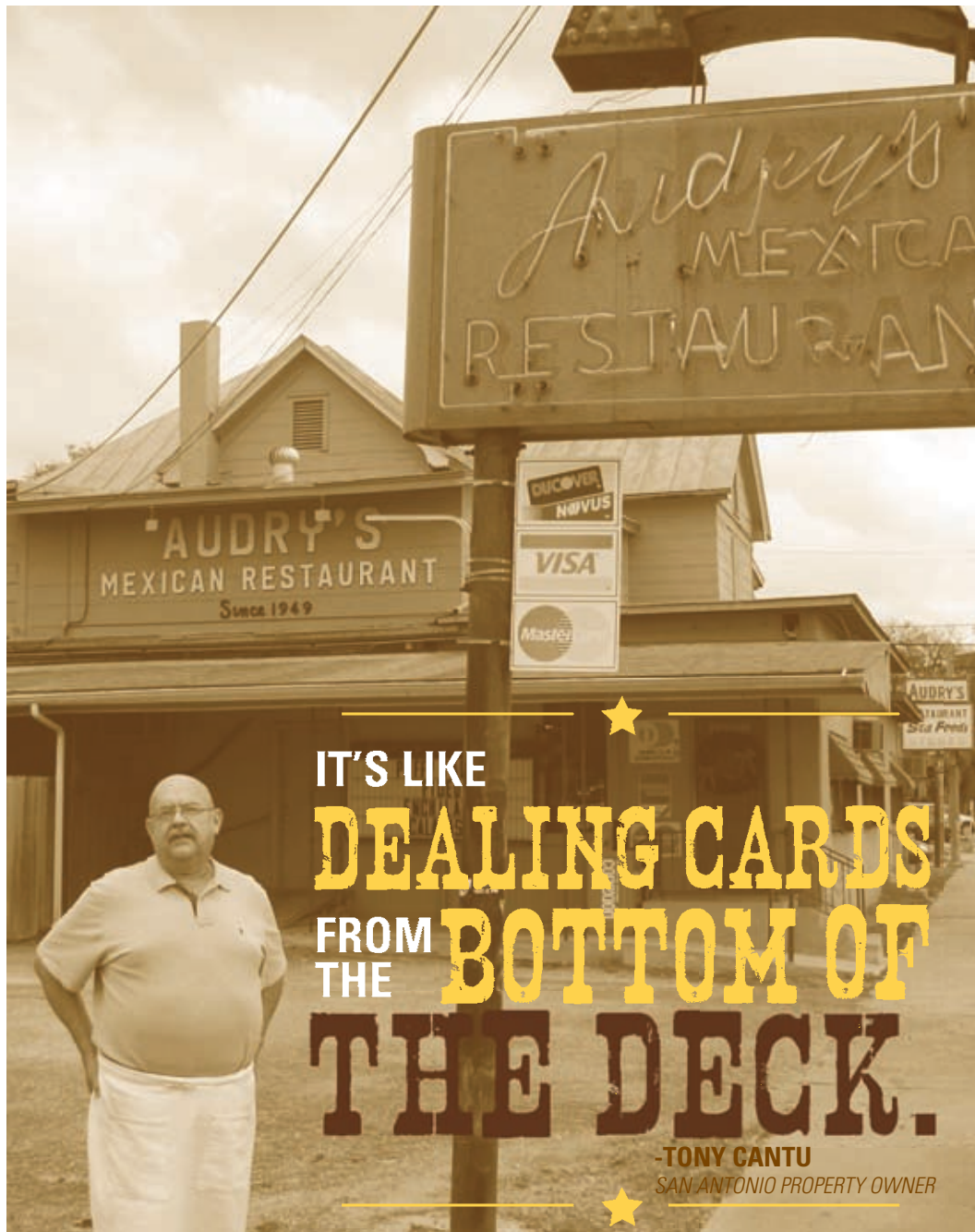
"We want to keep the property," said Billy. "My grandfather, my father, myself—we've been here a long time and have fought a long battle to stay in business. We bought this property in 1935. In the old days, we were blacksmiths. We make and sell truck springs—mostly big trucks. We're a pretty industrial business."

Billy Burkholder's point is more apt than he realizes. One of the common threads between what is happening in El Paso, Houston and San Antonio is the desire of governments and developers to wipe out historic parts of town and replace them with shiny condos, arts walks and parks for more affluent citizens. It does not matter that redevelopment is likely to occur naturally. Trusting the future of an area to individual decision makers (property owners) makes city planners uneasy.



**BILLY BURKHOLDER**  
SAN ANTONIO PROPERTY OWNER





What those planners uniformly overlook is the fact that these old parts of town are working, today. Billy Southwell employs 39 people. Billy Burkholder employs ten. These are not entry-level, minimum wage jobs. They are good, skilled jobs that allow someone to support a family. The home and business owners in these areas are not failing the cities. The cities are failing their residents.

Billy Burkholder said, “This thing stinks to high heaven. Government thinks they can go in, and they have this beautiful, grandiose idea of what’s going to happen, but they’ve got to get rid of the warts—and I am one of the warts.”

In response to the city’s plan to literally wipe them off the map, business owners in River North banded together to form a grassroots group called the San Antonio River North Improvement Association (SARNIA). Staying connected and informed has helped them stay on top of the city’s plans to push them out of their businesses. “We put door hangers on every single door in River North” informing businesses and residents of the city’s plans, said Harper. Since then, SARNIA has compelled the city to listen, albeit grudgingly, to its members’ concerns.

Has it made a difference?

“Once the cat got out of the bag, the city went back and placed a disclaimer on the plan saying that the plan isn’t intended to facilitate the use of eminent domain,” said Harper. “But I don’t think that’s enough. I don’t think that solves our problem. The plan is the first step. Of course the plan matters. It’s the blueprint for this whole area. But later steps are where eminent domain could move from a concept to reality. The plan shows over 70 percent of the current structures in River North being demolished and replaced. We can improve this area without wrecking peoples’ businesses. They like living here and doing business here.”

Tony Cantu isn’t impressed by the new language, or the city’s refusal to genuinely involve existing residents and business owners. “They are trying to wear us out,” said Tony, who owns Audry’s Mexican Restaurant, a San Antonio landmark. “A lot of the players have started to get disenchanted with the process. They are fatigued and worn out. I could almost be guilty of that. I try to stay vigilant, but I’ve got so many irons in the fire.” Tony pauses, “I do what I can, but the city is not responsive. It’s like dealing cards from the bottom of the deck. If we don’t catch them, they will get away with a lot.”

“The city is silly if they think these business owners are going to sit back and not do something about this,” said Billy Southwell. “I wish the city would work for us instead of against us. I think the city has breached the confidence level that your average citizen has. And they’ve done it over and over and over.”





# ★ HOUSTON ★

Houston's light rail plans have upset many. The proposed lines spear through five different neighborhoods, transforming them without any meaningful input from the affected residents and business owners.

Worse, the rail authority is allowed to take any property within a quarter mile of any proposed rail station—including through the use of eminent domain—to promote a concept called "transit-oriented development." Once again, it is out with the old neighborhood and in with the centrally planned coffee shops, condos, parking garages and mass transit. Existing homes and businesses don't seem to be part of the plan.

Daphne Scarbrough admitted she was a little slow to recognize the significance of the little circles on Houston's proposed light rail map. The all have a 1,500 foot radius, making each circle over half a mile across. At the center of each circle is a proposed light rail station. "This is more territory than you would need for a station," noted Daphne.

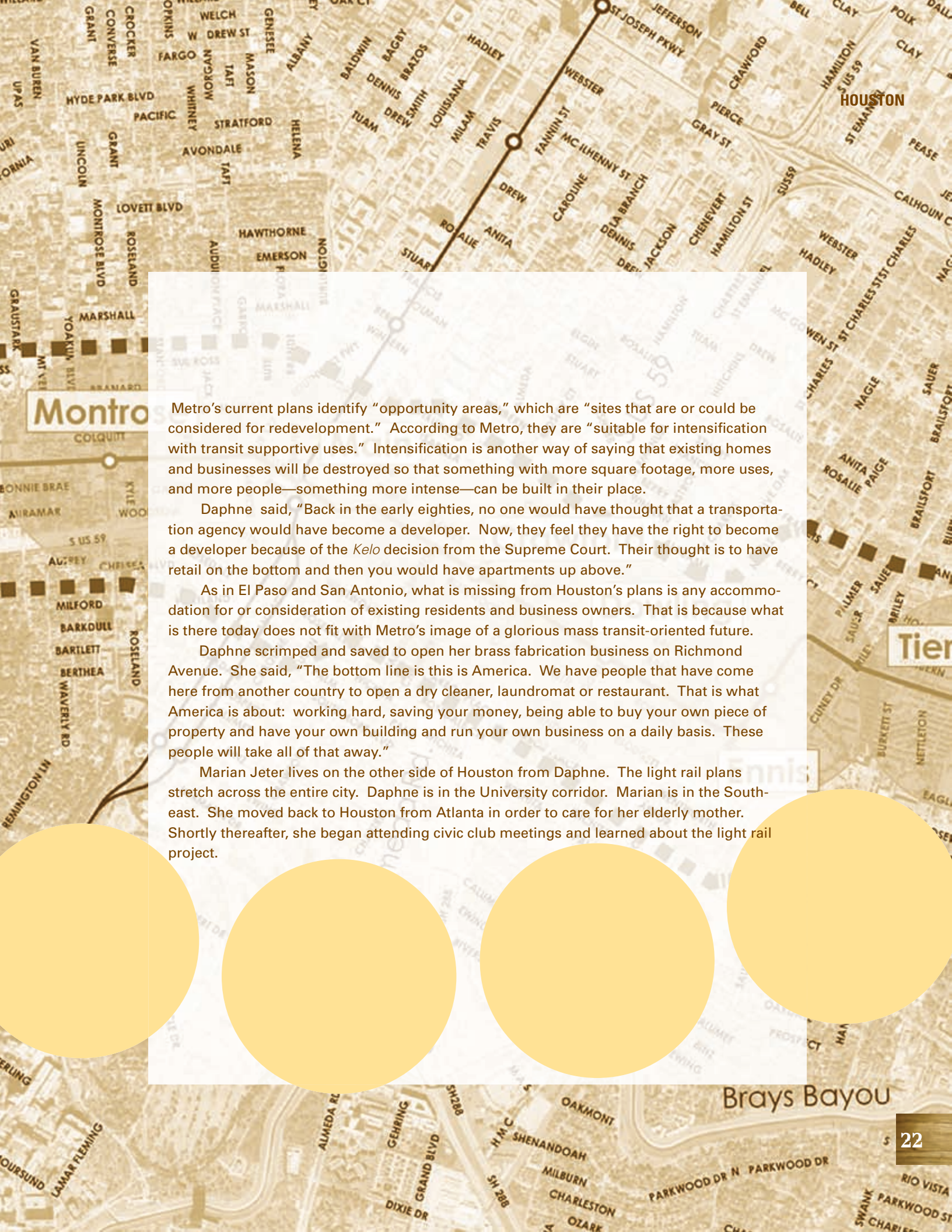
So why are the circles so big?

The story begins in 1978, when the Texas legislature and local voters authorized the Houston Metropolitan Transit Authority to condemn any land it needed to facilitate light rail development in Houston. After sitting on this authority for more than 30 years, Metro has embarked on an ambitious plan to bring "transit-oriented development" to Houston.

That means doing a lot more than building rail lines and stations. Metro has the power to condemn land within 1,500 feet of any station in order to promote transit-oriented development. What does that mean? It means people like Daphne, who own a home and business on one of the proposed corridors, will see their homes and livelihoods disrupted and possibly destroyed.

Suddenly Houston's light rail future is about a lot more than rail lines and stations.





Metro's current plans identify "opportunity areas," which are "sites that are or could be considered for redevelopment." According to Metro, they are "suitable for intensification with transit supportive uses." Intensification is another way of saying that existing homes and businesses will be destroyed so that something with more square footage, more uses, and more people—something more intense—can be built in their place.

Daphne said, "Back in the early eighties, no one would have thought that a transportation agency would have become a developer. Now, they feel they have the right to become a developer because of the *Kelo* decision from the Supreme Court. Their thought is to have retail on the bottom and then you would have apartments up above."

As in El Paso and San Antonio, what is missing from Houston's plans is any accommodation for or consideration of existing residents and business owners. That is because what is there today does not fit with Metro's image of a glorious mass transit-oriented future.

Daphne scrimped and saved to open her brass fabrication business on Richmond Avenue. She said, "The bottom line is this is America. We have people that have come here from another country to open a dry cleaner, laundromat or restaurant. That is what America is about: working hard, saving your money, being able to buy your own piece of property and have your own building and run your own business on a daily basis. These people will take all of that away."

Marian Jeter lives on the other side of Houston from Daphne. The light rail plans stretch across the entire city. Daphne is in the University corridor. Marian is in the Southeast. She moved back to Houston from Atlanta in order to care for her elderly mother. Shortly thereafter, she began attending civic club meetings and learned about the light rail project.



**HAS ANYBODY ASKED  
THIS COMMUNITY IF  
THE PROJECT  
WOULD EVEN  
BE VIABLE HERE**



**-MARIAN JETER**  
*HOUSTON RESIDENT*



Marian said, “The majority of homeowners have been here 30-plus years. My mother has been in her home 38 years. These people are elderly. Has anyone even asked this community if the project would be viable here?”

The sense, among Marian and others, is that Metro simply does not care about questions like community viability. What matters is the viability of the rail system itself, and of the mass transit-oriented development that will supposedly spring up around it.

“I left my career, uprooted my child, brought him in a new environment,” noted Marian. “Yet Metro won’t even come to us and sit down at the table and see what we can work things out. The city is not responsive.”

Ron and Michael Robles, who own a home and business in a third corridor—the North—agree that Metro does not seem to care about existing home and business owners. The Robles brothers are directly in Metro’s crosshairs.

“One option has the rail line going right through our property,” said Ron. “The other has a station right in front of my house. I’ve lived there 10 years. I’ve lived in Houston all my life. We have gone up to the City Hall many times, and we have brought many people with us. We have spoken out to City Council and the mayor, and they have just turned a deaf ear to us.”

Participants in the Metro battle are weary. Their fight has been going on for years. In January of 2005—five months before *Kelo* was decided—the Metro Board Chairman told the *Houston Business Journal*, “If you have a large tract of land around a station and one piece is needed, then it . . . could go to condemnation.”

As local officials always do, in plan after plan across the nation, the Chairman claimed that eminent domain would be used “as a last resort.” But the manager of Metro’s real estate portfolio also noted, in the same article, that landowners who were “holding up” a larger development would face condemnation.

This goes back to El Paso property owner Jerry Rosenbaum’s point about eminent domain being like a gun sitting on the negotiating table. Development officials always claim that they do not want to use eminent domain (and why would they when the issue is so unpopular?), but at the same time they refuse to rule out its use.

Paul Magaziner is waist-deep in information about the light rail in Houston. His business, VCI Group, sits on the proposed Richmond Avenue corridor.

He said, “On Richmond Avenue, there’s a street called Shepherd. You’ll see a 50-acre transit-oriented development on Metro’s plan. They’re playing with 50 acres of land they don’t own right down to the point where they give the financial pro formas for the development. The land costs they’ve assigned are absurdly low. The city is not a developer. It’s better left in private hands. You can look for people to take advantage of this. It’s a city insider deal.”

Indeed, the role of the government is not to act as a developer (let alone a developer on steroids with the power of eminent domain). One of the primary roles of the government is to protect the constitutionally enshrined rights of property owners.



The idea that these deals primarily benefit insiders is another common thread between El Paso, San Antonio and Houston. A city's "preferred developers" get everything—prime property, prime zoning, access to public financing—while the little guys get whatever the city chooses to give them when it exercises its power of eminent domain. In the end, the developer gets the land, the city gets the prospect of new tax revenue and the property owners get the boot. This is not how government power is supposed to be used.

Even those who are not living under the threat of eminent domain will see their lives transformed by Metro. In an effort to force people out of their cars and into commuter trains, Metro is transforming major six-lane thoroughfares into two-lane feeder streets with trains running down the middle.

"They've got a new street classification that allows transit to roll and shuck existing property owners in the transit street corridor," said Paul. "I guess the city is looking at when this property redevelops 50 years from now—we'll redevelop it like Portland or a city that already has so-called 'pedestrian realms.'"

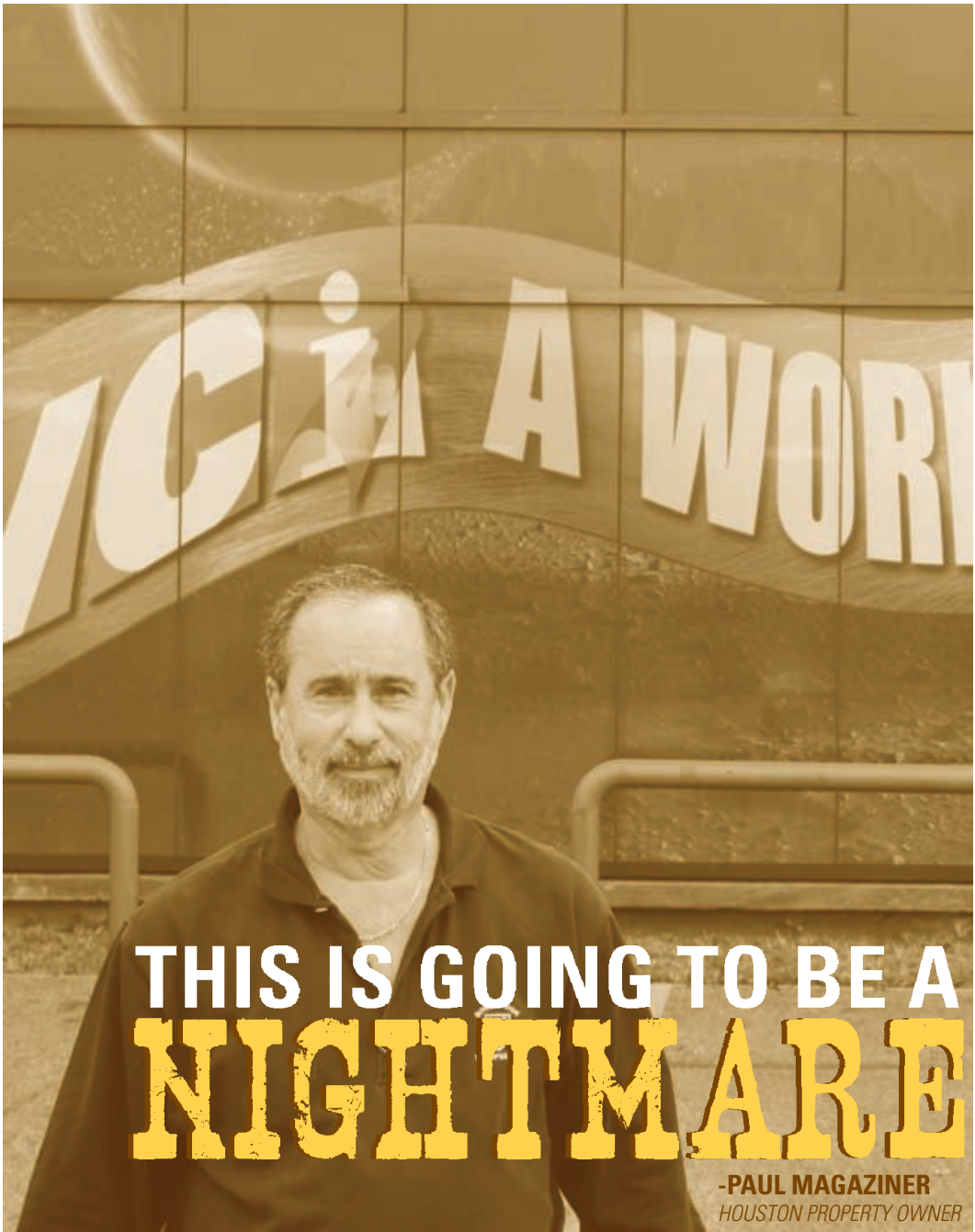
In the meantime, businesses along the corridors will languish.

Paul concluded, "It's going to be a nightmare. How will our customers ever get to us with no left turns and one lane of traffic on each side of the train? Basically, existing properties are worthless under the new plan. The only option is to sell to someone who is assembling large tracts to build condos or some other preferred project."

Which brings us back to those 1,500-foot circles. As Daphne observed, they are far larger than what is needed for trains, stations and parking lots. And there are dozens and dozens of them in the city's plans—one for every station. Each of those circles represents an "opportunity area" to Metro's planners, a concept that perfectly embodies the myopic mindset of those who see eminent domain as one more tool in their redevelopment toolbox. It does not matter that people like Paul, Daphne, Ron, Michael or Marian and her mother already live and work there. Nor that those homes shelter Houston's own residents. Nor that those businesses employ Houston's own citizens. They are out of sync with the redevelopers' vision of the centrally planned future. Somehow, despite the



**RON & MICHAEL ROBLES**  
*HOUSTON PROPERTY OWNERS*





overwhelming tangible evidence to the opposite conclusion, they continue to believe that somehow, somehow, these plans will work for them. In the end they will not, and everyone in their path will suffer the consequences as a result of the planners' arrogance.

And so the Pauls and Daphnes of the world must be removed to make way for something else. Sometimes people in the "opportunity areas" will be removed by squeezing them so tightly with new zoning regulations that they have no alternative. If that does not work, and if the property owner refuses to sell at the price that Metro wants to pay, then the "last resort" of eminent domain will suddenly become the preferred tool in the toolbox. Metro already has the power to condemn thousands of acres within the city. There is nothing standing in the way of its exercise of that power except action by the Texas legislature to prevent it in the future (or costly litigation under the Texas and U.S. constitutions).

"Metro is not interested in being a transportation agency," said Daphne. "They are interested in being developers now."

That nicely summarizes the mindset of most public officials who are seized by redevelopment fever. They are not interested in serving the citizens that live, work, vote and pay taxes in their cities today. They are more interested in leaving a "legacy" of ushering their city into some better and more perfect future. Daphne summarizes it nicely: "They are very, very contrite and say 'of course we're going to lose businesses. We'll just get new ones.'"



# ★ CONCLUSION ★

## AN OPEN LETTER TO THE TEXAS LEGISLATURE

All over our state, Texans live in fear of having their property forcibly taken from them by the government to promote private redevelopment projects. We know this because we met with dozens of them while preparing this report. These home and business owners never imagined that they would wake up one day to find themselves in the crosshairs of a major redevelopment project. They never imagined that they would be the ones fighting city hall and developers in their own community for nothing more than the right to stay put and to continue enjoying the home, business and land that is rightfully theirs. Yet here they are, drowning in the floodwaters that Justice O'Connor foresaw in her *Kelo* dissent.

The time for true eminent domain reform in Texas is now.

Our local officials have shown themselves to be unable to resist eminent domain as a way to grease the gears of massive re-imaginings of some of our largest cities. It is not hard to see why redevelopment is so attractive to local officials. The plans, reports and PowerPoint presentations are slick and glitzy. They promise greatness in the place of perceived mediocrity. They promise to lead Texas into a new, dense, shiny, condo-and-coffee-shop-filled future. The problem is that real people with real rights stand to have their homes and businesses taken from them and destroyed in the process. The democracy masquerade that local officials engage in—like holding public hearings after decisions have already been made—does nothing to lessen the impact on the victims of these projects.

The communities are being targeted for redevelopment because they stand in the way of somebody's grand scheme of how other people's future ought to look. As Gil Kimmelman from El Paso said, "I'm not being put out of business because I made a mistake in the way I ran my business. I'm being put out of business by the government."

Rather than government deciding where roads, schools, parks and police stations should be located, local officials have gotten into the business of choosing winners and losers in the development game. The winners are usually wealthy and politically connected, and the losers are usually average citizens who were minding their own business.

Ironically, private redevelopment happens every day without the use of eminent domain. Nearly every building you see in nearly every city around you was not built as a result of government force, but rather in that more traditional American style of private negotiation—a style that respects the individual and his or her rights. Nobody we spoke to is against redevelopment. They each want to see their cities continue to grow and prosper. They believe, however, that this can and should happen without the use of eminent domain.

And they are right.

In a report the Institute for Justice released in January 2008 titled, "Doomsday? No Way," we methodically studied the issue of whether states that enacted strong eminent



domain reform would suffer a downturn in redevelopment versus those that enacted weak or no reforms. That report showed that states that enacted strong protections for property owners are just as likely to prosper as those that allow eminent domain abuse to occur. The abuse accomplishes nothing except an erosion of property rights, public trust and good will. The bottom line is that states can have both strong protection for property owners against eminent domain abuse and redevelopment, too.

The Texas legislature must act, forcefully and finally, to give Texans that which is rightfully theirs: the guarantee that their property will not be taken by eminent domain except for actual use by the public. Local officials' high-minded promises of such public "purpose" or "benefits" as the mere potential of new jobs or taxes are not enough reason to strip someone else of their land. As Justice Clarence Thomas said in his *Kelo* dissent, "Once one permits takings for public purposes in addition to public uses, no coherent principle limits what could constitute a valid public use."

Meaningful reform would close the blight loophole that is being exploited in El Paso. It would make public use a question for judges and not the elected officials in the legislative or executive branches of government—the very individuals who seek to abuse eminent domain. And it would fundamentally recognize that redevelopment is not in and of itself a public use under the Constitution.

Texas tried to pass meaningful reform in both 2005 and 2007, and the legislature is to be commended for those efforts. Unfortunately they were not enough. The 2005 law left too many loopholes. The 2007 bill was a good law, but it died on Governor Perry's desk due, allegedly, to fears about its impact on the Trans-Texas Corridor.

Meanwhile, ordinary Texans are suffering. We prepared this report in order to bring their stories to life. Some of them may be familiar, but the totality of the problem—its depth and breadth—is shocking. We hope you will be as outraged by what is happening as we are. Let these stories motivate you to finally push genuine eminent domain reform across the finish line in Texas. Our citizens need your help, and they need it this legislative session.

Matt Miller  
Executive Director  
Institute for Justice Texas Chapter  
January 2009

# ABOUT THE AUTHOR

**MATT MILLER** is the executive director of the Institute for Justice Texas Chapter, where he fights to secure property rights, economic liberty, freedom of speech and school choice.

Matt is a lifelong Texan, having grown up in Fort Worth and attended college at the University of Texas at Austin. He also holds a master of arts degree from the “great books” program at St. John’s College in Santa Fe, N.M. While in New Mexico, he worked for the New Mexico Legislative Finance Committee and, later, with local communities and Native American tribes on development issues. After earning his law degree from the University of Chicago, Matt worked for a large Dallas firm as a land use attorney. There, Matt represented Texas property owners who were seeking to secure their property rights against cities, counties and state agencies.

Matt represented Texas property owners in a range of property rights disputes, including eminent domain, annexation, zoning, special districts and citizen referendums. He has helped litigate cases before the Texas Supreme Court, and has written amicus briefs in cases before the U.S. Supreme Court and the Ohio Supreme Court.

The Texas Chapter’s work has been featured in dozens of newspapers and web publications, in addition to numerous blogs. Matt has been quoted by CNN Money and by newspapers, television and radio stations, and blogs across Texas. He has testified by invitation before the Texas House Committee on Government Reform and the Texas House Agriculture and Livestock Committee.

Matt lives in Austin with his wife and daughter. ★



# THE INSTITUTE FOR JUSTICE

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The Institute for Justice Texas Chapter was founded in 2008.



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