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Pittsburgh's 'land grabs'

Violating the Constitution for 'political expediency' must stop, writes Institute for Justice senior attorney Dana Berliner.

Pittsburgh is rapidly becoming the national poster child for eminent domain abuse. The proposed Market Place at Fifth & Forbes condemnation of 64 buildings and 125 local businesses illustrates everything that's wrong with eminent domain throughout the nation.

The condemnations are both unconstitutional and unwise. Not only is a new mall for Urban Retail Properties not a constitutional "public use," but the city has mischaracterized the area as "blighted," and the businesses will never be able to relocate. Pittsburgh is not alone in these abuses, and it is time for courts and the public to put a stop to such wholesale trampling on private property rights and restore limits on government's ability to condemn private property.

Eminent domain is the power of government to take private property. Because it allows a government agency to force people to abandon their homes or to lose their businesses, it is one of the most despotic and potentially disruptive government powers - more than taxes or regulations.

Such a power requires constraints, and

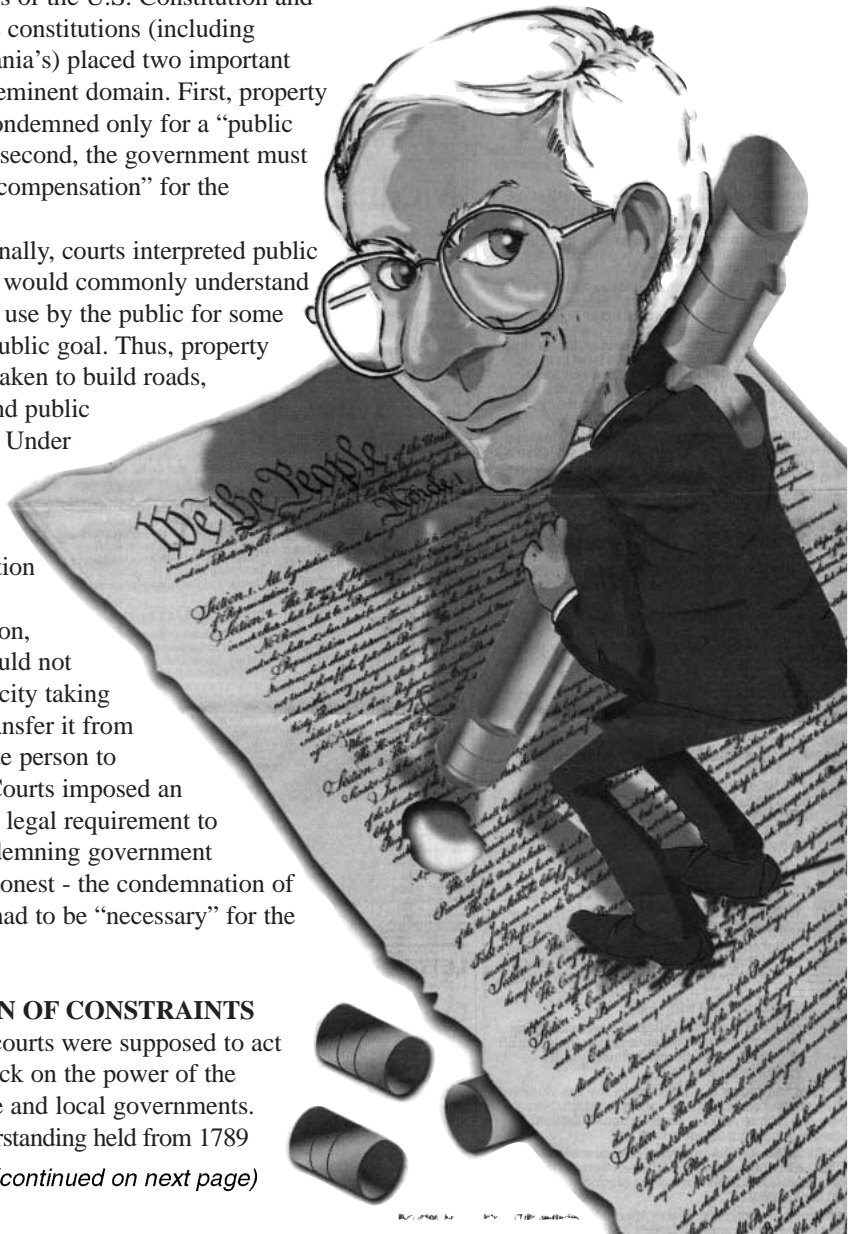
the authors of the U.S. Constitution and most state constitutions (including Pennsylvania's) placed two important limits on eminent domain. First, property may be condemned only for a "public use," and second, the government must pay "just compensation" for the property.

Originally, courts interpreted public use as we would commonly understand the term - use by the public for some obvious public goal. Thus, property could be taken to build roads, utilities and public buildings. Under this common-sense interpretation of the Constitution, courts would not tolerate a city taking land to transfer it from one private person to another. Courts imposed an additional legal requirement to keep condemning government officials honest - the condemnation of property had to be "necessary" for the project.

EROSION OF CONSTRAINTS

The courts were supposed to act as the check on the power of the legislature and local governments. This understanding held from 1789

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until the 1950s, when a wave of urban planning swept the country, taking cherished private property rights with it. At that point, courts began abdicating that role and allowing state and local governments free rein to condemn property on a whim. The 1954 case of *Berman v. Parker* spelled the beginning of trouble. The U.S. Supreme Court allowed the District of Columbia to condemn property in a badly deteriorated area to transfer it to a private developer. Throughout the next 30 years, courts changed the rules, allowing property to be condemned for a wide variety of private uses and deferring to local governments on whether the condemnation was necessary.

‘BLIGHT’ VS. ‘PUBLIC USE’

The easiest way to condemn property is to declare it “blighted,” and this has become the tool of choice for government agencies seeking to transfer property to a favored private party. Also in the early 1900s, many states, including Pennsylvania, enacted laws allowing a municipality to declare an area “blighted” on the flimsiest of justifications. Once an area is designated blighted, condemnation becomes easy, because simply razing the buildings to the ground removed the blight. Whatever happens next, including transfer to private parties, was irrelevant.

While such a rule might make sense for an unsanitary and dangerous area, it makes no sense for most blight declarations. For example, the basis for the Fifth and Forbes blight designation is, essentially, that the historic buildings in the neighborhood are too narrow and that some of the second and third floors do not currently have commercial tenants. Those are not reasons that justify immediate demolition to save the area from dangerous blight. Nor will demolishing these historic buildings necessarily bring the economic prosperity city planners believe is lacking, as the failed Lazarus store, a white elephant, vividly shows.

OTHER HAZARDS

Blight designations bring other hazards. In Pennsylvania, they never

expire, so the area technically remains “blighted” even after a redevelopment project, leaving it open to further condemnations down the road if the redevelopment agency gets another bright idea. Blight designations are also a profit-making enterprise for redevelopment agencies, which get the benefit of tax-increment financing in areas with redevelopment projects and create a strong and unhealthy incentive for agencies to designate as much land as possible. Such problems became possible when courts stopped forcing state and local governments to adhere to the constitutional “public use” requirement. By abdicating their constitutional responsibility, courts invited the rampant abuse of the power of eminent domain. Now, eminent domain is often used as simply another tool for political favoritism. It sweetens the deal in corporate welfare projects and is used to eliminate working-class housing and shopping districts that bureaucrats find undesirable.

RELOCATION IMPOSSIBLE

Many people think condemnation disputes are all about money. In fact, people often simply don’t want to move. A house in a good school district or near family and friends can be difficult to replace. In business, location is everything. Forcing a small business to lose its long-term customer base will often sound the death knell for that enterprise.

The recent events at the Pittsburgh Wool Co. are instructive. The settlement provided a new building for the wool company itself, although it would have to cease its 100-year manufacturing activities. The city promised to find new locations for the other five tenants. But six months later, new locations have yet to be found. If the city is unable to relocate five businesses, how can it claim, with a straight face, that it will relocate 125? A recent real estate survey shows only 30 available Downtown slots, so the bottom line is that most of these businesses will close as a result of this condemnation.

Apparently, the city is no longer interested in retaining Pittsburgh businesses, at least not small ones.

LEADER OF THE PACK

Pittsburgh itself has an embarrassment of threatened eminent domain cases. The Fifth-Forbes corridor, a local shopping area that serves a mix of business commuters and working-class shoppers, may be replaced by a more upscale mall. The city wants homes in the Ridgemont area to make way for more parking at the Parkway Center Mall. The middle Hill District, already devastated by one public project (the Civic Arena), is slotted to be replaced by more upscale homes.

Most residents are already familiar with the ongoing condemnation suit against the Garden Theater. And just last year, condemnation of the Pittsburgh Wool Co. was narrowly averted when the wool company and H.J. Heinz Co. reached a private settlement.

Finally, just outside of Pittsburgh, the borough of Ambridge is condemning 10 homes and small businesses so that a CVS Pharmacy can move a few blocks down from its current location.

Pittsburgh has an alarming number of local examples, but the abuse of eminent domain is a national problem:

- In Mishawaka, Ind., a county wants to condemn 51 homes - an entire community - to increase parking for a new car manufacturing plant.
- Rochester, N.Y., wants to condemn a thriving business area to transfer the land to Ikea for a new store.
- Bureaucrats in Stamford, Conn., want the site of a historic diner for upscale housing.
- Next month, the Illinois Supreme Court will hear a case in which the Southwestern Illinois Development Authority (the local equivalent of Pittsburgh’s Urban Redevelopment Authority) has condemned an auto shredding company and environmentally sound landfill, which employ more than 80 people, so that the nearby racetrack can increase its parking and host larger races. The racetrack decided it would be easier and cheaper to have the state agency condemn someone else’s property than to build a multilevel parking garage on its own land.

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Condemnation is almost always less expensive than voluntary purchase, because many of the costs that would usually be part of the purchase price aren't included in "just compensation." But it is also important to realize that "just compensation," while it reimburses for the appraised value of the property, does not compensate for the cost of buying a comparable new home or business location. It does not compensate for lost goodwill or lost business, either during the move or permanently. Improvements and customized construction on homes or businesses also are lost. All those are enormous costs that the displaced property owner must bear. That's why most businesses never reopen after being condemned and why many homeowners must leave the area.

The Illinois case also shows political favoritism at its most craven. The head of the condemning agency got free tickets to racetrack events, and the agency charges a 6 percent fee on the value of the property it condemns for private parties. It is not always easy to find such direct evidence of cronyism and profiteering, but unrestricted eminent domain power makes such abuses inevitable. Such blatant misuse of eminent domain power is finally causing courts to take notice. The Illinois Appellate Court found that condemnation to be for a private purpose. Michigan and Delaware have increased their scrutiny of condemnation for private parties, and a court in New Jersey found that the condemnation of a woman's home for Donald Trump resulted in a predominantly private, not public, use.

The Pennsylvania Supreme Court has not considered an eminent domain case in many years, and the time is ripe for it to cut back on the freewheeling use of condemnation. There are two bills pending in the Pennsylvania Legislature to curtail wanton eminent domain abuse. Courts, the legislature and the public should all seek to cut back condemnation. It's time to stop this use of government's most drastic power for mere political expediency.

The Institute for Justice is a nonpartisan public interest law firm based in Washington, D.C. It would have represented Pittsburgh Wool had its case gone to court. The institute has been retained by a number of Downtown merchants to represent them if eminent domain is attempted in the Market Place at Fifth & Forbes project. For more information, visit the institute's Web site: www.ij.org