

IN THE SUPERIOR COURT OF ELBERT COUNTY

STATE OF GEORGIA

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|---------------------------------|---|---------------------|
| CITY OF ELBERTON, GEORGIA, |) | |
| |) | |
| CONDEMNOR, |) | |
| |) | CIVIL ACTION |
| v. |) | FILE NO. 16-EV-281M |
| |) | |
| 0.013 ACRES OF LAND IN THE |) | |
| CITY OF ELBERTON, |) | |
| ELBERT COUNTY, GEORGIA; |) | |
| ROBERT A. THOMAS, RINA THOMAS, |) | |
| ELCON FOODS, INC., |) | |
| PINNACLE BANK, |) | |
| HON. STEPHANIE HEWELL, |) | |
| PROBATE JUDGE OF ELBERT COUNTY, |) | |
| LORRIE HIGGINBOTHAM, |) | |
| ELBERT COUNTY TAX COMMISSIONER, |) | |
| |) | |
| CONDEMNEES. |) | |
| _____ |) | |

PETITION TO SET ASIDE, DISMISS, VACATE AND ANNUL THE PETITION FOR CONDEMNATION AND DECLARATION OF TAKING

Pursuant to O.C.G.A. § 32-2-11, Condemnees Robert A. Thomas, Rina Thomas, and Elcon Foods, Inc. hereby petition this Court to set aside, dismiss, vacate and annul the City of Elberton’s Petition for Condemnation and Declaration of Taking. The City’s Petition violates the Thomases’ property rights under Georgia statutes and the Georgia Constitution. A City cannot circumvent legal protections for property rights simply because it wants to make money on a for-profit venture. Thus, the Petition and Declaration should be set aside.

In this case, the City has invoked authority under the “quick take” provisions of Title 32 of the Georgia Code which allows eminent domain “for present or future public road or other transportation purposes.” But the use of eminent domain here is not for public road or transportation purposes. Instead, the City is engaged in subterfuge: The real reason for the

attempted condemnation is to benefit the economic interests of the for-profit hotel next door to the Thomases' property. This for-profit hotel is the City's own enterprise, meaning the City seeks to benefit its own economic interests by depriving the Thomases of their property and property rights. Moreover, by wrongly invoking the power of eminent domain under Title 32, rather than under Title 22 of the Georgia Code, the City has sought to minimize the Thomases' due process rights.

The City's Petition and Declaration are based on fraud or bad faith; are an improper use of the powers of Title 32, Article 1; are an abuse or misuse of the powers of Title 32, Article 1; are an invocation of Title 32, Article 1 beyond the privileges conferred therein; are *ultra vires*; and are a taking for other than a public use in violation of Article I, Section III, of the Georgia Constitution. In addition, because there is no genuine urgency to justify immediate termination of the Thomases' property rights or for the City to take immediate possession of the Thomases' property, the quick take process here violates Condemnees' Due Process rights under Article I, Section I, paragraph 1 of the Georgia Constitution. Moreover, the City's approval of this action is void under the Open Meetings Act. Accordingly, this Court must, pursuant to O.C.G.A. § 32-2-11, set this matter for a hearing and set aside, dismiss, vacate and annul the City of Elberton's Petition for Condemnation and Declaration of Taking. In addition, because the City cannot acquire the Thomases' property through its Petition for Condemnation and Declaration of Taking, this Court should award the Thomases their reasonable costs and expenses, including their attorneys' fees.

FACTS

Background

1. Condemnor, City of Elberton, Georgia is a municipal corporation of the State of Georgia.

2. The City has brought this condemnation proceeding pursuant to Title 32, Article 1 of the Official Code of Georgia Annotated.
3. The land sought to be condemned is located in the City of Elberton, Elbert County, Georgia.
4. The legal description of the land the City seeks to condemn is properly stated in Appendix A to Exhibit A to the City's Declaration of Taking.
5. The address of the target property is 6 South Public Square.
6. Befitting its address, 6 South Public Square is located on Public Square and is centrally located in Elberton.
7. 6 South Public Square is owned by Robert A. Thomas and Rina Thomas, husband and wife ("the Thomases").
8. The Thomases have owned 6 South Public Square for 13 years, since 2003. Prior to purchasing 6 South Public Square, they leased it for approximately five years.
9. 6 South Public Square is used by the Thomases as the office for their business, Elcon Foods, Inc.
10. The Thomases also use 6 South Public Square for a variety of voluntary civic purposes, which it is particularly well suited for given its central location. These purposes include political meetings or activities and the sale of tickets for a local non-profit theater group.
11. Although the City's Petition was first filed on June 8, 2016, the Thomases were not served with the Petition, as required by O.C.G.A. § 32-3-8, until July 13, 2016.
12. Jurisdiction and venue are otherwise proper in this Court.

The City's For-Profit Hotel

13. Immediately next door and to the west of 6 South Public Square is 4 South Public Square.
14. 4 South Public Square is known as the Samuel Elbert Hotel ("the Hotel").

15. The Hotel contains both a hotel and a restaurant.
16. The City owns the Hotel.
17. The City purchased the Hotel in 2012 for \$200,000.
18. The City has paid or is planning to pay as much as \$4.9 million to renovate the Hotel as part of a redevelopment project.
19. The City has financed the Hotel renovations by taking out loans which it must repay.
20. The City wants to lease the Hotel to a company or individuals to operate as a for-profit business.
21. The City plans to profit on the lease(s) so it can repay its loans and collect more revenue.
22. The City has approved an agreement to lease the restaurant portion of the Hotel to a private operator.
23. The lease provides that the City receives 5% of the restaurant's gross revenue of sales.
24. About this lease, the City Manager said: "This is a standard lease. We are not having anything to do with the day-to-day operation. This is a private business with a private owner."¹
25. The City plans to approve a similar lease for the remainder of the Hotel, which will similarly be a "private business with a private owner."
26. The Hotel will thus be run as a for-profit operation, providing profits for both the City and the company or individuals that operate the Hotel through the lease.

The City's Numerous Attempts to Acquire 6 South Public Square for the Benefit of its Hotel

27. The City's Petition for Condemnation and Declaration of Taking are the latest in a long line of attempts by the City to acquire 6 South Public Square to benefit its Hotel.

¹ Mark Berryman, Council approves hotel restaurant lease, Elberton Daily Star, Aug. 3, 2016, at 1

28. The Thomases have been unwilling to sell 6 South Public Square unless they could find comparable property to buy on Public Square. This has proved impossible and so the Thomases have rejected several offers to buy 6 South Public Square from the City and even higher offers from a private party.

29. In March 2014, the City offered the Thomases \$35,000 for 6 South Public Square. Based on the impossibility finding comparable property to buy on Public Square, the amount they paid for the building, and the cost of recent repairs, the Thomases rejected the offer. The City dropped the issue.

30. In August 2015, the City considered a resolution to authorize an offer of \$40,000 to buy 6 South Public Square. The purpose of this offer to purchase 6 South Public Square was “for its potential future uses in conjunction with the renovation of the Elbert Hotel and the revitalization of downtown Elberton.” This resolution was tabled until September 2015.²

31. In September 2015, by a vote of 5-0, the proposed resolution to purchase 6 South Public Square was defeated.³

32. In September 2015 the City chose to proceed with the renovation of the Hotel without acquiring 6 South Public Square because acquiring 6 South Public Square was not necessary for the Hotel renovation project.

33. In April 2016, the City Council authorized the Mayor to make a cash offer of \$42,000 to purchase 6 South Public Square. The purpose of this acquisition was “for public use in conjunction with the renovation of the Samuel Elbert Hotel and the revitalization of downtown Elberton.”⁴

34. The Thomases rejected this offer in mid-April because the building was not for sale.

² City of Elberton Mayor and Council Meeting minutes of Aug. 3, 2015, at 4-5.

³ City of Elberton Mayor and Council Meeting minutes of Sept. 14, 2015, at 2.

⁴ City of Elberton Mayor and Council Meeting minutes of April 4, 2016, at 2-3.

35. On June 2, 2016, the City Council authorized the filing of a petition for condemnation for 6 South Public Square.

36. The City of Elberton Mayor and Council did not comply with the Georgia Open Meetings Act, in particular O.C.G.A. § 50-14-1(b)(1), (b)(2), and (e)(1), when it authorized the filing of the Petition because no public notice of the City's consideration of the petition for condemnation of 6 South Public Square was ever given.

37. The Thomases were never notified that the City was considering authorizing the petition for condemnation of 6 South Public Square and therefore were denied any opportunity to object to the petition before the City Council.

38. The City's Petition for Condemnation, filed in this Court under penalty of perjury, claims the condemnation is "for construction of public street and related transportation improvements," Petition for Condemnation at ¶ 1, specifically, "to allow for the construction of transportation improvements and to provide airspace rights," Petition for Condemnation ¶ 4. The Petition indicates the purpose of the "Public Square Transportation Enhancement Project is identified in plans which are on file for inspection by the public at Elberton City Hall." Petition for Condemnation at ¶ 1.

The City's Claimed Transportation Enhancement Project Is a Pretext

39. As set forth above, the City has repeatedly attempted to acquire 6 South Public Square for years to benefit its Hotel.

40. Prior to April 22, 2016, there was never any indication that if the City acquired 6 South Public Square the City would use 6 South Public Square for a transportation project.

41. Prior to April 22, 2016, agents of the City stated that, if acquired, 6 South Public Square would remain as an office building.

42. Prior to April 22, 2016, the site plans for the Hotel renovation project showed 6 South Public Square as an office building.

43. On April 22, 2016, just days after the Thomases rejected the City's last offer to purchase 6 South Public Square, the site plans for the Hotel renovation project were amended to show, for the first time, a "pedestrian thoroughfare" between Public Square and a parking lot behind the Hotel (the "Parking Lot") running through 6 South Public Square's present location to the east of the Hotel.

44. There is already a pedestrian thoroughfare between Public Square and the Parking Lot: The public sidewalk on the other (west) side of the Hotel.

45. The City owns the Parking Lot from which the "pedestrian thoroughfare" would run.

46. The Parking Lot will service the Hotel.

47. The public can already access Public Square from the Parking Lot by simply walking on the public sidewalk on the other side of the Hotel

48. The true purpose of the claimed "pedestrian thoroughfare" is to benefit the Hotel and Hotel renovation project.

49. The "pedestrian thoroughfare" here is a pretextual reason for the exercise of eminent domain.

The City's Prior Trespass into 6 South Public Square's Airspace and Resulting Damage to 6 South Public Square

50. As part of its renovations to the Hotel, the City or its agents or employees have, on two occasions, trespassed into the airspace rights of 6 South Public Square without the consent of the Thomases.

51. The Mayor, Chief of Police, and City Manager all witnessed one or both of these trespasses.

52. In January, 2016, the City trespassed into the airspace rights of 6 South Public Square by operating a crane above 6 South Public Square to remove slate tiles from the hotel.

53. During the removal, many tiles struck the roof of 6 South Public Square, damaging the roof and causing leaks.

54. Not only did this trespass damage 6 South Public Square, it placed the Thomases, as well as their employees, family members, customers, and other visitors, at substantial risk of bodily harm.

55. In January, 2016, the Thomases instructed the City to stop trespassing into the airspace above 6 South Public Square and warned of criminal trespass.

56. Notwithstanding the Thomases' instruction to respect their property rights, the City, returned unannounced in February, 2016, and, again without permission, continued to remove slate tiles from the Hotel roof using a crane above 6 South Public Square.

57. Only after the Thomases employed a drone to record the City's trespass did the City cease its illegal activity.

58. The City finally asked for permission to operate in the airspace of 6 South Public Square and the Thomases were willing to let them, on condition that the City paid to fix their roof and paid a daily fee because the Thomases could not stay in the building while the City had a crane overhead and would therefore have to close their business, Elcon Foods, on those days.

Alternatively, the Thomases offered to let the City work in the airspace for free on Saturdays. The Thomases asked that the City not work on Sundays so as to avoid noise interference with services of several churches in the immediate area.

59. The City has still not paid to repair the roof of 6 South Public Square. On information and belief, the cost of repair could amount to several thousand dollars.

60. The true purpose of condemning for “airspace rights” is to benefit the Hotel and Hotel renovation project.

61. The Hotel is a for-profit venture of the City.

Claims for Relief

Claim 1

Ultra Vires

62. Condemnees incorporate and reallege the allegations contained in ¶¶ 1 through 61.

63. The City has brought this condemnation proceeding pursuant to Title 32, Article 1, of the Official Code of Georgia Annotated.

64. Title 32, Article 1, grants the power of eminent domain only for “public road or other transportation purposes.”

65. Statutes authorizing eminent domain, such as Title 32, Article 1, must be strictly construed because they diminish, and can extinguish, owners’ lawful property rights.

66. The power of eminent domain granted by Title 32, Article 1, must be strictly construed in order to give effect to The Landowner’s Bill of Rights and Private Property Protection Act, lest the City improperly claim authority under Title 32 to avoid the significant substantive and procedural protections for property owners found in Title 22, Article 1.

67. The City claims that the use of eminent domain here is for a “pedestrian thoroughfare” between Public Square and the Parking Lot and for “airspace rights.”

68. The “pedestrian thoroughfare” between Public Square and the Parking Lot is not a “public road or other transportation purpose.”

69. The airspace rights for a building renovation are not a “public road or other transportation purpose.”

70. Because the City’s attempted use of eminent domain here is not for “public road or other transportation purposes” it is *ultra vires*.

71. *Ultra vires* acts are without legal authorization and must be set aside.

72. The City’s Petition for Condemnation and Declaration of Taking are *ultra vires* and must be set aside, dismissed, vacated and annulled.

Claim 2

O.C.G.A. § 32-3-11(b) Improper Use of Title 32, Article 1; Invocation of Title 32, Article 1 Beyond the Privileges Conferred

73. Condemnees incorporate and reallege the allegations contained in ¶¶ 1 through 72.

74. The City has brought this condemnation proceeding pursuant to Title 32, Article 1, of the Official Code of Georgia Annotated.

75. Title 32, Article 1, grants the power of eminent domain only for “public road or other transportation purposes.”

76. Statutes authorizing eminent domain, such as Title 32, Article 1, must be strictly construed because they diminish, and can extinguish, owners’ lawful property rights.

77. The power of eminent domain granted by Title 32, Article 1, must be strictly construed in order to give effect to The Landowner’s Bill of Rights and Private Property Protection Act, lest the City improperly claim authority under Title 32 to avoid the significant substantive and procedural protections for property owners found in Title 22, Article 1.

78. The City claims that the use of eminent domain here is for a “pedestrian thoroughfare” between Public Square and the Parking Lot and for “airspace rights.”

79. The “pedestrian thoroughfare” between Public Square and the Parking Lot is not a “public road or other transportation purpose.”

80. The airspace rights for a building renovation are not a “public road or other transportation purpose.”

81. This Court has authority to set aside, vacate, and annul the declaration of taking, together with any title acquired thereby based on “[t]he improper use of the powers of this article, such as are not contemplated by this article.” O.C.G.A. § 32-3-11(b)(2).

82. This Court has authority to set aside, vacate, and annul the declaration of taking, together with any title acquired thereby based on “[s]uch other questions as may properly be raised, including the question of whether or not this article has been invoked in some respect beyond the privileges conferred by this article” O.C.G.A. § 32-3-11(b)(4).

83. Because the City’s attempted use of eminent domain here is not for “public road or other transportation purposes” it is an improper use of the powers granted by Title 32, Article 1, and in violation of O.C.G.A. § 32-3-11(b)(2).

84. Because the City’s attempted use of eminent domain here is not for “public road or other transportation purposes” it is an invocation of Title 32, Article 1 beyond the privileges granted by the Georgia Legislature and in violation of O.C.G.A. § 32-3-11(b)(4).

85. The City’s Petition for Condemnation and Declaration of Taking are in violation of O.C.G.A. § 32-3-11(b) and therefore must be set aside, dismissed, vacated and annulled.

Claim 3

O.C.G.A. § 32-3-11(b)

Fraud or Bad Faith;

Abuse or Misuse of the Powers of Title 32, Article 1.

86. Condemnees incorporate and reallege the allegations contained in ¶¶ 1 through 85.

87. The City claims that the use of eminent domain here is for a “pedestrian thoroughfare” between Public Square and the Parking Lot (which is behind the Hotel) and for “airspace rights.”

88. The real reason the City has brought this condemnation proceeding is for the benefit of the City-owned, for-profit Hotel.
89. Government is not allowed to use the eminent domain power for the benefit of particular powerful groups at the expense of property owners.
90. The City has repeatedly attempted to acquire 6 South Public Square as part of the Hotel renovation project.
91. The City's claimed "pedestrian thoroughfare" between Public Square and the Parking Lot is a pretext, a subterfuge, utilized in order to veil the real purpose of the condemnation: To benefit the Hotel and Hotel renovation project.
92. The City's claimed "pedestrian thoroughfare" between Public Square and the Parking Lot was not added to site plans until months after site plans for the Hotel renovation project were drawn up.
93. The City's claimed "pedestrian thoroughfare" between Public Square and the Parking Lot was not added to site plans until after the Thomases repeatedly declined to sell 6 South Public Square to the City for the Hotel renovation project.
94. There is already a public pedestrian thoroughfare between Public Square and the Parking Lot: A sidewalk on the other side of the Hotel.
95. The "airspace rights" the City seeks to acquire are the very airspace rights the City has already trespassed on and caused damage to the roof of 6 South Public Square as part of the Hotel renovation project.
96. Those "airspace rights" are meant to allow the City to continue its Hotel renovation project without having to get permission from the Thomases to use the airspace above 6 South

Public Square because that permission would require to the City to pay to use the airspace and for the damages it has already caused.

97. The City approved filing this eminent domain action without providing any public notice of its intention to do so or even its consideration of doing so.

98. By concealing its consideration and approval of this eminent domain action, the City concealed the pretextual nature of this taking, which is for the benefit of its for-profit Hotel at the expense of the Thomases and denied the Thomases and the public the opportunity to object to the City's fraud, bad faith, and abuse and misuse of eminent domain.

99. This Court has authority to set aside, vacate, and annul the declaration of taking, together with any title acquired thereby based on "[f]raud or bad faith," O.C.G.A. § 32-3-11(b)(1).

100. This Court has authority to set aside, vacate, and annul the declaration of taking, together with any title acquired thereby based on "[t]he abuse or misuse of the powers of this article." O.C.G.A. § 32-3-11(b)(3).

101. Because the City's attempted use of eminent domain here is a pretext or subterfuge it amounts to fraud or bad faith and is an abuse or misuse of the powers granted by title 31, Article 1, and in violation of O.C.G.A. § 32-3-11(b)(1) & (3).

102. Because the City's attempted use of eminent domain here is for the benefit of its for-profit Hotel at the expense of property owners, it amounts to fraud or bad faith and is an abuse or misuse of the powers granted by title 32, Article 1 and in violation of O.C.G.A. § 32-3-11(b)(1) & (3).

103. The City's Petition for Condemnation and Declaration of Taking are in violation of O.C.G.A. § 32-3-11(b) and therefore must be set aside, dismissed, vacated and annulled.

Claim 4

**Article I, Section III of the Georgia Constitution
Taking Not For Public Use**

104. Condemnees incorporate and reallege the allegations contained in ¶¶ 1 through 103.
105. The City is not authorized to exercise the power of eminent domain to acquire property to be used by private individuals for private use and private gain.
106. Article I, Section III of the Georgia Constitution, prohibits the taking of private property for other than “public use” (and additionally requires just compensation) except for private ways in cases of necessity.
107. “Public use” is not satisfied when government takes property for its own economic interests.
108. The City owns the Hotel and plans to lease it to private parties to operate as a for-profit business. The City has already agreed to lease the restaurant portion of the Hotel to a private operator for a for-profit business.
109. The City plans to profit on the lease(s) so it can, among other things, repay its loans.
110. The City claims that the use of eminent domain here is for a “pedestrian thoroughfare” between Public Square and the Parking Lot and for “airspace rights.”
111. The airspace rights the City seeks are for the benefit of the Hotel renovation project.
112. These are the same airspace rights that the City has already trespassed on during the Hotel renovation project.
113. The pedestrian thoroughfare the City seeks is for the benefit of the Hotel and Hotel renovation project.
114. The pedestrian thoroughfare is just a pretext, a subterfuge to justify the use of eminent domain for the benefit of the Hotel and Hotel renovation project.

115. The pedestrian thoroughfare runs solely between Public Square and the Parking Lot, which is also owned by the City and is located behind the City-owned Hotel.
116. The City-owned Parking Lot will be for the benefit of the City-owned Hotel.
117. Neither the pedestrian thoroughfare nor airspace rights are a necessary private way.
118. Because the City’s exercise of eminent domain here is for the benefit of the Hotel and this is not a case involving a necessary private way, this taking is not for public use and is prohibited by Article I, Section III of the Georgia Constitution.
119. The City’s Petition for Condemnation and Declaration of Taking therefore must be set aside, dismissed, vacated and annulled.

Claim 5

**Article I, Section I, paragraph 1 of the Georgia Constitution
Due Process**

120. Condemnees incorporate and reallege the allegations contained in ¶¶ 1 through 119.
121. The City has brought this condemnation proceeding pursuant to Title 32, Article 1, of the Official Code of Georgia Annotated.
122. Title 32, Article 1, imposes “quick take” proceedings.
123. Under Title 32, Article 1, title to the targeted property—here 6 South Public Square—automatically passes to the condemnor—here the City—upon the filing of the declaration of taking. O.C.G.A. §§ 32-3-7(a), 32-3-13(a).
124. Under Title 32, Article 1, possession of the targeted property—here 6 South Public Square—must be surrendered within 60 days from the filing of the declaration of taking. O.C.G.A. § 32-3-12(b).

125. Under Title 32, Article 1, condemnees have only 30 days from service of the declaration of taking to contest the taking through a petition to set aside, vacate, and annul the declaration of taking, together with any title acquired thereby. O.C.G.A. § 32-3-11(c).

126. Under Title 32, Article 1, there is “a prima-facie presumption that the property or interest condemned is taken for and is necessary to the public use provided for in this article,” meaning that condemnees have the burden of proof to justify keeping their own property. O.C.G.A. § 32-3-11(a).

127. Under Title 32, Article 1, any hearing on such a petition must occur within 60 days from the filing of the Declaration of Taking. O.C.G.A. § 32-3-11(c).

128. Thus, under Title 32, Article 1, condemnees have only a very limited window of time to present their case and meet their burden before they are deprived of their property rights.

129. By way of comparison, Title 22, Article 1, places the burden of proof on condemnors to justify the use of eminent domain and does not vest title in a condemnor until after a full and fair opportunity to contest a taking and a court approves the use of eminent domain. O.C.G.A. § 22-1-11.

130. The limited process rights for condemnees under Title 32, Article 1, especially when compared to the protections for condemnees under Title 22, Article 1, invites the exploitation of Title 32, Article 1, by condemnors, especially in cases involving the use of eminent domain for other than public use or takings that are based on fraud or bad faith, are an improper use of eminent domain, are an abuse or misuse of eminent domain, or are beyond the privileges conferred by the Georgia Legislature.

131. Nothing in Title 32, Article 1, requires a condemnor to demonstrate a genuine urgency to justify immediate termination of a condemnee's property rights or to take immediate possession of property.
132. Absent a genuine urgency to justify immediate termination of a condemnee's property rights or to take immediate possession of property, there is no justification for limiting a condemnee's process rights.
133. Because there is no genuine urgency to justify immediate termination of Condemnees' property rights or to take immediate possession of Condemnees' property, Georgia's quick take proceedings under Title 32, Article 1, violate Condemnees' Due Process Rights under Article I, Section I, paragraph 1 of the Georgia Constitution.
134. The City's Petition for Condemnation and Declaration of Taking therefore must be set aside, dismissed, vacated and annulled.

Claim 6

O.C.G.A. §§ 32-3-11(b) & 50-14-1(b)(2) Violation of Georgia Open Meetings Act

135. Condemnees incorporate and reallege the allegations contained in ¶¶ 1 through 134.
136. The City Council and Mayor authorized the filing of the Petition for Condemnation of 6 South Public Square at a June 2, 2016, meeting.
137. No public notice of that the City would consider authorizing the Petition for Condemnation of 6 South Public Square at the June 2, 2016, meeting was ever given.
138. No agenda for the June 2, 2016, meeting showing that the City would consider authorizing the Petition for Condemnation of 6 South Public Square was ever published.

139. The City's June 2, 2016, meeting, at which its Council and Mayor authorized the filing of the Petition for Condemnation of 6 South Public Square was subject to the requirements of the Georgia Open Meetings Act.

140. The City, its Council and Mayor did not comply with the Georgia Open Meetings Act, and in particular O.C.G.A. § 50-14-1(b)(1), (b)(2), and (e)(1), when it authorized the filing of the Petition for Condemnation.

141. The authorization of any action in violation of the Georgia Open Meetings Act is void.

142. There was no unexpected or emergent circumstances that required authorizing the Petition for Condemnation at the June 2, 2016, meeting.

143. The City's authorization of the Petition for Condemnation is void under the Georgia Open Meetings Act and the City's Petition for Condemnation and Declaration of Taking therefore must be set aside, dismissed, vacated and annulled.

144. Because the City's attempted use of eminent domain here was authorized in violation of the Georgia Open Meetings Act, it amounts to fraud or bad faith; is an improper use of the powers granted by Title 32, Article 1; is an abuse or misuse of the powers granted by Title 32, Article 1; and is an invocation of Title 32, Article 1 beyond the privileges granted by the Georgia Legislature; violated O.C.G.A. § 32-3-11(b), and therefore must be set aside, dismissed, vacated and annulled.

Claim 7

O.C.G.A. §§ 22-1-12, 32-3-11, & 13-6-11 Reasonable Costs and Expenses

145. Condemnees incorporate and reallege the allegations contained in ¶¶ 1 through 144.

146. Pursuant to O.C.G.A. § 22-1-12, this Court shall award Condemnees such sum as will reimburse Condemnees for their reasonable costs and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if:

- (1) The final judgment is that the condemning authority cannot acquire the real property by condemnation; or
- (2) The proceeding is abandoned by the condemning authority.

147. For the foregoing reasons, the City—the condemning authority here—cannot acquire 6 South Public Square by condemnation.

148. Pursuant to O.C.G.A. § 13-6-11, this Court shall award litigation costs, including reasonable attorney fees, to Condemnees who seek to vacate condemnation in proceedings pursuant to O.C.G.A. § 32-3-11.

149. Condemnees here seek to vacate condemnation in proceeding pursuant to O.C.G.A. § 32-3-11.

150. Condemnees are therefore entitled to an award of their reasonable costs and expenses here upon entry of final judgment (or if the City abandons the proceeding).

WHEREFORE, Condemnees pray that the judge cause a Rule Nisi to issue and be served upon Condemneor requiring it to show cause, not earlier than fifteen (15) days from service of the Rule Nisi upon the Condemnor, to determine why title acquired by said Declaration of Taking should not be vacated and set aside; that the Petition of Condemnation and Declaration of Taking and title acquired thereby be set aside, dismissed, vacated and annulled; that the Condemnees receive reasonable costs and expenses, including attorney fees and cost for maintaining this

action; and that the Court grant all further legal and equitable relief as the Court may deem just and proper.