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## Sometimes, You Really Can Fight City Hall

By Timothy S. Hollister

Whoever said "You can't fight City Hall" may have been talking about eminent domain – the government's power to take private property, even against the owner's will, for a "public use." Although this power (also called "condemnation" or "taking") can be used to evict families from their homes, it has been used so often for things we take for granted – roads, bridges, schools, storm drains, sewers, etc. – that if government decides it needs a property, we assume it will succeed in taking it.

Across the country, however, there are some signs that the courts, which can be asked to review the use of condemnation, are taking a harder look at what government must demonstrate in order to take land. Historically, when government has taken land, it has had to satisfy five requirements: (1) follow required procedures (notice, hearings, etc); (2) act in good faith; (3) take land only for a "public use;" (4) take only what is necessary for that use; and (5) pay the owner "just compensation," meaning fair market value. Procedural compliance, necessity and adequate compensation have been regular subjects of court cases but public use has not, because back in the 1950s, the U. S. Supreme Court held that what is a public use is up to Congress and the state legislatures. Given this latitude, governments have gotten into the habit of condemning land for the "public purpose"

### Opinion



of promoting private economic development, such as demolishing run-down buildings to make way for a shopping center. For decades, the courts have rarely interfered, but in the past three years, in Connecticut and nationally, this has started to change.

Recent court decisions cover a wide range of situations. In Illinois, a regional economic development authority condemned 148 acres owned by an auto-shredding business in order to build a parking lot that would allow an adjacent auto racetrack to add enough seats to attract Nascar/Winston Cup events. The racetrack, however, was privately owned and operated, and the auto-shredding business sued, claiming that the taking was not for a public use. Particularly, the owner of the shredding business pointed to the fact that the racetrack owner had agreed to put up the money (\$1 million) that the authority would pay as just compensation (an arrangement that is not uncommon). The Illinois Supreme Court held that the taking was "a private venture designed to result not in a public use, but in private profits," and thus unconstitutional.

In Indiana, a redevelopment agency used

its condemnation power to invalidate a covenant that restricted lots in a subdivision to residential use, allowing three of the lots to become part of a shopping center. A state court held that the agency's action was not for a public purpose.

The courts are also applying heightened scrutiny to governments' determinations of when "blight" (building deterioration) justifies a taking. A federal court in Kentucky recently rejected a city's claim that a neighborhood's tax delinquencies, illegal dumping grounds and drainage problems were a basis for clearing the way for a privately owned hotel and conference center. State law, said the court, required that a finding of blight be based on a threat to health or safety.

The Connecticut Supreme Court issued two opinions on eminent domain earlier this year. When the city of Bridgeport sought to condemn a privately owned yacht club and marina as part of its redevelopment efforts, the court held the city had not used all reasonable efforts to obtain the property by agreement or demonstrated that the property was necessary to the redevelopment plan. In another case, the city of Stamford sought to acquire the location of a popular diner known as Curley's. Stamford had adopted its urban renewal plan in 1963, but did not condemn under an amended version of this plan until 1999. The court held that Stamford could not base a condemnation on a document so far out-of-date.

Another recent Connecticut case struck down the use of eminent domain to thwart a "locally unwanted land use" (also known as a "LULU"). In the town of Orange, a developer sought to build on nine acres a 168-unit apartment complex in which 25 percent of the units would be affordable housing. While hearings on the zoning permits were in progress, the town quickly prepared a plan for an "industrial park" con-

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sisting of 172 acres, including the housing site. The plan's first step would have been to condemn the nine acres, but it said nothing about the remaining 163 acres. The Connecticut Supreme Court issued an injunction, finding that the timing of the plan and the scarcity of its information showed that the town was acting in bad faith.

Finally, a federal court in California recently enjoined a redevelopment agency from condemning land where a growing church wanted to build a new place of worship. The court noted that the redevelopment plan had been in place for 10 years, but only when the church filed a zoning application did the agency activate its redevelopment efforts. The court also held that since the intended beneficiary of the redevelopment was a Costco discount store, the

agency was not pursuing a public use.

These developing limits on eminent domain are of particular interest to Connecticut property owners for one other reason: our Supreme Court held earlier this year that in a condemnation, the costs of cleaning up pollution on a property can be deducted from fair market value when the government takes the land. Thus, the financial stakes in some condemnations have been raised, and a landowner may need to fight a condemnation just to keep control of the scope and cost of a remediation program.

The lesson of these cases is that there are "red flags," circumstances or facts that may signal a basis to challenge a condemnation:

- When a private party is responsible for some large part of the money that will be

used to pay for the condemnation;

- When the government condemns more land than is necessary for the stated public purpose;

- When the condemnation proceeds without a current or recent study of the economic benefits;

- When land becomes condemned property for a project that will be run entirely by a private business;

- When condemning land that will have the effect of denying housing or interfering with a religious organization; or

- When government stretches the definition of "blight" or fails to negotiate fairly with an existing business before a taking.

Eminent domain is an awesome power, but we are discovering that it indeed has limits. ■

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