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Satisfying The "Public Use" Requirement Of Eminent Domain

Timothy S. Hollister
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, Connecticut 06103-1919
Phone: (860) 251-5601
Fax: (860) 251-5699
E-Mail: thollister@goodwin.com
Website: ShipmanGoodwin.com

SPEAKER BIOGRAPHY

Timothy S. Hollister is a partner in the Hartford office of the Connecticut law firm of Shipman & Goodwin LLP, where he concentrates his practice in land use, environmental, and municipal law. He is a Regional Vice President of the International Municipal Lawyers Association ("IMLA"), the organization of city, town, county, and special district attorneys in the United States and Canada. In October 2002, he will receive from IMLA the designation of "Local Government Law Fellow," a certification of expertise in municipal law. In Connecticut, Mr. Hollister has served as chair of the Bar Association's Environmental Law Section and is a long-time member of the Section's Executive Committee. Mr. Hollister received a B.A. from Wesleyan University, a M.A. in Urban Studies from Occidental College (Los Angeles), and his law degree from Boston University.

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The research in this paper is updated to September 20, 2002.

I. The New "Public Use" Debate: Is A Lid Nailed Shut Now Popping Open?

For decades, the "public use" requirement for the exercise of eminent domain[1] has been considered settled law, a constitutional limitation to be acknowledged but rarely a substantive limitation on the government's power to condemn property. This state of affairs was the result of two categories of court decisions. In the earliest eminent domain cases, dating to the mid-1800's, the courts confirmed the basic constitutional authority of governments to take private property for a use endemic to one of their core functions, such as roads, public buildings, public safety, or infrastructure.[2] In a second generation of cases, the most prominent being *Berman v. Parker* (1954)[3] and *Hawaii Housing Authority v. Midkiff* (1984)[4], the courts expanded the concept of public use by holding that governments may take private property to promote private economic development, and may even transfer taken land to a private business, so long as the overall action may conceivably result in an identifiable public benefit. With the state and federal courts having established a minimal standard of review rooted in deference to legislative findings, the public use requirement, with only a few exceptions,[5] disappeared as a contested issue in eminent domain cases. In the vast majority of jurisdictions, condemnation in aid of private, for-profit development has been blessed by statute and case law

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[1] The Takings Clause of the Fifth Amendment to the U. S. Constitution, of course, provides that "[Nor] shall private property be taken from public use, without just compensation." State constitutions contain similar language.

[2] *See*, *e.g.*, *Clark v. Saybrook*, 21 Conn. 313, 324 (1851); *West River Bridge Co. v. Dix*, 47 U.S. 507, 531-32 (1848); *Pollard v. Hagan*, 44 U.S. 212, 222-23 (1845).

[3] 348 U.S. 26, 75 S. Ct. 98 (1954) (upholding slum clearance in Washington, D.C.).

[4] 467 U.S. 229, 104 S. Ct. 2321 (1984) (upholding act of Hawaii legislature breaking up oligarchical land estates, and transferring land from landlords to lessees, in order to abate social and economic evils of concentrated land ownership).

[5] *See, e.g., Merrill v. City of Manchester*, 499 A.2d 216 (N.H. 1988); *City of Owensboro v. McKormick*, 581 S.W.2d 3 (Ky. 1979); *Pulos v. James*, 302 N.E.2d 768 (Ind. 1973); *Port Authority of St. Paul v. Grippoli*, 202 N.W.2d 371 (1972); *Little Rock v. Raines*, 411 S.W.2d 486 (Ark. 1967).

and, in the absence of a bad faith, illegal motive, statutory violation, or procedural error in the taking process, condemnations have proceeded unfettered.[6]

In the past three years, however, a line of cases, described by some journalists and commentators as a "new wave," has emerged in which the use of eminent domain for the particular purpose of taking land in order to assist a private business or promote predominately private economic development has been questioned anew. The issue has been resurrected primarily in six situations: (1) where the government asserts the future economic consequences *per se* of a private venture – employment opportunities, increased tax revenues, or synergistic effects of new construction on nearby properties – as the public purpose; (2) where a condemnation promotes economic development in which the government will not have an on-going role as partner, joint venturer, or manager; (3) where a taking to promote economic growth is not also justified as abating a nuisance, clearing a slum or blighted area, or alleviating a threat to public health or safety; (4) condemnation of land that is occupied by an existing, viable business in order to turn it over to another existing business that is deemed *better* for the local economy; (5) condemnation in order to stop a use that officials believe will be *detrimental* to local or regional economic interests; or (6) takings carried out under redevelopment plans or anti-blight ordinances that are outdated and thus not reflective of current economic circumstances. Court cases addressing these situations have also increasingly scrutinized the structure of the contractual and other ties between condemnors and the beneficiaries of condemned lands and the fairness of the condemnation process. More

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[6] Two of the seminal cases on this topic involve the efforts of the Port of New York Authority in the mid-1960's to condemn a delicatessen in order to clear the way for a large group of office buildings in lower Manhattan – the World Trade Center. *See Courtesy Sandwich Shop, Inc. v. Port of New York Authority*, 190 N.E.2d 402 (1963); *In the Matter of the Port of New York Authority*, 219 N.E.2d 797 (1966). *See also* J. Glanz and E. Lipton, "The Height of Ambition," *The New York Times Magazine*, September 8, 2002 at 32-37 (excerpt, Attachment B, *infra*); G. Kanner, "At Times, Goliath Wins," *The National Law Journal*, Sept. 16, 2002 at A21.

fundamentally, these recent cases reveal judges struggling to resolve the competing principles that courts are to construe condemnation authority against the condemnor and in favor of the property owner, but at the same time are directed to defer to legislative judgments about what constitutes a proper public purpose.

It is difficult to say why this new line of cases has emerged. It may be that the focus in recent years on public-private partnerships has further blurred the lines between public uses and private economic development. One commentator has suggested that political pressure for redevelopment of economically depressed areas has prompted redevelopment officials to act more precipitously and perhaps brazenly,[7] prompting landowners to fight back. Alternatively, it is possible that the aura of invincibility that has surrounded the exercise of eminent domain has emboldened authorities to keep pushing the envelope, with the inevitable result that sooner or later the courts would start to question their plans and identify limitations on the use of condemnation. Another possible explanation is that in some of the more urbanized states, appropriations of public funds for open space acquisitions have increased, thus creating more takings and causing private economic interests to either align with or oppose those efforts. Finally, there are now several advocacy groups that provide legal assistance to property owners who are urging the courts to narrowly construe eminent domain authority.[8]

In any event, this national trend has been recognized in several newspapers, including *The Wall Street Journal,*[9] *The National Law Journal*,[10] and *Lawyers Weekly USA,*[11] and it is

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[7] *See* D. Digges, "Challenge to Eminent Domain On The Rise," *Lawyers Weekly USA*, Sept. 16, 2002 at 13, comments of Professor Gideon Kanner.

[8] *See, e.g.*, D. Kelleher and C. O'Brien, "Coast Guard Out Of Fort Trumbull," *The Hartford Courant*, Aug. 25, 2002 at C3 (describing efforts of homeowners in New London, Connecticut, assisted by the Institute for Justice, challenging the taking of their land for a new Coast Guard museum as part of New London's harbor redevelopment).

[9] D. Starkman, "Condemnation Is Used To Hand One Business Property of Another; Tactic by Local Governments Seeking Jobs and Taxes Is Protested as Unfair," *The Wall Street Journal*, Dec. 2, 1998 at A1; D. Starkman, "More Courts Rule Cities Misapply Eminent Domain," *The Wall Street Journal*, July 23, 2001 at B1.

truly exemplified by a case from Illinois discussed in the next section. This article, therefore, reviews recent cases in which courts have limited, restrained, or enjoined local government use of eminent domain. It provides several cautionary tales about pushing the limits of the condemnation power, identifies the issues of this new debate, and suggests substantive and procedural steps that condemnors may take to ensure that their use of eminent domain is vindicated if challenged.

II. Private Economic Benefits As The Public Use Justification For Eminent Domain

A. *Southwestern Illinois Development Authority v. National City Environmental, LLC* (2002).

Perhaps no court case has presented as extensive an examination of the use of eminent domain to promote private economic interests as the judicial roller coaster known as *Southwestern Illinois Development Authority v. National City Environmental, LLC*, in which the Illinois Supreme Court, in April 2001, reversed an appellate court decision invalidating a taking, but then in April 2002, after rehearing, reversed itself.[12] The case presented a veritable law school examination question on the public use requirement of eminent domain.

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[10] D. Nicolai, "Can Eminent Domain Be Wielded Against Developers?," *The National Law Journal*, February 18, 2002 at B14; G. Kanner, "The Development Score," *The National Law Journal*, July 30, 2001 at A18; D. Van Cuch, "Business Watch: Eminent Domain Use Curtailed," *The National Law Journal*, June 14, 1999 at B4. *See also* M. Jennings "Eminent Domain Is Not What It Used To Be," *Real Estate Law Journal*, Vol. 30 at 232-41 (2001).

[11] D. Digges, "Challenges To Eminent Domain On The Rise," Sept. 16, 2002 at 13.

[12] 710 N.E.2d 896 (Ill. App. 1999); *reversed*, 2001 Ill. LEXIS 478 (April 19, 2001); *rehearing granted*, 748 N.E.2d 194 (2001); *reversed* [appellate court opinion affirmed], 768 N.E.2d 1 (2002). The Illinois Supreme Court's final ruling is Attachment A to this article. The plaintiff Authority has filed a petition with the U. S. Supreme Court seeking a writ of certiorari. As of the date of this article (September 20, 2002), that petition (No. 02-34) is pending. The author expresses his appreciation to Tom Kelty, General Counsel of the Illinois Institute for Local Government Law for providing him with appellate briefs and rehearing decision in this case, and to Attorneys Richard Skelton and Michael Zimmerman of Park Ridge, Illinois for a copy of the *Amicus Brief* of the International Municipal Lawyers Association in support of SWIDA's petition for a writ of certiorari.

St. Clair County, located in southwestern Illinois, in decades past was the home to major warehouses and meat-packing plants, but after those uses disappeared the area became economically depressed. The Illinois legislature in 1987 established the Southwestern Illinois Development Authority ("SWIDA") to encourage business development, increased employment, and greater tax revenues in the region. The Authority's enabling legislation specifically identified as goals assistance to and promotion of for-profit businesses, including sports and parking facilities. In 1996, the Authority issued $21.5 million in bonds and loaned the proceeds to a private corporation called the Grand Prix Association of Long Beach, Inc., a/k/a "Gateway," to expand and develop an auto race track. Gateway then turned a small existing raceway into the Gateway International Raceway, a state-of-the-art facility with more than 50,000 seats. The ultimate goal of Gateway was to expand the raceway to accommodate Winston Cup NASCAR events, requiring 85,000 to 100,000 seats.

Development of the raceway had measurable economic benefits for the area, including development of a new golf course, replacement of junkyards and dilapidated housing, and the construction of restaurants, hotels, road improvements, and bridges.

However, the success of the racetrack created a need for more parking. Gateway sold out most of its events in 1997, and it projected attendance increases for the following year. In 1997, while adding 10,000 seats to the racetrack, Gateway lost control of 30 acres that it had leased for parking.

Gateway identified the preferred site for new parking as a 148-acre tract immediately west of the raceway owned by National City Environmental, LLC and the St. Louis Auto Shredding Company, an auto metal-shredding operation ("National City"). Gateway asserted that this property would alleviate patrons of the racetrack from having to cross a state highway on foot to reach the racetrack from existing parking areas. National City used this land occasionally for temporarily storing "fluff," the non-metal materials not salvaged by the auto-shredding operation. The property also had been identified for use within several years as an extension of the company's landfill. Finally, National City also used some clay and dirt from

the 148 acres as cover material for its current landfilling. National City's operation had been in existence since the 1970's, and employed between 80 and 100 people full-time.

Gateway attempted to purchase the 148 acres directly from the owners, but was unable to do so. It then turned to the Authority, filing an "Application for Use of Quick-Take Eminent Domain" in February 1998, setting forth its urgent need for additional parking. The St. Clair County Board endorsed the application, and in March 1998 the Authority passed a resolution to condemn the subject property for Gateway's use as parking.

Just prior to this resolution, the Authority and Gateway entered into a written agreement whereby Gateway agreed to fund all of the Authority's expenses in connection with the taking, including legal fees. The Authority obligated itself to turn over the property to Gateway within five days of acquisition. The day before the Authority initiated condemnation, Gateway paid the Authority $1 million to pay for the acquisition of National City's land. The Authority took title and immediately quit-claimed to Gateway. The unsuccessful private Gateway negotiations, attempts by the Authority to acquire the land without condemnation, and the taking all occurred within approximately six weeks.

National City challenged the condemnation on the grounds that the taking was not for a public purpose; the taking of 148 acres was excessive for Gateway's parking needs; the taking was unnecessary because Gateway did not have an immediate need for the parking; and the Authority had not engaged in good faith negotiations as required.[13]

A trial court hearing on the legality of the "quick-take" occurred just three weeks later. The Authority called witnesses who supported the taking on the grounds of economic development, the elimination of blight in surrounding areas, and improved public safety by providing access to racetrack patrons without having to cross the state highway.

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[13] National City challenged the taking under the public use requirement of the Takings Clauses of both the federal Fifth Amendment and the Illinois Constitution, and it appears that no one contended that the state constitutional standard differed from the federal one.

National City defended primarily by attacking the contractual relationship between the Authority and Gateway and the lack of studies to support the benefits cited by the Authority in support of its action. In a colloquy with National City's attorney, the Executive Director of the Authority conceded that the condemnation was Gateway's idea and that the Authority itself had no need for the land and always intended to convey the land immediately to Gateway. The Authority also conceded that it had not commissioned studies analyzing the economic impacts that might result from the taking. It further acknowledged that it had not consulted with the Illinois Department of Transportation about the alleged safety needs or improvements prior to the taking. Moreover, National City pointed out that while those who would park on the 148 acres would not have to cross the state highway, the parking lot requiring patrons to cross would remain in use, and thus the safety problem would not be eliminated. Finally, National City elicited testimony about the substantial economic benefits to Gateway from having the additional parking and obtaining the rights to host a Winston Cup race. The trial court found that the Authority had the power to take National City's land and had exercised that authority properly.

It appears that this was a routine condemnation case until the Illinois Appellate Court for the Fifth District reversed in an opinion issued April 29, 1999.[14] After a review of the history of eminent domain in the United States and recognition of the many purposes for which the exercise of eminent domain has been upheld, the court stated, "As disparate as these purposes are, it should be noted that none of them involved the taking of property from one private party and the immediate transfer of it to another private party, whose interest in the property is solely to earn greater profits." The court continued that "takings of private property are justified only where the third-party beneficiary is the public." The court then reviewed the trial testimony, noting that the condemned land would be used only for Gateway's

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[14] 710 N.E.2d 896.

private business purposes, and that the taking of the entire 148 acres had been justified in part on the basis that parking at ground level would be less expensive than a tiered parking garage. The court also noted that there was no history of accidents in the vicinity from race day traffic or congestion; the Authority had not conducted any studies of economic benefits; and the taking did not appear to have anything to do with elimination of blight. Finally, the court noted that the current auto shredding operation conferred a type of public benefit by disposing of one type of solid waste. The court concluded that, "Notwithstanding any incidental economic benefit from [the Authority's] actions in this case, we cannot subordinate a constitutional right to private corporate interests."[15]

In a concurring opinion, Justice Kueuhn pointed out that the condemnation of private property and its conveyance to other private businesses was clearly intended by the Authority's enabling legislation, and the case should have been resolved on the ground of whether "[L]egislation can constitutionally authorize a government agency to take an owner's land and make it the private property of a new owner because the new owner is capable of putting the land to a more productive use and/or a use that better serves the broader social or economic interests of the public at large." The concurrence concluded:

> If property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic byproducts of a private capitalist ability to develop land cannot justify a surrender of ownership to eminent domain. If a government agency can decide property ownership solely upon its view of who would put that property to more productive or attractive use, the inalienable right to own and enjoy property to the exclusion of others will pass to a privileged few who constitute society's elite. The rich may not inherit the earth, but they most assuredly will inherit the means to acquire any part of it they desire.[16]

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[15] 710 N.E.2d at 904.

[16] *Id*. at 906.

The Authority appealed, and the proceedings before the Supreme Court of Illinois appear to have attracted a who's who of large law firms in the state, along with eight *amicus curiae* briefs. The court, in a 4-3 decision issued in April 2001,[17] reversed the Appellate Court, holding that the standard for the legality of the condemnation was whether it was "rationally related to economic development," and that the Authority had met that standard.

The Supreme Court began by reviewing the U. S. Supreme Court's decision in *Berman v. Parker*.[18] It noted the principles that the use of private enterprise for economic redevelopment had long been recognized as being within the "public use" requirement, and that the means for satisfying that mandate were a matter of legislative discretion. The court also reiterated the principle that "The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose," *citing Hawaii Housing Authority v. Midkiff*.[19] Finally, the court recognized that economic development in general and the elimination or prevention of blight had been recognized as public purposes in previous Illinois decisions.[20]

Chief Justice Harrison and two other judges filed a stinging dissent:

> The 148.5-acre tract of land at issue in this case was not blighted. It was a productive adjunct to [the metal recovery] operations. The only reason that it is now owned by Gateway [the racetrack] rather than [the metal recovery plant] is that it provided the cheapest solution to the parking and traffic problems created by Gateway's expansion of its racetrack. Other solutions were available. This was just the least expensive. In the end, all [the Authority's] intervention did was save Gateway money at [the plant's] expense.[21]

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[17] 2001 Ill. LEXIS 478 (April 19, 2001).
[18] 348 U.S. 26 (1954)
[19] 467 U.S. 229, 243-44 (1984)
[20] 2001 Ill. LEXIS at *37.
[21] *Id*. at *45.

As we all know, rehearing petitions in appellate matters are rarely granted, but this time the court granted the motion. After a second round of briefs and argument, the Supreme Court on April 4, 2002, in a 5-2 decision, reversed itself and affirmed the outcome of the April 1999 Appellate Court decision.[22]

At the outset, the Supreme Court stated that the issue was not the Authority's transfer of the property to a private business, but whether the SWIDA had exceeded its delegated constitutional authority by taking land to assist a private party make a profit "when the property is not put to a public use."

The court reaffirmed that while the designation of a public use is subject to "great deference" to legislative discretion, "whether a given use is a public use is a judicial function." The court then rejected SWIDA's position that the test of "public use" is whether a "public purpose" is served by the taking, and reached back to a century old case, *Gaylord v. Sanitary District,*[23] for the proposition that *the defining characteristic of a public use is public access as-of-right*: "[T]he public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right."[24] The court found that while spectators of races of Gateway would benefit from additional parking, the racetrack is not open to the public by right, but is "a private venture designed to result not in a public use, but in private profits." The court held that the promotion of such private profits could not justify the taking, "especially in light of evidence that Gateway could have built a parking garage structure on existing property."

Finishing its analysis, the court held that economic growth *per se* could not be the test of "public use" for a taking, because as noted in the *Gaylord* decision, "incidentally, every lawful business does this." Returning them to its earlier theme, the court determined that the

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[22] 768 N.E.2d 1 (2002).
[23] 204 Ill. 576 (1903).
[24] 768 N.E.2d at 21, *quoting* 204 Ill. at 584.

public was not the "primary intended beneficiary" of this taking. The court also faulted SWIDA for not having conducted a study of parking alternatives or a projection of economic benefits, and for acting, in effect, "as a default broker of land for Gateway's proposed parking plan." Finally, the court stated that "initial, legitimate development of a public project does not justify condemnation for any and all related business expansions." "The power of eminent domain is to be exercised with restraint, not abandon."[25]

In dissent, Justices Freeman and McMorrow pointed out that defining "public use" by whether the public would have access to the land after the taking had been expressly rejected in *Berman v. Parker* and Illinois cases following it. They also identified several prior Illinois cases in which the courts had upheld takings that resulted in private ownership with no right of public access.[26]

This case is troubling for at least two reasons. First, I respectfully submit that the Illinois Supreme Court had it right in its first (April 2001) opinion. The economic development benefits to the area of the racetrack in the prior three years appear to have been substantial and prompt, and such economic development clearly had been recognized as a public use in Illinois previously, both in statute and in appellate case law. The Authority's enabling legislation expressly identified auto raceways and associated parking as intended projects.

What apparently made this case so difficult for the courts was *how* the Authority and Gateway went about the taking, which created several problems. The first problem was the Authority's contractual relationship with Gateway, which created at least the impression that the Authority had bargained away its eminent domain power in return for being financially indemnified with respect to application fees, legal fees, and just compensation. Second, after

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[25] 768 N.E.2d at 24-27.
[26] *Id.* at 27-71.

the conveyance to Gateway, the Authority had no role in the on-going project. Third, the Authority did no studies or quantifications before the taking (or the trial) of the expected economic benefits of having increased parking available. Fourth, it appears that the private negotiations that preceded the taking were handled in a manner that allowed Gateway to suggest to National City that if it was unsuccessful as a private company, it could quickly co-opt the Authority's eminent domain power and obtain the property at a lower price. Next, it appears that the Authority condemned more property than was needed for even long-term parking uses, without providing any study of the actual acreage needed for parking for an additional 10,000± racetrack seats. Sixth, the Authority appears to have overreached by claiming elimination of blight as one benefit of the taking and in claiming that the condemnation would help public safety by allowing racetrack patrons to avoid crossing a state highway. Finally, National City had a colorable argument that Gateway's need for more parking was not the result of blight or economic degradation, but the success of the racetrack itself and, perhaps, a lack of planning for parking during the initial expansion of the facility.

As a matter of defining the limits of the law of eminent domain, the rehearing decision appears likely to create confusion. The Illinois Supreme Court appears to have established a bright-line test for public use, the "right" of the "public" to "use" the taken land or whatever is built on it. These terms, of course, are problematic. And this test contradicts a long line of Illinois cases that, like cases from around the country, validated takings that resulted in private facilities to which the public *did not* have access. For example, takings in order to facilitate the construction of privately owned and managed industrial parks are commonly upheld based on their direct and indirect economic benefits, even though the general public will have no right of access to or use of the facility. In addition, if the initial development of the Gateway racetrack *per se* was a legitimate authority for SWIDA, why not also additional parking? In fact, if the defining characteristic is public "access," the parking area has a better claim to being a public use than the raceway.

Unfortunately, the Illinois Supreme Court also appears to have overlooked three ways it could have voided this particular taking without further contorting the public use analysis. The court could have held that taking the 148 acres was excessive and unnecessary because Gateway clearly could have built a tiered garage on a smaller parcel. Alternatively, the court could have faulted the lack negotiations that proceeded the taking.[27] Finally, the contractual relationship between SWIDA and Gateway raised an issue of whether the Authority had improperly delegated its condemnation powers to a private entity.[28]

In any event, we should thank the litigants and the Illinois courts for illuminating, in one case, so many aspects of the public use requirement! And stay tuned in the event that the U. S. Supreme Court grants SWIDA's petition for review.

B. Other Recent Public Use Cases.

One of the most detailed and thoughtful analyses in recent years of the public use requirement is the opinion of Judge Manion of the Sixth Circuit Court of Appeals in *Daniels v. Area Plan Commission*.[29] The Daniels owned a lot in a residential subdivision that was encumbered by a restrictive covenant prohibiting within the development anything other than residential use. A private company obtained title to three lots that abutted a well-traveled road and, proceeding under Indiana's "vacation" statute, asked the Area Plan Commission to vacate the covenant as to three lots and rezone the land to commercial use. The company's ultimate plan was a shopping center. The Commission granted both applications, and the Daniels' sued in federal court under 42 U.S.C. § 1983 for an injunction, alleging that the vacation of the covenant constituted a taking of a property interest for a private purpose.

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[27] *See* pp. 17-18, *infra*, discussion of the *Pequonnock Yacht Club* case.

[28] *See* pp. 15, *infra*, discussion of the *110 Washington Street* case.

[29] 2002 U.S. App. LEXIS 18640 (Sept. 11, 2002). (Proving that no good deed of legal scholarship goes unpunished, this important opinion became available just three days before this article was due to be completed.)

After a lengthy analysis of whether the taking claim as brought in federal court complied with the state-court-first ripeness requirement of *Williamson County Regional Planning Board v. Hamilton Bank*,[30] the court addressed the public use issue. It first noted decisions of the U. S. Supreme Court interpreting the public use provision of the federal Takings Clause, and identified the scope of review as narrow and deferential to legislative determination. However, in this case, the Area Plan Commission's action failed to satisfy the public use requirement for two reasons. First, Indiana's vacation statute did not spell out what types of private economic development would justify the abrogation of private covenants, but delegated that determination *to the Commission* with minimal direction or oversight. Thus, judicial deference to "legislative" findings was less warranted, if not inapplicable. Second, the economic benefit was speculative because it was dependent on the owner of the three lots actually building and completing a successful shopping center, which it was under no obligation to do. Thus, the covenant was being invalidated solely to provide a speculative commercial development opportunity for a single private company, and "economic development on its own does not constitute a public purpose sufficient to satisfy the public use requirement inherent in the exercise of eminent domain under Indiana law."

On the other hand, three recent cases have held that the condemnor satisfied the public use requirement. In *Blanchard v. Dept. of Transportation*,[31] the state transportation agency condemned a 1.4 acre parcel in order to preserve it as a parking lot for ferry service to Chebeague Island in Casco Bay, Maine. The Maine Supreme Court (with two justices dissenting) held although a private company participated in the parking lot's operation, and all spaces in the lot would be reserved for residents of the island, the lot and ferry service were

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[30] 473 U.S. 172, 105 S. Ct. 3108 (1985). The court held that since the Daniels sought an injunction against the vacating of the covenant, *Williamson County* did not apply, because that case only requires a first resort to state courts when the plaintiffs seek just compensation.

[31] 798 A.2d 1119 (Me. 2002).

part of a larger public transportation system. The fact that a small group of identifiable people, the island's residents, had priority if not exclusive use of the lot did not detract from the public purpose of the taking.

In *Illinois Central Railroad Company v. Mayeux*,[32] the federal Fifth Circuit held that a taking to facilitate construction of a rail spur to a private chemical storage facility served a public purpose because use of the spur would be regulated by the Louisiana Public Service Commission, and the storage facility would serve "numerous" shipping companies.[33]

Finally, in *West 41st Street Realty LLC v. New York State Urban Redevelopment Corp.*,[34] the condemnation of land for a new headquarters building for *The New York Times* was not for the sole benefit of a private party. The taking was part of a long-standing redevelopment plan for the area that envisioned, in the area encompassing the subject property, a combination of public transportation improvements as well as office space, retail, and condominiums.

III. Pushing The Envelope On "Blight" Determinations

Another recent trend is heightened judicial scrutiny of blight determinations. A federal district court in Kentucky rejected a development authority's claim of blight in *Henn v. City of Highland Heights*.[35] The City adopted a redevelopment plan that covered an area of platted but undersized lots that were owned by the plaintiffs. The plan called for condemning this platted area on the basis that it was blighted. The City contended that because the land, though platted, had minimal infrastructure, many non-conformities, some tax delinquencies, some

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[32] 301 F.3d 359 (6th Cir. 2002).

[33] However, the court ultimately overturned the District Court's grant of summary judgment for the Railroad, holding that there was a genuine issue of fact regarding whether the amount of land taken was necessary to the project.

[34] 2002 WL 1349624 (N.Y.A.D. 1 Dept.).

[35] 69 F. Supp.2d 908 (E.D. Ky. 1999), *vacated on other grounds,* 3 Fed. Appx. 487 (6th Cir. 2001).

illegal dumping, and some drainage problems, it could be condemned. The plaintiffs contended that the area, though run down, was no different from several other neighborhoods in the area, and was not *per se* a risk to public health or safety. The court held that the City's blight characterization did not meet the state statutory criteria, and its actions were arbitrary and capricious. The court also faulted the City for its motive, which was to turn the land over to a private corporation for a hotel and conference center. Colorfully, the court rejected the City's evidence with these words: "Merely establishing a large administrative and legislative record does not entitle a legislature or administrative agency to declare an apple to be an orange." The court concluded:

> Naked and unconditional governmental power to compel a citizen to surrender his productive and attractive property to another citizen who will use it predominantly for his own private profit just because such an alternative private use is thought to be preferable in the subjective notion of governmental authorities is repugnant to our constitutional protections whether they be cast in the fundamental fairness component of due process or in the prohibiting against the exercise of arbitrary power.

In *99 Cents Only Stores v. Lancaster Development Agency*,[36] in the early 1980's, the Lancaster Redevelopment Agency and the City of Lancaster adopted a redevelopment plan to restore a blighted area. In 1998, the 99 Cents Only Store leased space in a shopping center that had become a cornerstone of the redevelopment area. Shortly thereafter, a major tenant, Costco, sought to expand its facility and expressed to the City its preference for the area occupied by the 99 Cents Only Store. After negotiations for other space failed and Costco threatened to relocate, Lancaster took steps to condemn the 99 Cents Only space, and through the center's landlord, transfer the property to Costco. 99 Cents Only Store sought injunctive relief, claiming a violation of the public use requirement of the Fifth Amendment.

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[36] 2001 U.S. Dist. LEXIS 9894 (C.D. Cal. 2001). An appeal is pending in the federal Ninth Circuit.

The federal district court found that the proposed taking violated the Fifth Amendment's public use requirement. Lancaster did not deny that the condemnation would benefit Costco, but argued that the public use was to prevent a "reestablishment of blight" that would result from the loss of a major shopping center tenant. The court dismissed Lancaster's argument, concluding that no evidence existed in the record to support such a finding because Lancaster had never demonstrated the existence of blight in the area subsequent to its initial findings in the early 1980's.

The Connecticut Supreme Court issued two opinions in March 2002 on blight claims in connection with eminent domain. In *Pequonnock Yacht Club, Inc. v. City of Bridgeport*,[37] Bridgeport had sought to condemn a privately-owned yacht club and marina as part of its redevelopment efforts. In 1970, Bridgeport adopted an urban renewal plan covering nearly 50 acres. That plan was modified eight times prior to the condemnation of the Pequonnock property. Only the eighth revision, adopted in 1998, incorporated the Pequonnock property in the redevelopment area. The Pequonnock property included a clubhouse building with a restaurant, bar, and meeting room, 196 boat slips, a winter boat storage area, and several parking areas, all of which were in good condition.

When Bridgeport began condemnation proceedings, Pequonnock sought a temporary injunction against the taking. The parties agreed to the injunction while they sought a new location for the club. Pequonnock also made several attempts to keep its location, including offers to invest its own funds to integrate its property into the redevelopment plan. When efforts to find an alternate location proved unsuccessful, Bridgeport condemned the property.

The Supreme Court upheld a ruling by the trial court requiring Bridgeport to reconvey the property to Pequonnock. The court found that Bridgeport had not exhausted all reasonable efforts to obtain the property by agreement, prior to use of its eminent domain powers. More

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[37] 790 A.2d 1178 (Conn. 2002).

importantly, Bridgeport had failed to demonstrate that the Pequonnock property was blighted and was necessary to the success of the redevelopment plan. Expressly curbing the City's condemnation power because of the club's existing viability and the weakness of the City's blight claim, the court concluded that "It is unreasonable for a redevelopment agency, even with the broad legislative authority delegated to it, arbitrarily to reject repeated requests to negotiate some form of assimilation into the overall redevelopment plan when the subject property is in good condition and is economically viable."

In *Aposporos v. Urban Redevelopment Commission of Stamford*,[38] Stamford also sought to acquire the Aposporos property, the location of a popular diner known as "Curley's," as part of its redevelopment area. Stamford had adopted its original urban renewal plan in 1963, which covered the area of the city in which the Aposporos property was located but did not specifically include that property. A study in the mid-1980's to review the 1963 plan suggested the incorporation of four additional properties into the plan, including the Aposporos property; this revision was adopted in March 1988. After some failed attempts at redevelopment due to real estate market downturns and after extensions of the length of the renewal plan, Stamford passed a resolution in 1997 authorizing work in connection with the 1988 plan. It condemned the Aposporos property in December 1999, at which time Ms. Aposporos and her co-owner sought both injunctive and declaratory relief.

The trial court declined to enjoin the condemnation, but the Supreme Court reversed. The Supreme Court determined that Stamford had relied solely on its 1963 plan to determine blighted conditions and had not made the requisite updated determination that the Aposporos property was blighted when it passed the 1988 "revised" plan. The court warned that redevelopment agencies cannot rely "indefinitely" on initial findings of blight to modify and extend a renewal plan. Allowing such modifications would give redevelopment agencies

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[38] 790 A.2d 1167 (Conn. 2002).

power beyond that authorized by statute and not subject to judicial review. Because Stamford had adopted what was in reality a new redevelopment plan in 1988 without following the statutory procedures, the condemnation of the Aposporos property was invalid.

In the *West 41st Street Realty* case described earlier (p. 15), the court upheld the taking even though the underlying redevelopment plan was more than 20 years old. The court rejected the argument of neighboring owners that the blighted conditions that had prompted the original plan had been alleviated and its urban renewal goals achieved. The fact that the taking at issue would promote other economic development goals of the plan was sufficient.

The Florida Court of Appeals recently addressed the timing of a property owner's right to contest a finding of blight. In *Rukab v. City of Jacksonville Beach*,[39] the validity of the City's redevelopment plan for the area that encompassed Rukab's land had been adjudicated in the mid-1980's. The City, however, moved to condemn Rukab's 0.47 acres (three building lots) in 1997 to make way for a shopping center and multi-family housing. The Appeals Court held that neither the earlier litigation about the plan, nor the fact that Rukab had purchased the lots in 1994 with knowledge that it was in a redevelopment area, precluded him from challenging the validity of the City's blight designation. (For the latter proposition, the court cited *Palazzolo v. Rhode Island*.)[40]

IV. *Bona Fide* Redevelopment Plan Or Bad Faith?

Another class of recent cases has involved the use of eminent domain to thwart or delay "locally unwanted land uses," also known as "LULUs".

In *AvalonBay Communities, Inc. v. Town of Orange*,[41] the property owner, a developer and manager of rental apartment communities, filed an application for permits to develop on

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[39] 2002 Fla. App. LEXIS 2015 (2002).
[40] 533 U.S. 606 (2001).
[41] 775 A.2d 284 (2001). The author's firm represented AvalonBay in this matter.

9.5 acres a 168 unit apartment complex in which 25 percent of the units would be set aside for 30 years for low and moderate income households. The application was filed under Conn. Gen. Stat. § 8-30g, Connecticut's affordable housing statute, which provides that if an application with affordable housing units is denied, the local agency has the burden on appeal to prove that its denial reasons were "substantial public interests" in health or safety that "clearly outweighed" the town's need for affordable housing. At the time of AvalonBay's application, multi-family housing with price-restricted units was allowed by special permit in the zone where the property was located. In addition, one nearby parcel was the site of a 94 unit assisted living facility, and another had been approved for 40 units of housing.

Almost immediately after AvalonBay filed its applications, the Planning and Zoning Commission attempted to impose a moratorium. When it became evident that that effort could not affect filed application, the Town of Orange, while the public hearings on the zoning permits were in progress, began to prepare a plan for an "industrial park," targeted to "high tech" or "biotech" businesses. The park was proposed to encompass 172 acres; including the AvalonBay site. The town retained a consultant to prepare a "Project Plan" for the 172 acres; under state law, such a plan would allow the town to use eminent domain. This Project Plan, in an initial draft, identified the condemnation of the AvalonBay building site as the "first step" in the industrial park's development, but said almost nothing about the disposition or development of the remaining 163 acres.

AvalonBay appealed a denial of its application to the trial-level court in April 1998. Meanwhile, town officials moved quickly to complete a draft of the Project Plan and to authorize the issuance of $1.5 million in bonds to condemn the AvalonBay site. While the Project Plan was still in draft, the Town Council called for a town-wide referendum on the bond issue. The proposal was defeated by a narrow margin in November 1998. Two months later, the Council called for a second referendum on the bonds, but this time it initiated a campaign to drum up voter support. As a result, at a town meeting on January 13, 1999, with

television cameras rolling, members of the Town Council made the following statements in support of the condemnation – and its ostensible purpose of developing an industrial park:

- Time is of the essence here. [It] would be totally against so much of what I have said and done and worked for, for so many years if I did not support doing whatever it takes to keep the Avalon project out of our town . . .

- [This] is a Town of Orange proposal for an economic technology park, which we need up there to help us not only fend off the type of development that we don't feel is practical in that area of town . . .

- When I think about this issue of the Avalon project, I hear a giant sucking sound. And it's the sound of our resources and tax dollars being sucked into paying for additional services which will be required for the 168 families in this apartment complex. . .

- I can say without any reservation that the Board of Selectmen's efforts to eliminate the Avalon proposal and replace it with an enterprise and technology park are entirely consistent with the zoning policy of the Town of Orange . . .

- But I would submit to you that if we buy that property and I'm wrong, we can't resell it very soon, if we let weeds grow on the property in question, the Town of Orange would be in a better financial shape than the alternative.

The referendum passed, and other town boards gave their requisite approvals in the following weeks. In late March 1999, the Town issued final approval of the condemnation.

AvalonBay moved to enjoin the condemnation and the Plan's implementation on the grounds that it was in bad faith and a pretext for blocking affordable housing. The trial court granted permanent injunctions on both counts. During the trial, another judge reversed the Town's denial of the zoning special permit and ordered the site plan approved.

The Connecticut Supreme Court in July 2001 affirmed the injunction against the Plan. The court concurred in the trial court's findings that the timing of the plan, as well as its sparsity of information and procedural errors, demonstrated pretext. The court noted that

zoning for the site allowed multi-family development, and that the idea for an industrial park had been raised only after AvalonBay had filed its affordable housing application. The Plan was hastily assembled, poorly envisioned, deficient in numerous areas, and at best incomplete, said the court.[42] Moreover, town officials had made public statements in support of the condemnation describing it as a means of regaining control taken away by the state's affordable housing statute and preventing additional costs to the town's school system.[43]

V. Judicial Scrutiny Of The Economic And Contractual Relationships Of Condemnors, Condemnees And Beneficiaries

As stated earlier, courts appear to be paying more attention to the relationship of condemnors and the beneficiaries of eminent domain proceedings.

In *Condemnation of 110 Washington Street*,[44] the court enjoined the use of eminent domain that, by contract between the authority and a private entity, was triggered only when the private entity decided to ask the condemning authority to go ahead with a taking. In addition, the private party agreed by contract to pay all funds necessary for the acquisition of the condemnee's property that would not be covered by state funds, and to provide a surety bond that all such payments would be forthcoming. The court held that the authority had illegally contracted away its condemnation power by putting the timing of the condemnation exclusively in the hands of a private entity, and by making the funds for the payment/just compensation a mostly private obligation.

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[42] A federal District Court made a similar finding when granting a preliminary injunction in the *Cottonwood Christian Center* case, *see* discussion at 23-24, *infra*.

[43] 775 A.2d at 299-300. The court also affirmed the trial court's holding that the plaintiff had not shown that the town violated the federal Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*, by attempting to prevent housing on the site. *Id*. at 306.

[44] 767 A.2d 1154 (Pa. Commw. Ct.), *app. denied*, 788 A.2d 379 (Pa. 2001).

In *Elizabeth Board of Education v. New Jersey Transit Corp.*,[45] the City Board of Education negotiated for several months with the New Jersey Transit Corporation, an entity affiliated with but independent of the New Jersey Department of Transportation, for construction of needed school buildings. After negotiations proved fruitless, the Board filed a condemnation petition to acquire the property. New Jersey Transit moved to dismiss the petition on the ground that the Board lacked the power to condemn property owned by another state entity. In an opinion interpreting a statute authorizing boards of education to condemn property for school purposes, the court found that the Board lacked the power to take New Jersey Transit's property. The lack of an express grant of power to a board of education was fatal. The court also awarded New Jersey Transit nearly $10,000 in attorneys' fees pursuant to a statute authorizing such an award if a court held that condemnation was unauthorized.

VI. Related, Recent Developments In Eminent Domain

A. Condemnation And The Religious Land Uses and Institutionalized Persons Act ("RLUIPA").

In a fascinating combination of constitutional and statutory issues, a federal district court in California recently enjoined the redevelopment agency of the city of Cypress from condemning land on which a large and growing church was currently appealing the denial of a conditional use permit for a new place of worship. The case is *Cottonwood Christian Center v. Cypress Redevelopment Agency*.[46] The court applied strict scrutiny to the agency's actions, concluding that this was mandated by both the Free Exercise Clause of the First Amendment and the federal Religious Land Uses and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc. Significantly, the court concluded that condemnation constitutes a "land

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[45] 776 A.2d 821 (N.J. Super. Ct. 2001).

[46] 2002 U.S. Dist. LEXIS 14379 (C.D. Cal., Aug. 6, 2002).

use regulation" under RLUIPA.[47] The court also questioned the agency's good faith, noting that its redevelopment plan had been in place for more than ten years, but only when the church purchased the land and launched its application did the agency activate the redevelopment efforts. Also, the uses it was it now ostensibly sought to promote by condemnation did not match the uses identified in the plan.[48] Finally, the court questioned the agency's assertion of blight, and noted that the intended beneficiary of the taking was a "Costco" discount store.

B. State Court Split On Valuation Of Contaminated Property.

A split of state courts has also developed on the issue of whether evidence of environmental contamination may be deducted from fair market value when land is condemned. In *Silver Creek Drain Dist. v. Extrusions Division, Inc.*[49] a Michigan appellate court held that a deduction for environmental remediation was improper, because allowing an offset would force the condemnee to give up any ability to allocate remediation costs to other potentially responsible prior owners or third parties. However, the Connecticut Supreme Court reached the opposite conclusion in *Northeast Economic Alliance, Inc. v. ATC Partnership*.[50]

A different twist on this issue is found in *New Jersey Transit Corp. v. Cat in the Hat LLC*,[51] a July 2002 decision of the New Jersey Superior Court. The court upheld the constitutionality of an "environmental reservation clause," which allowed the state agency, after acquiring property by condemnation, to seek later recovery for environmental remediation costs.

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[47] *Id.* at 39.
[48] *Id.* at 49-50.
[49] 630 N.W.2d 347 (Mich. App. 2001).
[50] 776 A.2d 1068 (2001).
[51] 2002 N.J. Super. LEXIS 364 (N.J. Super., July 22, 2002).

C. Condemnation Of Indian Lands; Tribal Sovereign Immunity Not A Defense.

In *Cass County Joint Water Resource District v. 1.43 Acres of Land*,[52] the North Dakota Supreme Court held that sovereign immunity of a federally-recognized Native-American tribe is not a defense to a taking of land. The court held that condemnations are *in rem* proceedings and *in personam* jurisdiction, as is implicated in a tribal sovereign immunity defense, is not necessary for the taking to proceed. The court noted that the tribe that owned the land held it in fee simple after a conveyance from a non-Indian owner, and thus the parcel was "not reservation land, allotted land, aboriginal land, or trust land."

D. Differentiating "Quick-Take" And Other Statutory Condemnation Authority.

In *J.L. Matthew, Inc. v. Maryland-National Capitol Park and Planning Commission*,[53] the agency seeking to condemn did not have "quick-take" but only "regular" condemnation powers, meaning that title would not vest until its condemnation had been confirmed after a court proceeding. When the owner, apprised of the intended but still incomplete condemnation, began earth-clearing and other activities pursuant to a residential development plan, the agency sought an injunction while the condemnation was in progress. The court denied the injunction, holding that the legislature intentionally had not delegated "quick-take" powers, and enjoining the owner while the process went on was similar to the impermissible practice of rezoning or otherwise freezing land in order to drive down the amount of just compensation due for a taking.

E. Necessity Of Size Of Condemned Parcel.

In *Piedmont Triad Regional Water Authority v. Sumner Hills, Inc.*,[54] the Authority condemned the property of Sumner Hills in connection with a water supply and dam

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[52] 643 N.W.2d 685 (N.D. 2002).
[53] 2002 Md. LEXIS 86 (Md. Ct. App., March 5, 2002).
[54] 543 S.E.2d 844 (N.C. 2001).

construction project. Although only 48 acres of this property was needed for the project, the Authority condemned the entire 145 acre parcel. Taking of excess land was authorized by the relevant statute if the remaining property after condemnation was "of such shape, size or condition that it is of little value."

Sumner Hills challenged the taking of the remaining property. The North Carolina Supreme Court found that the Authority had the burden of proving that the remainder was of little value. By failing to offer any evidence beyond conclusory allegations, the Authority did not satisfy its burden and the court found that the taking of the remainder was unnecessary for the stated public purpose.

F. Court Ordered Reversion After Unconstitutional Taking.

In the case of *In re Rapp*,[55] a county took Mr. Rapp's 2.5 acres for $6,000 to build a road. The applicable statute made no provision for judicial review at any stage of the legality of the taking, and only provided for an appeal from compensation. The Minnesota appeals court affirmed that the statute was unconstitutional for failing to provide for an opportunity to contest the taking itself. Even though title had passed and the road had been built, the court voided the conveyance *ab initio* and ordered the property returned. The court, rejecting the position of several other states,[56] rejected the County's argument that the challenge to the conveyance was moot.

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[55] 621 N.W.2d 781 (Minn. App. 2001).

[56] *See*, *e.g.*, *Greater Omaha Realty Co. v. City of Omaha*, 605 N.W.2d 472 (Neb. 2000), and cases collected in that opinion.

G. Condemnation By State Highway Department To Satisfy Wetlands Mitigation Obligation.

In *Cannon v. State of Delaware*,[57] the Delaware Supreme Court, in a 3-2 decision, held that the state transportation agency could condemn land for the purpose of satisfying an obligation to preserve and improve wetlands in order to mitigate the impacts on other wetlands of a nearby highway construction project.

H. Montana's Proposed Condemnation Of Hydroelectric Dams To Reestablish Control Of Electricity Pricing.

The New York Times recently reported that the citizens of Montana will be voting on an initiative this November about whether to reacquire, through negotiation or condemnation, hydroelectric dams that were sold to private companies as part of electricity deregulation. Electricity rates have increased substantially in some parts of the state, and officials hope to regain control of electricity pricing by reacquiring ownership of the dams.[58]

I. Articles Of Interest To Condemnor's Counsel.

Finally, the *Urban Lawyer* has recently published two excellent guides for counsel to condemnors: *see* W.S. Dahlstrom, "Land Use Regulations in the Eminent Domain Process,"[59] and L.J. Smith, "Eminent Domain Litigation: Multiple Property Consolidated Trials and Pre-Condemnation Planning."[60]

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[57] 2002 Del. LEXIS 557 (Del., Aug. 28, 2002).

[58] T. Egan, "It's Cheap Power Gone, Montana May Buy Dams," *The New York Times*, Sept. 4, 2002 at A1.

[59] 31 Urb. Law. 569 (1999).

[60] 32 Urb. Law. 479 (2000).

VII. Lessons, Reminders, Observations, and Remaining Issues For Condemnors And Their Counsel

From these cases, we can extract a list of "red flags," circumstances or facts that should alert counsel to condemning authorities that a challenge to the use of eminent domain may result:

- Contracting to give a person or entity other than the condemning authority the power to decide when or how eminent domain will commence;
- Contracting to make a private party responsible for some substantial part of the money that will be used to pay just compensation or condemnation expenses;
- Making the beneficiary of condemnation an entity whose finances or operations are not open to public inspection, such as the freedom of information laws, or public access;
- Condemning more land than is necessary for the stated public purpose;
- Conducting the condemnation without a current or at least recent, *bona fide*, and credible study of the economic or social benefits expected to result from the condemnation;
- Delegation, by the state legislature to a local or regional redevelopment agency or a municipality, of the authority to determine whether a proposed taking satisfies the public use requirement;
- Condemning property for a project that will then be run entirely by a private business, with no governmental involvement;
- Condemning land that will have the effect, at least partially, of denying housing to a group that is protected by state or federal fair housing laws or the Americans with Disabilities Act;
- Condemning land in which a religious organization has an interest;

- Stretching or ignoring statutory or common law definitions of "blight," and failing to recognize that blight is not simply a substandard condition, but generally a threat to health or safety that necessitates eradication; and

- Creating a situation in which government officials need to mount a public information effort in order to explain the purpose of a proposed taking or to obtain voter approval to condemn land or to appropriate funds to do so.

Finally, several observations and a list of unresolved issues:

- In evaluating a challenge to whether a proposed taking satisfies the public use requirement, courts will generally begin by examining the state statutes that authorize the taking in the first place, and should reach the constitutional issue only if the taking complies with statutory authorization.[61]

- If a court reaches a constitutional issue, it will generally turn first to the state constitution.

- In general, state constitutions are required to provide no less protection of the rights of its citizens than comparable provisions of the U. S. Constitution. In other words, the Fifth Amendment Takings Clause is regarded as the "floor" of protection of the rights of landowners, and state constitutions should be interpreted to provide no less protection.[62] This would imply that *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff* constitute a minimum national standard for adherence to the public use requirement – but how can U. S. Supreme Court decisions that emphasize judicial deference to legislative determinations of public purpose be regarded as a "minimum" standard? Does the Illinois Supreme Court's decision in *SWIDA* "violate" the Fifth Amendment Takings Clause as interpreted in *Berman* and *Midkiff*?

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[61] *See, e.g.*, *Illinois Railroad Company v. Mayeux*, 301 F.3d 359 (6th Cir. 2002); *Blanchard v. Dept. of Transportation*, 798 A.2d 1119 (Me. 2002); *Tolksdorf v. Griffith*, 626 N.W.2d 163 (Mich. 2001) (invalidating a state statute that authorized converting private roads to public use "by a jury of freeholders," but with no standards or public use requirement stated).

[62] *See, e.g.*, *Mills v. Rogers*, 457 U.S. 291, 102 S. Ct. 2442 (1982).

- As touched on earlier, how should judges resolve the apparently contradictory principles that condemnation authority is to be strictly construed against the condemnor, but courts are to defer to legislative determinations of what constitutes a public use?

- Is it possible to define public use with any precision? Some cases state that it is, of necessity, a flexible concept that the legislature must be able to adapt to changing economic and social circumstances. But can we do any better than to conclude that it is an *ad hoc* determination?

- The Illinois Supreme Court's formulation in *SWIDA*, which requires some form of as-of-right access by the public to the condemned land, seems not only to conflict with Illinois statutes and precedent, but also the prevailing, national views of the scope and limits of eminent domain.

- At the risk, perhaps, of avoiding the central and difficult issue of arriving at a workable definition of public use, I would suggest that there are two common threads in those cases in which a taking has been successfully challenged for lack of a public use: (1) the appearance or reality of procedural unfairness in the condemnation process; and (2) the taking of a relatively small parcel for a small, discrete, or identifiable group of private beneficiaries. As discussed earlier, in *SWIDA*, the condemnation for the racetrack, a large regional facility, sailed through, but when the Authority subsequently came back to condemn one discrete parcel for the benefit of a single, identifiable company (Gateway, the racetrack owner) at the expense of a single, identifiable existing business (National City), SWIDA ran into problems. Put another way – and perhaps cynically – the larger the condemnation, the more apparent the public purpose. This observation is illustrated by Attachment B, an excerpt from a recent article about the planning of the World Trade Center in the 1960's. When the proponents of the development were accused of using eminent domain for private business purposes, their answer, in part, was to make the project so big that its importance to New York City and the region became indisputable.

- In conclusion: do your homework, be fair, and focus on the big picture.

The author would be happy to supply on request copies of any of the cases, briefs or articles cited here.

September 20, 2002

ATTACHMENT A

THE SOUTHWESTERN ILLINOIS DEVELOPMENT AUTHORITY, Appellant, v. NATIONAL CITY ENVIRONMENTAL, L.L.C., et al., Appellees.

Docket No. 87809

SUPREME COURT OF ILLINOIS

199 Ill. 2d 225; 768 N.E.2d 1; 2002 Ill. LEXIS 299; 263 Ill. Dec. 241

April 4, 2002, Opinion Filed

{***1} THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE 21 DAY PETITION FOR REHEARING PERIOD.

PRIOR HISTORY: Southwestern Ill. Dev. Auth. v. National City Envtl., 304 Ill. App. 3d 542, 238 Ill. Dec. 99, 710 N.E.2d 896, 1999 Ill. App. LEXIS 300 (5th Dist. 1999).

DISPOSITION: Court of appeals' judgment was affirmed.

COUNSEL: For Southwestern Illinois Development Authority, APPELLANT: Hugh C. Griffin, Lord, Bissell & Brook, chicago, IL, Harry J. Sterling, Harry J. Herling, P.C., Fairview Heights, IL, Robert E. Becker, Becker, Paulson & Hoerner, P.C., Belleville, IL.

For National City Environmental, L.L.C., APPELLEE: Jerold S. Solovy, Barry Levenstam, Jenner & Block, Chicago, IL, Daniel Schattnik, Unsel, Schattnik & Juen, East Alton, IL.

For Illinois Institute for Local Government Law, Ltd., AMICUS CURIAE: Thomas W. Kelty, Kelty Law Offices, P.C., Springfield, IL, Thomas A. Thanas, Naperville, IL. For St. Clair County, AMICUS CURIAE: Robert B. Haida, State's Attorney St. Clair County, Belleville, IL. For Madison County, AMICUS CURIAE: William R. Haine, State's Attorney of Madison County, Edwardsville, IL. For Illinois Municiapl League, AMICUS CURIAE: Roger Huebner, Illinois Municipal League, Springfield, IL. For Illinois Agricultural Association, AMICUS CURIAE: Barbara Kay Stille, Illinois Agricultural Association, Bloomington, IL. For Matthew Kassnel, AMICUS CURIAE: Tobin M. Richter, Chicago, IL. For City of Chicago, AMICUS CURIAE: Joseph H. Kim, Assistant Corporation Coounsel, Chicago, IL. For Institute for Justice and the Heartland Institute, AMICUS CURIAE: William H. Mellor, Institute for Justice, Washington, DC.

JUDGES: JUSTICE GARMAN delivered the opinion of the court. JUSTICE FREEMAN, dissenting.

OPINIONBY: GARMAN

OPINION: {****243} {**3} {*227} JUSTICE GARMAN delivered the opinion of the court:

The issue in this case is whether the Southwestern Illinois Development Authority (SWIDA) properly exercised the power of eminent domain to take property owned by National City Environmental, L.L.C., and St. Louis Auto Shredding Company (collectively NCE), and convey that property to Gateway International Motorsports Corporation (Gateway). The circuit court of St. Clair County ruled that SWIDA had properly exercised its authority

to take the land in question. The appellate court reversed. **304 Ill. App. 3d 542.** On April 19, 2001, we reversed the decision of the appellate court, but subsequently granted rehearing. We now affirm the decision of the appellate court.

BACKGROUND

SWIDA was created in 1987 by the Illinois General Assembly through passage of the Southwestern Illinois Development Authority Act (the Act) (**70 ILCS 520/1** *et seq.* (West 1998) (formerly Ill. Rev. Stat. 1991, ch. 85, par. 6151 *et seq.*)). {***2} SWIDA is a political entity and municipal corporation whose stated purpose is to "promote industrial, commercial, residential, service, transportation and recreational activities and facilities, thereby reducing the evils attendant upon unemployment and enhancing the public health, safety, morals, happiness and general welfare of this State." **70 ILCS 520/2(g)** (West 1998).

{*228} The Act mandates that SWIDA "promote development within the geographic confines of Madison and St. Clair counties." **70 ILCS 520/5** (West 1998). It is the duty of SWIDA to assist in the development, construction, and acquisition of industrial, commercial, housing or residential projects within these counties. **70 ILCS 520/5** (West 1998). A "commercial project" is defined as "any cultural facilities of a for-profit or not-for-profit type including *** racetracks *** [and] parking facilities." **70 ILCS 520/3(j)** (West 1998).

To accomplish the purposes of the Act, the legislature empowered SWIDA to issue bonds for the purpose of acquiring, improving or developing projects, including those established {***3} by business entities attempting to locate or expand property within Madison and St. Clair Counties. **70 ILCS 520/7** (West 1998). SWIDA also has the authority to acquire property by condemnation. According to the Act, SWIDA's "acquisition by eminent domain of such real property or any interest therein by [SWIDA] shall be in the manner provided by the 'Code of Civil Procedure' [**735 ILCS 5/1-101** *et seq.* (West 1998)], *** including Section 7-103 thereof [**735 ILCS 5/7-103** (West 1998)]." **70 ILCS 520/8(b)** (West 1998).

In June 1996, SWIDA issued $ 21.5 million in taxable sports facility revenue bonds. The proceeds of the bonds were lent to Gateway to finance the development of a multipurpose automotive sports and training facility in the region (the racetrack). Gateway signed a loan agreement {**4} {****244} and a note to evince its obligation to repay the loan. Revenues received by SWIDA pursuant to the loan agreement are pledged to secure payment of the bonds. **70 ILCS 520/7(d)** (West 1998). If at any time SWIDA is unable to pay the principal and interest on {***4} the bonds, it shall so certify to the Governor, who then submits the amounts so certified to the General Assembly. As such, the bonds constitute a moral obligation of the state. **70 ILCS 520/7(f)** (West 1998).

{*229} The racetrack was developed and has flourished. In 1997, the racetrack had a total attendance of 400,000 at various large and small events. Seating included 25,000 grandstand seats and 25,000 portable seats. In 1998, Gateway increased its seating capacity and desired to increase its parking capacity as well. It called upon SWIDA to use its quick-take eminent domain powers to acquire land to the west of the racetrack for the purposes of expanded parking facilities. The adjacent 148.5 acre tract of land sought was owned by NCE.

NCE operates a metal recycling center in an area of St. Clair County that, until recently, was National City, Illinois. NCE employs 80 to 100 persons full time and has been at its present location since 1975. NCE shreds cars and appliances and separates the reusable metals. It disposes of nearly 100,000 cars per year. Nonrecyclable by-products of the process, referred to as "fluff," are deposited in NCE's landfill, located to the {***5} east of its recycling center. When this landfill site reaches capacity, NCE plans to expand its landfill operations onto the 148.5 acre tract of land it owns to the east of the current landfill. NCE uses clay and dirt from the 148.5 acre tract to fill and cover fluff in the landfill area currently in use.

In early 1998, Gateway attempted to discuss the purchase of NCE's land with NCE's owner. NCE would not discuss the matter and, initially, Gateway made no offer to purchase the land. Instead, Gateway asked SWIDA to exercise its quick-take eminent domain powers to take the 148.5 acres of land and transfer it to Gateway.

Gateway completed a "Quick-Take Application Packet" and stated that it wanted to use the land as a parking lot for the purpose of increasing the value of Gateway's racetrack. Gateway paid SWIDA an application fee of $ 2,500, and the sum of $ 10,000 to be applied toward SWIDA's sliding scale fee of 6% to 10% of the {*230} acquisition price

of property being condemned. In addition, Gateway agreed to pay SWIDA's expenses, including the acquisition price of the property, and other costs associated with the quick-take process.

Approval of the county board is required before SWIDA {***6} can use its quick-take eminent domain powers within unincorporated areas of a county. **70 ILCS 520/8(b)** (West 1998). On February 23, 1998, the St. Clair County board adopted a resolution authorizing SWIDA to exercise its quick-take eminent domain authority to acquire the NCE tract of land for Gateway parking. The board noted that dramatic attendance increases could be expected at the racetrack and that it was necessary to create additional parking facilities to adequately serve patrons. The board also found that expansion of the racetrack facilities would enhance the public health, safety, morals, happiness, and general welfare of the citizens of southwestern Illinois by increasing the tax base in the area and generating additional tax revenues.

On March 5, 1998, SWIDA held a public meeting to address the proposed taking. Notice was given to NCE and adjacent property owners. Over the objections of NCE's counsel, SWIDA adopted a resolution manifesting an intent to assist Gateway with racetrack expansion through the {**5} {****245} acquisition of NCE's property. Like the St. Clair County board resolution, SWIDA's resolution recounted the numerous benefits that could be created {***7} for the region. SWIDA found that the acquisition of NCE's property was essential to the success of the proposed expansion and further development of the racetrack, and authorized its executive director, Alan Ortbals, to acquire title to the property by all necessary and appropriate means, including negotiations and quick-take eminent domain proceedings. SWIDA authorized the execution of an agreement with Gateway for acquisition of the property through quick-take eminent domain {*231} proceedings and subsequent conveyance of the property to Gateway.

In an effort to acquire the property through a negotiated sale, Ortbals attended a meeting on March 17, 1998, at which he delivered to NCE a written offer to purchase the property for $ 1 million. By letter dated March 19, 1998, NCE rejected the $ 1 million offer but indicated its willingness to meet with SWIDA the week of March 30, 1998, following an expected appraisal of the property. On March 20, 1998, SWIDA made another written offer to NCE to purchase the property for $ 1 million and advised NCE that SWIDA would initiate proceedings to condemn the property if NCE did not accept the offer by 5 p.m. on March 30, 1998.

NCE did not respond to {***8} the second offer and ultimatum until April 20, 1998. By letter, NCE indicated that it felt it was unnecessary to respond to the offer, as SWIDA was aware of NCE's prior rejection of the earlier offer to purchase the property for the identical sum of $ 1 million. However, to be clear on the matter, NCE indicated that it was again rejecting the offer of $ 1 million for the sale of its property.

Meanwhile, on March 31, 1998, SWIDA filed a complaint in the circuit court of St. Clair County seeking condemnation of, and acquisition of fee simple title to, the property. In addition, SWIDA filed a motion for immediate vesting of title, and asked the circuit court to fix a date for quick-take proceedings pursuant to sections 7-103 and 7-104 of the Code of Civil Procedure (**735 ILCS 5/7-103**, 7-104 (West 1998)). On the same date, NCE filed a motion to dismiss the complaint and on April 2, 1998, filed a traverse and motion to dismiss. NCE argued that the proposed taking was for an unconstitutional private use; the proposed taking was excessive; additional parking at Gateway's racetrack was not needed; and SWIDA had failed to make a good-faith effort to {*232} negotiate an {***9} acceptable purchase price with NCE. In addition, NCE filed a motion to strike SWIDA's request for immediate vesting of title. The circuit court denied both the motion to dismiss and the motion to strike the request for immediate vesting of title.

The circuit court held a quick-take hearing and on April 27, 1998, ruled in SWIDA's favor. Relying on testimony from Mike Pritchett of the Illinois Department of Transportation (the Department), the circuit court found that the taking was for a public purpose as there were serious public safety issues involved. Pritchett had testified that the Department was working with Gateway to develop a traffic plan that would move traffic into and out of the racetrack facility, while minimizing impact on the surrounding state and interstate highways. According to traffic pattern data studied by the Department, significant traffic congestion occurred on Interstate 55-70 when major events were held at the racetrack. According to Pritchett, a safety hazard was created because drivers do not normally anticipate stopped traffic on the interstate. Pritchett {**6} {****246} further testified that pedestrians often crossed Illinois Route 203 from the parking areas east of {***10} the highway to the racetrack. A traffic signal was in place to allow patrons to cross Route 203. However, the signals created even more automobile traffic delays. There was additional testimony that there was a risk pedestrians would be struck by automobile traffic as they crossed Route 203 at improper locations away from the designated crossing area and signal. Pritchett testified

that construction of a parking lot on NCE's property, as suggested in the Department's 1996 traffic impact study, would provide parking to the west of the racetrack and alleviate traffic problems when major events were taking place at the racetrack. Therefore, according to Pritchett, there was some urgency in acquiring the property and developing parking facilities to alleviate stress on the highway system and improve safety.

{*233} The circuit court also relied on Ortbals' testimony regarding public safety, economic development, and elimination of blight. According to Ortbals, the county was experiencing serious traffic problems on days the racetrack hosted events. Like Pritchett, Ortbals also referred to congestion on Interstate 55-70 and traffic and pedestrian concerns related to Illinois Route 203. In addition, {***11} Ortbals testified that development of a parking facility on the property was necessary to promote economic development, as the number of spectators, development and expansion of neighboring businesses, and other economic spin-off, all had exceeded initial expectations. Ortbals testified that it was necessary to acquire the entire 148.5 acre tract owned by NCE because areas that had previously been used for patron parking, such as areas now occupied by hotels and restaurants and the golf course, were no longer available. In addition, Ortbals testified that the development of the racing facilities had indirectly helped to eliminate blight in the area.

Rod Wolter, president and general manager of Gateway International Raceway, testified that by turning the 148.5 acres owned by NCE into parking for the racetrack, Gateway would grow and profits would increase. Wolter acknowledged that Gateway had discussed developing a parking garage facility to meet its needs but that it would be much less expensive to have SWIDA take the property in question from NCE and give it to Gateway for ground parking.

The circuit court also heard testimony from a number of other sources, including city officials {***12} from the region, area businessmen and other Gateway officials. Most, if not all, testified as to the many benefits that continued expansion of Gateway could potentially bring to the area. The court found that the taking was not excessive and that NCE had been unwilling to negotiate in a meaningful fashion for the sale of the property. The court found {*234} that SWIDA had bargained for the property in good faith and NCE's failure to timely reject SWIDA's final offer of sale or to present a counteroffer was dispositive of this issue. Therefore, the circuit court held that quick-take procedures were necessary to avoid any negative economic impact to the people of the region.

The circuit court denied NCE's oral motion for a stay of proceedings (see **735 ILCS 5/7-104(b)** (West 1998)) and heard evidence of just compensation for the property (see **735 ILCS 5/7-104(c)** (West 1998)). On April 28, 1998, the circuit court made a preliminary finding that $ 900,000 was just compensation for the property. On April 30, 1998, the circuit court entered an order of taking, vesting SWIDA with title to the property in fee simple and granting it the right {***13} to immediate possession of the property. See **735 ILCS 5/7-105(a)** {**7} {****247} (West 1998)). On the same day, SWIDA conveyed title to the property to Gateway by way of a quit-claim deed. NCE filed an emergency motion in the circuit court seeking a stay of the transfer of title or, in the alternative, an order requiring SWIDA to post a bond of $ 38 million pending appeal. The motion was denied.

Pursuant to section 7-104(b) of the Code of Civil Procedure (**735 ILCS 5/7-104(b)** (West 1998)) and Supreme Court Rule 307(a)(7) (188 Ill. 2d R. 307(a)(7)), NCE filed an interlocutory appeal arguing in part that SWIDA lacked constitutional authority to take the property and convey it to Gateway. NCE also filed an emergency motion for a stay of the condemnation, which was granted.

The appellate court determined that SWIDA had exceeded its constitutional authority in taking NCE's land by eminent domain and reversed the decision of the circuit court. **304 Ill. App. 3d 542.**

SWIDA filed a petition for leave to appeal pursuant to Supreme Court Rule 317 (134 Ill. 2d R. 317). We {*235} granted the petition and on April 19, 2001, reversed the judgment {***14} of the appellate court and remanded the cause. Subsequently, NCE petitioned this court for rehearing, which we allowed on June 4, 2001. 155 Ill. 2d R. 367. On rehearing, we now affirm the decision of the appellate court.

ANALYSIS

The State of Illinois, as a sovereign, has the inherent right to condemn property, subject to the state constitutional mandate that private property shall not be taken or damaged for public use without just compensation to its owner. Ill. Const. 1970, art. I, § 15; ***Forest Preserve District v. West Suburban Bank*, 161 Ill. 2d 448, 455, 204 Ill. Dec.**

269, 641 N.E.2d 493 (1994). The fifth amendment to the United States Constitution (U.S. Const., amend. V), made applicable to the states through the fourteenth amendment (U.S. Const., amend. XIV), also provides that private property shall not be taken for public use without just compensation. ***Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 231, 81 L. Ed. 2d 186, 191, 104 S. Ct. 2321, 2324 (1984).**

In this case, we determine whether this taking achieves a legitimate public use pursuant to the constitutionally exercised police power of the government (***Berman v. Parker*, 348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954))** {***15} and, therefore, whether eminent domain powers authorized by the State of Illinois were improperly exercised in the taking of private property from one private entity for the benefit and use of another private entity.

The right of a sovereign to condemn private property is limited to takings for a public use. U.S. Const., amend. V; Ill. Const. 1970, art. I, § 15; ***Gaylord v. Sanitary District*, 204 Ill. 576, 588, 68 N.E. 522 (1903).** Clearly, private persons may ultimately acquire ownership of property arising out of a taking and the subsequent transfer to private ownership does not by itself defeat the public purpose. *Hawaii* {*236} ***Housing Authority*, 467 U.S. at 243-44, 81 L. Ed. 2d at 199, 104 S. Ct. at 2331.** However, that principle alone cannot adequately resolve the issues presented in this case. "Before the right of eminent domain may be exercised, the law, beyond a doubt, requires that the use for which the land is taken shall be public as distinguished from a private use." ***People ex rel. Tuohy v. City of Chicago*, 394 Ill. 477, 481, 68 N.E.2d 761 (1946).**

SWIDA's action in taking NCE's property and transferring it to Gateway for Gateway's {***16} private use presents fundamental {**8} {****248} constitutional issues that are essential to resolving this dispute. The essence of this case relates not to the ultimate transfer of property to a private party. Rather, the controlling issue is whether SWIDA exceeded the boundaries of constitutional principles and its authority by transferring the property to a private party for a profit when the property is not put to a public use.

It may be impossible to clearly delineate the boundary between what constitutes a legitimate public purpose and a private benefit with no sufficient, legitimate public purpose to support it. "We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts." ***Berman*, 348 U.S. at 31-32, 99 L. Ed. at 37, 75 S. Ct. at 102.** "While, from time to time, the courts have attempted to define public use, there is much disagreement as to its meaning." ***Tuohy*, 394 Ill. at 481.** Great deference should be afforded the legislature and its granting of eminent domain authority. ***Berman*, 348 U.S. at 31-32, 99 L. Ed. at 37, 75 S. Ct. at 102;** {***17} ***Old Dominion Land Co. v. United States*, 269 U.S. 55, 66, 70 L. Ed. 162, 165, 46 S. Ct. 39, 40 (1925);** *United States ex rel. Tennessee* ***Valley Authority v. Welch*, 327 U.S. 546, 552, 90 L. Ed. 843, 848, 66 S. Ct. 715, 718 (1946).** However, the exercise of that power is not entirely beyond judicial scrutiny (see *Hawaii Housing* {*237} ***Authority*, 467 U.S. at 241, 81 L. Ed. 2d at 197, 104 S. Ct. at 2329** (and cases cited therein)), and it is incumbent upon the judiciary to ensure that the power of eminent domain is used in a manner contemplated by the framers of the constitutions and by the legislature that granted the specific power in question. "Courts all agree that the determination of whether a given use is a public use is a judicial function." ***Tuohy*, 394 Ill. at 481.**

SWIDA contends that the condemnation and taking of NCE's property is sustainable because a public purpose will be served through (1) the fostering of economic development, (2) the promotion of public safety, and (3) the prevention or elimination of blight. Moreover, once the determination is made that one or all of these requirements is satisfied, "possessory use {***18} by the public is not an indispensable prerequisite to the lawful exercise of the power of eminent domain." ***People ex rel. Gutknecht v. City of Chicago*, 3 Ill. 2d 539, 544-45, 121 N.E.2d 791 (1954).**

SWIDA contends that any distinction between the terms "public purpose" and "public use" has long since evaporated and that the proper test is simply to ask whether a "public purpose" is served by the taking. While the difference between a public purpose and a public use may appear to be purely semantic, and the line between the two terms has blurred somewhat in recent years, a distinction still exists and is essential to this case. We agree that these terms are necessarily somewhat loosely defined. However, that does not mean they are indistinguishable. The term " 'public purpose' is not a static concept. It is flexible, and is capable of expansion to meet conditions of a complex society that were not within the contemplation of the framers of our constitution." ***People ex rel. Adamowski v. Chicago R.R. Terminal Authority*, 14 Ill. 2d 230, 236, 151 N.E.2d 311 (1958)** (citing ***People ex rel. Gutknecht v. Chicago Regional Port District*, 4 Ill. 2d 363, 123 N.E.2d 92 (1954),** {***19} ***Grasse v. Dealer's Transport Co.*, 412 Ill. 179, 106 N.E.2d 124 {*238} (1952), *People v. Chicago Transit Authority*, 392 Ill. 77, 64**

N.E.2d 4 (1945), and ***People ex rel. Greening v. Bartholf*, 388 Ill. 445, 58 N.E.2d 172 (1944)).** However, this flexibility does not {**9} {****249} equate to unfettered ability to exercise takings beyond constitutional boundaries. "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." ***Hawaii Housing Authority*, 467 U.S. at 245, 81 L. Ed. 2d at 200, 104 S. Ct. at 2331.** As this court held in ***Gaylord*, 204 Ill. at 584,** "the public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right."

Clearly, the taking of slums and blighted areas is permitted for the purposes of clearance and redevelopment, regardless of the subsequent use of the property. See, *e.g.*, ***Village of Wheeling v. Exchange National Bank of Chicago*, 213 Ill. App. 3d 325, 157 Ill. Dec. 502, 572 N.E.2d 966 (1991); *City of Chicago v. Gorham*, 80 Ill. App. 3d 496, 35 Ill. Dec. 905, 400 N.E.2d 42 (1980);** {***20} ***City of Chicago v. Walker*, 50 Ill. 2d 69, 277 N.E.2d 129 (1971).** However, this proposition and the cases supporting it are of little assistance in this instance, as we are not dealing with a taking for the purposes of eliminating slums or blight.

If this taking were allowed to stand, it may be true that spectators at Gateway would benefit greatly. Developing additional parking could benefit the members of the public who choose to attend events at the racetrack, as spectators may often have to wait in long lines of traffic to park their vehicles and again to depart the facility. We also acknowledge that a public use or purpose may be satisfied in light of public safety concerns. See ***Illinois Toll Highway Comm'n v. Eden Cemetery Ass'n*, 16 Ill. 2d 539, 158 N.E.2d 766 (1959).** The public is allowed to park on the property in exchange for the payment of a fee. Gateway's racetrack may be open to the public, but not "by right." ***Gaylord*, 204 Ill. at 584.** It is a private venture designed to {*239} result not in a public use, but in private profits. If this taking were permitted, lines to enter parking lots might be shortened and pedestrians might {***21} be able to cross from parking areas to event areas in a safer manner. However, we are unpersuaded that these facts alone are sufficient to satisfy the public use requirement, especially in light of evidence that Gateway could have built a parking garage structure on its existing property.

We have also recognized that economic development is an important public purpose. See ***People ex rel. City of Canton v. Crouch*, 79 Ill. 2d 356, 38 Ill. Dec. 154, 403 N.E.2d 242 (1980); *People ex rel. City of Urbana v. Paley*, 68 Ill. 2d 62, 11 Ill. Dec. 307, 368 N.E.2d 915 (1977); *People ex rel. City of Salem v. McMackin*, 53 Ill. 2d 347, 291 N.E.2d 807 (1972).** SWIDA presented extensive testimony that expanding Gateway's facilities through the taking of NCE's property would allow it to grow and prosper and contribute to positive economic growth in the region. However, "incidentally, every lawful business does this." ***Gaylord*, 204 Ill. at 586.** Moreover, nearly a century ago, *Gaylord* expressed the long- standing rule that "to constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement. {***22} " ***Gaylord*, 204 Ill. at 584.**

This case is strikingly similar to our earlier decision in ***Limits Industrial R.R. Co. v. American Spiral Pipe Works*, 321 Ill. 101, 151 N.E. 567 (1926).** In *Limits Industrial*, this court held that a railroad could not exercise eminent domain authority to acquire property for the purpose of expanding its facilities. Despite a certificate of convenience and necessity issued by the Illinois Commerce Commission, we found the proposed spur track and public {**10} {****250} freight house provided minimal public benefit and principally benefitted the railroad itself and a few other business entities. ***Limits Industrial*, 321 Ill. at 109-10.** Similarly, it is incumbent upon us to question SWIDA's findings as to the parking situation at Gateway and determine whether {*240} the true beneficiaries of this taking are private businesses and not the public.

We do not require a bright-line test to find that this taking bestows a purely private benefit and lacks a showing of a supporting legislative purpose. As was the case in *Limits Industrial*, members of the public are not the primary intended beneficiaries of this taking. ***Limits Industrial*, 321 Ill. at 109-10.** {***23} This condemnation clearly was intended to assist Gateway in accomplishing their goals in a swift, economical, and profitable manner.

Entities such as SWIDA must always be mindful of expediency, cost efficiency, and profitability while accepting the legislature's charge to promote development within their defined parameters. However, these goals must not be allowed to overshadow the constitutional principles that lie at the heart of the power with which SWIDA and similar entities have been entrusted. As Justice Kuehn stated in dissent in the appellate court, "If property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic by-products of a private capitalist's ability to develop land cannot justify a surrender of ownership to eminent domain." **304 Ill. App. 3d at 556** (Kuehn, J., specially concurring).

While the activities here were undertaken in the guise of carrying out its legislated mission, SWIDA's true intentions were not clothed in an independent, legitimate governmental decision to further a planned public use. SWIDA did not conduct or commission a thorough study of the parking situation {***24} at Gateway. Nor did it formulate any economic plan requiring additional parking at the racetrack. SWIDA advertised that, for a fee, it would condemn land at the request of "private developers" for the "private use" of developers. In addition, SWIDA entered into a contract with Gateway to condemn whatever land "may be desired *** by Gateway." Clearly, {*241} the foundation of this taking is rooted not in the economic and planning process with which SWIDA has been charged. Rather, this action was undertaken solely in response to Gateway's expansion goals and its failure to accomplish those goals through purchasing NCE's land at an acceptable negotiated price. It appears SWIDA's true intentions were to act as a default broker of land for Gateway's proposed parking plan.

This point is further emphasized by the fact that other options were available to Gateway that could have addressed many of the problems testified to by Pritchett, Ortbals and others. Gateway could have built a parking garage structure on its existing property rather than develop the land owned by NCE. However, when Gateway discovered that the cost of constructing a garage on land it already owned was substantially higher than {***25} using SWIDA as its agent to take NCE's property for open-field parking, Gateway chose the easier and less expensive avenue.

As a result of the acquisition of NCE's property, Gateway could realize an estimated increase of $ 13 to $ 14 million in projected revenue per year. While we do not deny that this expansion in revenue could potentially trickle down and bring corresponding revenue increases to the region, revenue expansion alone does not justify an improper and unacceptable expansion {**11} {****251} of the eminent domain power of the government. Using the power of the government for purely private purposes to allow Gateway to avoid the open real estate market and expand its facilities in a more cost-efficient manner, and thus maximizing corporate profits, is a misuse of the power entrusted by the public.

The legislature intended that SWIDA actively foster economic development and expansion in Madison and St. Clair Counties. **70 ILCS 520/2(g)**, 5 (West 1998). However, the actions of SWIDA in this case blur the lines between {*242} a public use and a private purpose. A highway toll authority may justify the use of eminent domain to ensure that motorists have reasonable access {***26} to gas stations. ***Illinois Toll Highway Comm'n,*** **16 Ill. 2d at 546.** Does the highway authority's power include the ability to use eminent domain authority to take additional land for a car wash, and then a lube shop? Could the authority then use its power to facilitate additional expansions for a motel, small retail shops, and entertainment centers? The initial, legitimate development of a public project does not justify condemnation for any and all related business expansions.

SWIDA contends that the "wisdom *** of the legislation and 'the means of executing the project' are beyond judicial scrutiny 'once the public purpose has been established.' It is that purpose which controls and not the 'means' or 'mechanics' of how the purpose is carried out." We disagree. The Constitution and the essential liberties we are sworn to protect control. In its wisdom, the legislature has given SWIDA the authority to use eminent domain power to encourage private enterprise and become involved in commercial projects that may benefit a specific region of this state. While we do not question the legislature's discretion in allowing for the exercise of eminent domain power, "the government {***27} does not have unlimited power to redefine property rights." ***Loretto v. Teleprompter Manhattan CATV Corp.,*** **458 U.S. 419, 439, 73 L. Ed. 2d 868, 885, 102 S. Ct. 3164, 3178 (1982).** The power of eminent domain is to be exercised with restraint, not abandon.

CONCLUSION

Accordingly, we agree with the appellate court's finding that, in this case, SWIDA exceeded its constitutional authority in taking NCE's land by eminent domain. The judgment of the appellate court is therefore affirmed.

Affirmed.

DISSENTBY: FREEMAN

DISSENT: {*243} JUSTICE FREEMAN, dissenting:

The majority holds that the Southwestern Illinois Development Authority (SWIDA) may not use the power of eminent domain to take real property owned by National City Environmental, L.L.C., and St. Louis Auto Shredding

Company (collectively NCE), and convey same to Gateway International Motorsports Corporation (Gateway). Because I believe the taking at issue is for a public use, and in furtherance of the purposes for which SWIDA was created, I respectfully dissent.

BACKGROUND

I agree with that portion of the majority's statement of facts setting forth the procedural posture of this case. I also agree with that portion {***28} of the statement of facts outlining the creation of SWIDA, the purposes of SWIDA, and the issuance of bonds by SWIDA to finance the costs of acquiring, constructing and installing a multipurpose automotive sports and training facility in the City of Madison. As to the balance of the statement of facts, I find that it contains conclusions unfairly slanted {**12} {****252} toward the result the majority desires to reach. Additionally, the majority omits certain facts adduced at trial which outline the reasons for the taking, and support the conclusion reached by the circuit court. I believe the reader of this opinion may benefit from a more complete rendition of the evidence in the record.

In June 1996, SWIDA issued $ 21.5 million in taxable sports facility revenue bonds. Gateway used the proceeds from the bonds to acquire a small racetrack and transform it into a racing and training facility capable of hosting major race car events. In 1997, the racetrack had 25,000 grandstand seats and 25,000 portable seats. The racetrack hosted three major events and a number of smaller events, with total attendance of 400,000. In 1998, Gateway increased seating capacity and hosted four major events at the racetrack. {***29} Gateway's goal is to increase {*244} seating capacity in increments to the point where the racetrack has the 85,000 to 100,000 seats needed to host a Winston Cup NASCAR event.

On February 20, 1998, Gateway requested that SWIDA use its quick-take eminent domain powers to acquire a 148.5 acre tract of land (the Property) west of the racetrack for parking. Gateway asked SWIDA to acquire the Property from its owner, NCE, and convey it to Gateway. Gateway paid an application fee of $ 2,500 to SWIDA, and the sum of $ 10,000 to be applied toward SWIDA's sliding scale fee of 6% to 10% of the acquisition price of property being condemned. Gateway also agreed to pay SWIDA's out-of-pocket expenses or other costs associated with the quick-take process, including the acquisition price of the Property. Members of SWIDA's board are not entitled to compensation (**70 ILCS 520/4(c)** (West 1998)) and did not receive any part of these fees.

On February 23, 1998, the St. Clair County board adopted a resolution authorizing SWIDA to exercise its quick-take eminent domain powers to acquire the Property for use by Gateway for racetrack parking. See **70 ILCS 520/8(b)** {***30} (West 1998) (requiring the approval of the county board before SWIDA can use its quick-take eminent domain powers within the unincorporated areas of a county). The board noted that attendance at the racetrack was expected to increase from 400,000 in 1997 to 600,000 in 1998, and that other development projects in the area would reduce available racetrack parking by 100 acres. The board found that it was necessary to create additional parking areas to safely and adequately service the spectators who would be attending events at the racetrack during 1998 and in subsequent years. Further, the board found that expansion of the racetrack would enhance the public health, safety, morals, happiness, and general welfare of the citizens of southwestern Illinois by increasing the tax base in St. Clair County and generating additional tax revenues.

{*245} Upon receipt of the St. Clair County board resolution, SWIDA held a public hearing on March 5, 1998, with notice given to NCE and adjacent property owners. Ray Reott, an attorney representing NCE, attended the meeting and voiced NCE's objections to the proposed taking. At the meeting, SWIDA adopted a resolution to assist the expansion of the racetrack {***31} (the Development Project) through the acquisition of the Property. SWIDA found that the Development Project would enhance the public health, safety, morals, happiness, and the general welfare of the citizens of southwestern Illinois through the creation of job opportunities, the generation of additional tax revenues and the expansion of the tax base within St. Clair County. SWIDA also found that the Property was integral to the success of the {**13} {****253} Development Project and authorized its executive director to take all necessary and appropriate actions, including negotiations and commencement of quick-take eminent domain proceedings, to acquire title to the Property. Further, SWIDA authorized its chairman or vice-chairman to execute an agreement between SWIDA and Gateway for acquisition of the Property through the use of quick-take eminent domain proceedings and conveyance of the Property to Gateway in furtherance of the Development Project.

Alan Ortbals, SWIDA's executive director, attended a meeting in Chicago on March 17, 1998, in an attempt to acquire the Property through negotiations. At the meeting, Gateway delivered a written offer to NCE to purchase the Property for $ 1 million. By {***32} letter dated March 19, 1998, NCE rejected the offer, but indicated its willingness to meet the week of March 30, 1998, when NCE expected to have a completed appraisal of the Property. In a separate letter to SWIDA, NCE requested that SWIDA forward copies of any appraisals of the Property in its possession by March 25, 1998. SWIDA complied with this request.

{*246} On March 20, 1998, SWIDA made a written offer to NCE to purchase the Property for $ 1 million, and advised NCE that it would initiate condemnation proceedings if NCE did not accept the offer by 5:00 p.m. on March 30, 1998. SWIDA also attempted to follow through with the suggestion in NCE's letter of March 19, 1998, that the parties meet the week of March 30, 1998. On March 30, 1998, Harry Sterling, SWIDA's attorney, and Ortbals attempted to place a conference call to Reott. Reott was not available and failed to return the telephone call.

NCE did not respond to SWIDA's offer by the stated deadline. Instead, by letter dated April 20, 1998, NCE indicated that it did not feel that it was necessary to respond to SWIDA's offer because SWIDA knew that NCE had rejected Gateway's offer to purchase the Property for the identical sum of {***33} $ 1 million. However, to remove any uncertainty on the subject, NCE indicated that it was rejecting SWIDA's offer.

Meanwhile, on March 31, 1998, SWIDA filed a complaint for condemnation in the circuit court of St. Clair County, seeking to acquire fee simple title to the Property. SWIDA also filed a motion for immediate vesting of title and requested that the court fix a date for a quick-take hearing, pursuant to the quick-take provisions of the Code of Civil Procedure. See **735 ILCS 5/7-103**, 7-104 (West 1998).

Also on March 31, 1998, NCE filed a motion to dismiss the complaint for condemnation. Subsequently, on April 2, 1998, NCE filed a traverse and motion to dismiss, arguing that the proposed taking was for an unconstitutional private use; that the proposed taking was excessive; that the racetrack did not need additional parking; and that SWIDA had not made a good faith attempt to agree with NCE on an acceptable purchase price. NCE also filed a motion to strike SWIDA's request {*247} for immediate vesting of title. The circuit court denied NCE's motion to dismiss and motion to strike SWIDA's request for immediate vesting of title.

The court proceeded to hold {***34} a quick-take hearing. At the hearing, John Baricevic, St. Clair County board chairman, testified that the Property is located in unincorporated St. Clair County, and that the board adopted a resolution authorizing SWIDA to exercise its quick-take eminent domain powers to acquire the Property. Baricevic also testified that certain economic studies were done in connection with the bond issue and Gateway's acquisition of the racetrack. These studies {**14} {****254} showed the projected economic impact from the development of the racetrack and from increased attendance as the racetrack expands. No specific studies were made regarding the impact of the proposed taking on tax revenues or the tax base.

Alan Ortbals testified regarding the economic and traffic impact of the racetrack on the surrounding area. Ortbals stated that the racetrack hosted more major races and drew more spectators in 1997 than anticipated in studies performed prior to the development of the racetrack. The racetrack had added 10,000 seats and was ahead of projections for attendance in 1998. As a result, the county was experiencing faster economic spin-off than anticipated. A truck stop across from the racetrack was undergoing expansion; {***35} a parcel of land across from the racetrack sold for development of a restaurant; and a golf course was being developed on the site of a former junk yard. In addition, several hotels and restaurants were being developed in the immediate area of the racetrack and in nearby municipalities.

Due to the success of the racetrack, the county was experiencing serious traffic problems on race days with traffic backed up on both sides of Interstate 55-70. A number of racetrack patrons parked east of Illinois Route {*248} 203, creating traffic safety problems as they crossed Illinois Route 203 to gain access to the racetrack. Using the Property for racetrack parking would alleviate both of these traffic problems.

Ortbals also testified that when Gateway approached SWIDA regarding the Property, he reviewed the studies that were done in connection with the financing of the racetrack, including an analysis of Gateway's business plan, an analysis of the economic impact of the racetrack, an analysis of the traffic impact of the racetrack, and a market demand study. He also reviewed an analysis of the economic impact of a similar racetrack in Topeka, Kansas. He presented a report to SWIDA board members regarding {***36} these studies. In Ortbals' opinion as an expert in

the field of economic development, SWIDA's acquisition of the Property by quick-take was necessary to promote economic development, alleviate traffic safety problems, and eliminate blight.

On cross-examination, Ortbals testified that SWIDA did not commission any studies analyzing the effect of the condemnation of the Property on employment levels, the tax base of St. Clair County, or traffic safety problems. Ortbals admitted that there were no slums on the Property. However, the development of the racetrack has had an indirect effect on the elimination of blight in the area. The golf course replaced an old junk yard and three or four dilapidated and abandoned homes on Bend Road have been demolished.

Mike Pritchett, a design and planning engineer employed by the Illinois Department of Transportation (the Department), testified as an expert in the field of civil engineering. He stated that the Department was working with Gateway to find a traffic plan that would move traffic in and out of the racetrack efficiently, with minimal impact on the state and interstate highways. To that end, the Department has studied the traffic patterns {***37} {*249} occurring around the racetrack. On days of major events, there were significant backups on Interstate 55-70, extending into Missouri. Because the interstate was designed to facilitate travel at high speeds, drivers do not anticipate that cars will be stopped in traffic on the interstate. Stopped traffic on the interstate is thus a safety hazard.

Pritchett also testified that large numbers of racetrack patrons crossed Illinois Route 203 from the parking areas east of the highway to the racetrack. Illinois {**15} {****255} State Police troopers operate a traffic signal at Ohio Street and Illinois Route 203 manually to allow racetrack patrons to cross the highway. However, the traffic backed up at the signal had negative repercussions on Interstate 55-70. Furthermore, many racetrack patrons crossed at random locations along the highway. When the Department put a fence along Illinois Route 203 to try to channel racetrack patrons to Ohio Street, they pushed the fence down to cross the highway. Although no accidents had yet occurred, there was no assurance that none would.

Pritchett testified further that the Department had improved Illinois Route 203 to help the flow of traffic in and out of the racetrack. {***38} These improvements were based on a traffic impact study conducted in 1996, which assumed a considerable amount of parking west of the racetrack. Construction of a parking lot on the Property would provide parking west of the racetrack, as suggested in the study, and alleviate traffic problems on race days. Pritchett concluded that it was necessary, from a safety standpoint, for SWIDA to acquire the Property for development of a parking lot.

On cross-examination, Pritchett testified that taking the Property would not solve all the traffic problems in the area. Some racetrack patrons would continue to park east of Illinois Route 203 and cross the highway to gain {*250} access to the racetrack. And if the racetrack was able to host a Winston Cup race, the traffic jams in the area would increase. However, construction of a parking lot on the Property was one of several measures the Department was considering to provide additional access to the racetrack and ease the pressure on Illinois Route 203.

The mayor of the City of Madison testified that the racetrack had brought new jobs to the city and increased revenues from sales and entertainment taxes. He attributed the development of the golf {***39} course to the racetrack and testified that several developers were negotiating plans with the city to develop motels and restaurants in the area. He also testified regarding the traffic problems on race days and stated that it would be beneficial to have parking on the Property.

The president of the Village of Fairmont City attributed the development of an 86-room hotel in the village to the racetrack. He testified that continued growth of the racetrack was in the best economic interest of the village.

The president of the Southwestern Illinois Tourism and Convention Bureau, a not-for-profit corporation representing eight southwestern Illinois counties, testified that tourism was the second largest industry in the area. He estimated that in 1997 tourism added between $ 520 million and $ 530 million to the economies of the eight counties, with the economic impact of the racetrack being $ 43.4 million. He also testified that, since January 1, 1996, in excess of 30 hotels had been built, were under construction, or were slated for construction in the area. The racetrack was a major contributing factor to the construction and proposed development of the hotels.

Scott Harding, a consulting {***40} engineer, performed an offsite evaluation of the Property. He testified that approximately 27 to 48 acres of the Property constitute wetlands. A developer who proposes to drain and build {*251} on an area that has been designated a wetland must first obtain a permit from the United States Army Corps of Engineers, listing conditions that must be met to minimize impact on the wetland, or steps, such as compensation,

that must be taken in mitigation. Compensation involves replacing wetland that is used in a project with wetland that is {**16} {****256} created on another part of the same site or on a different site. Harding testified that Corps of Engineers policies call for compensation ratios of three to one for wooded wetlands, two to one for wetlands with scrub shrub, one and a half to one for emergent wetlands and one to one for farm wetlands. The Corps of Engineers may determine that certain high quality wetlands should not be impacted at all.

Based upon the types of wetland found on the Property, Harding estimated that the Corps of Engineers would require two to one compensation, that is, for every acre of wetland impacted by construction, the Corps of Engineer would require that Gateway create or construct {***41} two acres of wetlands. Thus, assuming that Gateway impacted 48 acres of wetlands and compensated on site, approximately 50 acres of land would remain for development.

Rod Wolter, Gateway's president and general manager, testified that all the major events at the racetrack were sold out in 1997. Total attendance at the racetrack that year was 400,000. The racetrack's schedule for 1998 listed more events than in 1997. In addition, the racetrack expected sell-out crowds at the major events in 1998. Attendance at those events would be greater than in 1997 because of increased seating capacity at the racetrack.

On cross-examination, Wolter testified that the racetrack had an immediate need for 2,000 to 5,000 parking spaces. The racetrack can park 2,000 cars on as little as 20 acres, and 5,000 cars on as little as 49 acres. The racetrack {*252} could get through the 1998 season without the Property, using remote parking areas. On redirect, Wolter testified that it was not in the racetrack's best interest to "get by" with parking. Lack of adequate parking could result in faltering attendance at the racetrack.

Christopher Pook, the CEO of Grand Prix, testified that Gateway added 10,000 seats to {***42} the racetrack in the spring of 1998 and planned to add another 20,000 seats in the fall. He also testified that, in order to obtain a contract to host a NASCAR Winston Cup event, Gateway would have to increase seating capacity to a minimum of 85,000 seats and have adequate parking in place. Gateway has considered building a raised parking garage at the racetrack. However, building such a garage was not economically feasible.

Pook testified next regarding several unsuccessful attempts, starting in May 1995, to reach an agreement with NCE for the use or purchase of the Property. Irv Pielet, one of NCE's owners, told him repeatedly that NCE was not interested in selling the Property or in any business relationship with Gateway. Pook also testified that two nearby landowners had notified Gateway that 30 acres of land previously used for parking would no longer be available.

Roger Bowler, the plant manager for St. Louis Auto Shredding Company, testified that the plant employed 80 people on a full-time basis. During periods of peak activity, the plant hired additional employees on a part-time basis. On an annual basis, the plant recycled 90,000 to 100,000 cars, recovering metals from the {***43} cars for shipment to foundries, steel mills and smelters, and depositing other materials in a landfill operated by the plant. Bowler also testified that the current landfill would be capped in five to eight years and NCE planned to use the Property as its new landfill.

In lieu of personal testimony, the circuit court admitted {*253} into evidence Irv Pielet's discovery deposition. Pielet stated that Pook was interested in some part of NCE's land for a business venture, but he denied that Pook spoke to him about purchasing {**17} {****257} the Property. Pielet claimed that he learned of Gateway's interest in the Property from a newspaper account of the St. Clair County board's resolution.

Pielet stated further that the NCE's current landfill had less than 10 years of capacity remaining. However, no studies had been done of the landfill's capacity and 11 acres of the landfill had not yet been used. Pielet also stated that NCE had taken dirt once from the Property to cover a portion of the current landfill. NCE planned to take more dirt from the Property as needed to cover the section of the landfill the auto recycling plant was currently using. Lastly, Pielet indicated that the Property has 9.2 acres of wetlands. {***44}

At the conclusion of the quick-take hearing, the circuit court approved the condemnation. The court found that the taking was for a public purpose, referring specifically to Pritchett's testimony regarding public safety and Ortbals' testimony regarding public safety, economic development and the elimination of blight. The court also found, in light of the testimony regarding wetlands and testimony that parking west of the racetrack would promote public safety, that the taking was not excessive. Further, the court found that Pielet had been unwilling to negotiate in a meaningful fashion and the use of quick-take procedures was necessary to avert any negative economic impact to

the people of Madison and St. Clair Counties. Finally, the court found that the SWIDA had bargained for the Property in good faith; NCE's failure to reject SWIDA's offer in a timely manner or to present a counteroffer was dispositive of this issue.

{*254} ANALYSIS

A. Public Use

The majority recognizes that the State, as a sovereign, has the inherent right to condemn property, subject to the constitutional mandate that private property may not be taken or damaged for public use without just compensation to {***45} the owner. See slip op. at 7. Further, the majority recognizes that the subsequent transfer of property to a private entity does not transform a taking for public use into a taking for private use. See slip op. at 8. The majority correctly cites ***Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984),** and ***Berman v. Parker*, 348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954),** for these propositions. However, *Hawaii Housing Authority* and *Berman* provide additional guidance in this area of law, which the majority fails to acknowledge. Contrary to the holdings of *Hawaii Housing Authority* and *Berman*, the majority gives little deference to the legislature's public use determination. Further, the majority engrafts upon *Hawaii Housing Authority* and *Berman* a requirement that property taken by eminent domain be put into use for the public, a proposition specifically rejected by the Court in *Hawaii Housing Authority*. See ***Hawaii Housing Authority*, 467 U.S. at 243-44, 81 L. Ed. 2d at 199, 104 S. Ct. at 2331.** Today's opinion is not an accurate rendition of the holdings of *Hawaii Housing* {***46} *Authority* and *Berman* and of the principles of law involved in this area.

In ***Berman*, 348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98,** the Supreme Court upheld the constitutionality of the District of Columbia Redevelopment Act of 1945 (60 Stat. 790, **D.C. Code §§ 5-701** through 5-719 (1951)). That act provided for the use of eminent domain to acquire property in slums and blighted areas and for the lease or sale of the property to private interests for redevelopment pursuant to a comprehensive redevelopment plan. {*255} The appellants {**18} {****258} argued that their property could not be taken constitutionally because the property was commercial, not residential property; the property was not slum housing; the property would be put into the project under the management of a private, not a public, agency and redeveloped for private, not public, use. The Court considered first whether the takings authorized by the act were for a public use, stating:

"The power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs. [Citation.] We deal, in other words, with what traditionally has been known as the {***47} police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia [citation] or the States legislating concerning local affairs. [Citations.] This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." ***Berman*, 348 U.S. at 31-32, 99 L. Ed. at 37, 75 S. Ct. at 102.**

The Court then rejected the appellants' contention that their property was being taken for a private use because the property would be transferred {***48} to a private individual or company, stating:

"Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. [Citations.] Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the {*256} means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. [Citations.] The public end may be as well or better served through an agency of private enterprise than through a department of government-or so the Congress might conclude." ***Berman*, 348 U.S. at 33-34, 99 L. Ed. at 38, 75 S. Ct. at 103.**

In ***Hawaii Housing Authority*, 467 U.S. at 240, 81 L. Ed. 2d at 197, 104 S. Ct. at 2329,** the Supreme Court explained that the public use principle is "coterminous with the scope of a sovereign's police powers. {***49} " The Court also explained the role of the judiciary in reviewing a legislature's public use determination:

"There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is 'an extremely narrow' one. [Citation.] The Court in *Berman* cited with approval the Court's decision in ***Old Dominion Co. v. United States*, 269 U.S. 55, 66, 70 L. Ed. 162, 46 S. Ct. 39 (1925),** which held that deference to the legislature's 'public use' determination is required 'until it is shown to involve an impossibility.' {**19} {****259} The *Berman* Court also cited to ***United States ex rel. TVA v. Welch*, 327 U.S. 546, 552 (1946),** which emphasized that 'any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields.' In short, the Court has made clear that it will not substitute its judgment {***50} for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.' [Citation.]*** Where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed {*257} by the Public Use Clause." ***Hawaii Housing Authority*, 467 U.S. at 240-41, 81 L. Ed. 2d at 197-98, 104 S. Ct. at 2329-30.**

See also ***National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422, 118 L. Ed. 2d 52, 69, 112 S. Ct. 1394, 1404 (1992).**

Additionally, the Court reaffirmed the principle outlined in *Berman* that a taking for a public use is not transformed into a private taking through a subsequent transfer to a private party. The Court stated:

"The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. 'It is not essential that the entire community, nor even any considerable {***51} portion, ... directly enjoy or participate in any improvement in order [for it] to constitute a public use.' [Citation.] 'What in its immediate aspect [is] only a private transaction may ... be raised by its class or character to a public affair.' *** Government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause." ***Hawaii Housing Authority*, 467 U.S. at 243- 44, 81 L. Ed. 2d at 199, 104 S. Ct. at 2331.**

This court has, heretofore, been guided by the principles outlined in *Berman*. Thus, in ***People ex rel. Adamowski v. Chicago R.R. Terminal Authority*, 14 Ill. 2d 230, 151 N.E.2d 311 (1958),** this court held constitutional the Railroad Terminal Authority Act (Ill. Rev. Stat. 1957, ch. 114, pars. 361 through 389). This court noted that the plaintiff's basic objection was that the principal beneficiaries of the act were private corporations. This court stated:

"To the extent that plaintiff's contentions are directed to an alleged absence of public use and public purpose, they are without merit. The General Assembly has described {***52} in considerable detail the conditions which the act is {*258} designed to eliminate and has declared the public use and public interest that it found to exist. Such a legislative declaration is not to be lightly set aside. [Citations.] 'Public purpose' is not a static concept. It is flexible, and is capable of expansion to meet conditions of a complex society that were not within the contemplation of the framers of our constitution. [Citations.]

The primary objects of the statute are the removal of the blighted conditions caused by antiquated terminal areas, the promotion of the growth and development of the city, and the relief of traffic congestion ***. [Citations.] It may be that private railroad corporations will {**20} {****260} derive some benefit under the act. Those benefits, however, will be incidental to the principal purpose of the statute ***." ***Adamowski*, 14 Ill. 2d at 235-36.**

In ***Illinois Toll Highway Comm'n v. Eden Cemetery Ass'n*, 16 Ill. 2d 539, 541, 158 N.E.2d 766 (1959),** the Illinois Toll Highway Commission sought to acquire an underground easement for sewer and water facilities through the defendants' cemetery property. The defendants objected {***53} that the property was being taken to service a gasoline station to be operated by a private corporation and to service a privately owned restaurant. This court noted

that the purpose of the toll highways was to provide fast, through traffic in a safe manner, and that it was necessary that gasoline service stations and restaurants be located on or in close proximity to the highway proper, thereby reducing a great number of entrances and exits to reach these services. This court reasoned:

"As plaintiff points out, the operations of a gas station or a restaurant are specialized businesses, and are enterprises calling for experts in these fields. So the legislature wisely granted to the Commission the power to make contracts with, and to grant concessions to, and to lease to persons and private corporations. As the court said in the case of ***Berman v. Parker*, 348 U.S. 26, 99 L. Ed. 27, at pages 33- 34, 75 S. Ct. 98:** 'The public end may be as well or better served through an agency of private enterprise than through a department of government-or so the Congress might conclude. We cannot {*259} say that public ownership is the sole method of promoting the public purposes {***54} of community redevelopment projects.'

We therefore conclude that service stations and restaurants are an integral part of the toll road system, whether they be operated by the Toll Highway Commission or leased to a private corporation who may be better able to carry on the business, thus bringing about the desired result. We think, further, that since access to sewer and water facilities is essential to the operation of service stations and restaurants, the reasoning which sustains the propriety of arrangements for the latter must uphold as well a reasonable exercise of condemnation powers in obtaining the former. The present exercise of the power has not been shown to be unreasonable under the circumstances ***." ***Eden Cemetery Ass'n*, 16 Ill. 2d at 545-46.**

See also ***People ex rel. City of Urbana v. Paley*, 68 Ill. 2d 62, 76, 11 Ill. Dec. 307, 368 N.E.2d 915 (1977)** ("It is apparent that the city of Urbana intends to undertake the redevelopment in question primarily for the purpose of revitalizing an economically stagnant downtown area. The purpose of the project is therefore clearly and predominantly a public purpose, and the benefit reaped by private {***55} developers is merely an inevitable incident thereto"); ***People ex rel. City of Salem v. McMackin*, 53 Ill. 2d 347, 355, 291 N.E.2d 807 (1972)** ("While we acknowledge that there is a benefit to private interests in the financing of industrial projects under the Act, we hold that the principal purpose and objective of the Act is public in nature. Therefore, it does not matter that there will be an incidental benefit to private interests"); ***City of Chicago v. Barnes*, 30 Ill. 2d 255, 257, 195 N.E.2d 629 (1964)** ("it does not follow that because the land may later be sold to a private developer its taking and clearance cannot have been for a public purpose").

Turning to the statute in the present case, I note that the legislature determined that "labor surplus areas currently exist in the southwestern part of the {**21} {****261} State" (**70 ILCS 520/2(a)** (West 1998)) and recognized that "the {*260} economic burdens resulting from involuntary unemployment fall in part upon the State in the form of increased need for public assistance and reduced tax revenues and, in the event that the unemployed worker and his family migrate elsewhere to find work, may also {***56} fall upon the municipalities and other taxing districts within the areas of unemployment in the form of reduced tax revenues, thereby endangering their financial ability to support necessary governmental services for their remaining inhabitants." **70 ILCS 520/2(b)** (West 1998). The legislature also found "that a lack of decent housing contributes to urban blight, crime, anti-social behavior, disease, a higher need for public assistance, reduced tax revenues, and the migration of workers and their families away from areas which fail to offer adequate, decent, affordable housing." **70 ILCS 520/2(d)** (West 1998). Thus, the legislature described in detail the conditions the Act was designed to eliminate.

Further, the legislature declared that "decent, affordable housing" (**70 ILCS 520/2(e)** (West 1998)) and access to "educational institutions, recreation, parks and open spaces, entertainment and sports, a reliable transportation network, cultural facilities and theaters" (**70 ILCS 520/2(f)** (West 1998)) should be available to every citizen. The legislature also declared that "the State {***57} has a responsibility to help create a favorable climate for new and improved job opportunities for its citizens by encouraging the development of commercial and service businesses and industrial and manufacturing plants within the southwestern part of the State." **70 ILCS 520/2(c)** (West 1998). The legislature affirmed that "the main purpose of this Act is to promote industrial, commercial, residential, service, transportation and recreational activities and facilities, thereby reducing the evils attendant upon unemployment and enhancing the public health, safety, morals, happiness and general welfare of this State." **70 ILCS 520/2(g)** (West 1998).

{*261} The legislature created SWIDA to promote development in Madison and St. Clair Counties. It charged SWIDA with the duty to assist in the development, construction and acquisition of industrial projects, housing or

residential projects, and commercial projects including cultural facilities such as sports training facilities, racetracks, and parking facilities. **70 ILCS 520/3**, 520/6 (West 1998). In turn, SWIDA issued $ 21.5 million of bonds to facilitate the development {***58} of the racetrack. SWIDA now seeks to condemn the Property to further the development of the racetrack by increasing available parking. The development of parking facilities is both a project contemplated under the Act and part of the continued development of the racetrack.

This court has previously upheld the validity of legislative enactments designed to assist economic development (***People ex rel. City of Canton v. Crouch*, 79 Ill. 2d 356, 364, 38 Ill. Dec. 154, 403 N.E.2d 242 (1980); *Paley*, 68 Ill. 2d at 76; *McMackin*, 53 Ill. 2d at 358),** to prevent or eliminate blight involving both structural infirmity and economic deterioration (***Paley*, 68 Ill. 2d at 74; *Barnes*, 30 Ill. 2d at 256; *People ex rel. Gutknecht v. City of Chicago*, 3 Ill. 2d 539, 545, 121 N.E.2d 791 (1954); *Chicago Land Clearance Comm'n v. White*, 411 Ill. 310, 316, 104 N.E.2d 236 (1952); *Cremer v. Peoria Housing Authority*, 399 Ill. 579, 588, 78 N.E.2d 276 (1948); *Zurn v. City of Chicago*, 389 Ill. 114, 128, 59 N.E.2d 18 (1945),** and to promote public safety (***Eden Cemetery Ass'n*, 16 Ill. 2d at 544).** {***59} See also ***Adamowski*, {**22} {****262} 14 Ill. 2d at 236** (blighted conditions, promotion of the growth and development of the city and the relief of traffic congestion). Such legislative determinations are well within the State's police powers.

In the present case, the majority cannot dispute the legislative findings regarding the need to alleviate certain economic, housing and other conditions in the southwestern part of this state. Nor can the majority dispute that alleviation of these conditions furthers certain public {*262} purposes. The legislature is, after all, "the main guardian of the public needs to be served by social legislation." ***Berman*, 348 U.S. at 31-32, 99 L. Ed. at 37, 75 S. Ct. at 102.** And, the legislature has determined, as it well may, to use the power of eminent domain to realize its objective. See ***Berman*, 348 U.S. at 31-32, 99 L. Ed. at 37, 75 S. Ct. at 102.** The legislature has vested in SWIDA the power of eminent domain so that SWIDA may assist in the development of housing, industrial and commercial projects in the area. The legislature has also given SWIDA the power to issue bonds to generate the financial wherewithal for the development {***60} of the projects. The means employed by the legislature to further the public purposes at issue are not irrational.

Applying the holdings of *Hawaii Housing Authority* and *Berman*, this court should defer to the legislative determination of the public use. Although the majority acknowledges that great deference is due the legislative determination (see slip op. at 9), the majority does not act in accordance with such deference. Indeed, the majority does not afford any measure of deference to the legislative determination.

The majority opinion is alarming both for its use of selective portions of *Hawaii Housing Authority* and *Berman* and for its attempt to engraft an additional principle upon the public use doctrine. The majority states,

"'A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.' ***Hawaii Housing Authority*, 467 U.S. at 245, 81 L. Ed. 2d at 200, 104 S. Ct. at 2331.** As this court held in ***Gaylord*, 204 Ill. at 584,** 'the public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission {***61} of the owner, but by right.'" Slip op. at 10.

The majority fails to acknowledge, however, that the Court in *Hawaii Housing Authority* specifically rejected a requirement that the property be put into use for the public,

{*263} "The Court long ago rejected any literal requirement that condemned property be put into use for the general public. 'It is not essential that the entire community, nor even any considerable portion, ... directly enjoy or participate in any improvement in order [for it] to constitute a public use.' [Citation.] 'What in its immediate aspect [is] only a private transaction may ... be raised by its class or character to a public affair.' *** Government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause." ***Hawaii Housing Authority*, 467 U.S. at 243-44, 81 L. Ed. 2d at 199, 104 S. Ct. at 2331.**

Not only is the majority disingenuous in its citation to *Hawaii Housing Authority* and *Berman* but it seeks to unravel the holdings of these opinions, for in imposing a requirement that the property be put {**23} {****263} into {***62} use for the general public, the majority effectively interdicts any taking for the purpose of economic development.

I must inquire of the majority what development project can satisfy the requirement that the public be "entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right"? Can a member of the general public enter a manufacturing plant as of right? What of a sports facility? Can a member of the general public enter a stadium, or for that matter the racetrack at issue, without paying a fee for the privilege? The majority states,

"We also acknowledge that a public use or purpose may be satisfied in light of public safety concerns. See ***Illinois Toll Highway Comm'n v. Eden Cemetery Ass'n*, 16 Ill. 2d 539, 158 N.E.2d 766 (1959).** The public is allowed to park on the property in exchange for the payment of a fee. Gateway's racetrack may be open to the public, but not 'by right.' " Slip op. at 10-11.

Again, I ask what project will survive the majority's requirement of use as of right by the general public?

I suggest that, in its attempt to reach a particular {*264} result, the majority does great harm to the public {***63} use doctrine and to the interests of this state.

B. Particular Taking

The majority errs in other ways. In considering the taking at issue, the majority applies the wrong standard of review and ignores the evidence adduced at trial.

Section 7-104(b) of the Code of Civil Procedure provides in part:

"At the [quick-take] hearing, if the court has not previously, in the same proceeding, determined that the plaintiff has authority to exercise the right of eminent domain, that the property sought to be taken is subject to the exercise of such right, and that such right is not being improperly exercised in the particular proceeding, then the court shall first hear and determine such matters." **735 ILCS 5/7-104(b)** (West 1998).

A finding on each of these three issues amounts to a determination of whether or not the plaintiff has the right to take the property by eminent domain. See ***Department of Public Works & Buildings v. Dust*, 19 Ill. 2d 217, 219, 166 N.E.2d 36 (1960).** As this court noted in ***Department of Transportation v. First Galesburg National Bank & Trust Co.*, 141 Ill. 2d 462, 468, 152 Ill. Dec. 567, 566 N.E.2d 254 (1990),** {***64} the plaintiff has only such powers of eminent domain as are conferred upon it by the legislature. See also ***Department of Public Works & Buildings v. Keller*, 61 Ill. 2d 320, 335 N.E.2d 443 (1975).** The law conferring the right of eminent domain must be strictly construed. ***First Galesburg National Bank*, 141 Ill. 2d at 469.**

When a defendant files a motion to dismiss challenging the authority to condemn, the burden is on the condemning authority to make a *prima facie* case of the disputed allegations. ***First Galesburg National Bank*, 141 Ill. 2d at 469; *Keller*, 61 Ill. 2d at 324.** This burden may be met by introducing in evidence a statute affirming the authority's right to acquire property by eminent domain (see ***First Galesburg National Bank*, 141 Ill. 2d at 469),** or a resolution and ordinance approving the taking (see {*265} ***City of Chicago v. Walker*, 50 Ill. 2d 69, 71, 277 N.E.2d 129 (1971)).** Once the condemning authority has made a *prima facie* case, the defendant is required to go forward with evidence showing that there was an abuse of discretion by the {**24} {****264} condemning authority. ***First Galesburg National Bank*, 141 Ill. 2d at 470;** {***65} ***Keller*, 61 Ill. 2d at 325.** The courts will interfere only where an abuse of discretion is shown, for as this court has held many times:

"Whether the exercise of the power of eminent domain is necessary or expedient to accomplish an authorized purpose is not a question within the province of the court to determine. The agency on which the power has been conferred also has the authority to decide the necessity for its exercise. In the absence of a clear abuse of this authority the courts will not inquire into the necessity or the propriety of its exercise." ***Keller*, 61 Ill. 2d at 325** (citing ***Department of Public Works & Buildings v. McNeal*, 33 Ill. 2d 248, 211 N.E.2d 266 (1965), *Forest Preserve District v. Wike*, 3 Ill. 2d 49, 119 N.E.2d 734 (1954), *City of Chicago v. Vaccarro*, 408 Ill. 587, 97 N.E.2d 766 (1951),** and ***Zurn v. City of Chicago*, 389 Ill. 114, 59 N.E.2d 18 (1945)).**

In the present case, SWIDA satisfied its *prima facie* burden of proof. Pursuant to section 8 of the Act, SWIDA may acquire real property, or rights therein, upon condemnation. **70 ILCS 520/8(b)** {***66} (West 1998). Section 5 of the Act commands SWIDA to assist in the development of commercial projects, including racetracks and parking

facilities. **70 ILCS 520/5** (West 1998). SWIDA introduced into evidence a resolution adopted by the St. Clair County board authorizing the acquisition of the Property by use of quick-take eminent domain. SWIDA also introduced into evidence a resolution it adopted to acquire the Property by quick-take eminent domain. The resolutions state that it is necessary to create additional parking areas for the racetrack to safely and adequately service racetrack spectators and that the acquisition of the Property for parking purposes will enhance the public health, safety, morals, happiness, and the general welfare of the citizens of southwestern Illinois through {*266} the creation of job opportunities, the generation of additional tax revenues and the expansion of the tax base within St. Clair County. This evidence suffices for a *prima facie* case.

It became incumbent upon NCE to introduce evidence showing that SWIDA had abused its discretion. NCE failed in this undertaking. The evidence at the hearing fully supports the circuit court's {***67} determination that taking the Property will further economic development, promote safety, and lead to the elimination of blight in the area.

The majority disagrees. As to the elimination of blight, the majority simply states, "we are not dealing with a taking for the purposes of eliminating slums or blight." Slip op. at 10. Nothing is said of Ortbals' testimony on the subject.

The majority is more forthright on the subject of economic development. As the majority notes,

"SWIDA presented extensive testimony that expanding Gateway's facilities through the taking of NCE's property would allow it to grow and prosper and contribute to positive economic growth in the region." Slip op. at 11.

However, the majority quickly dispenses with this "extensive testimony" of economic development. The majority simply notes that "'incidentally, every lawful business does this.'" Slip op. at 11, quoting ***Gaylord v. Sanitary District,* 204 Ill. 576, 586, 68 N.E. 522 (1903).** {**25} {****265}

The majority reluctantly acknowledges the evidence regarding public safety. The majority notes,

"If this taking were permitted, lines to enter parking lots might be shortened and pedestrians {***68} might be able to cross from parking areas to event areas in a safer manner." Slip op. at 11.

However, this acknowledgment fails to convey the full impact of the trial testimony regarding public safety. Pritchett testified that it was necessary, from a safety standpoint, for SWIDA to acquire the Property for {*267} development of a parking lot. Ortbals testified that using the Property for racetrack parking would alleviate the traffic back-ups on Interstate 55-70 and allow racetrack patrons parked east of Illinois Route 203 to gain access to the racetrack safely.

Acknowledgment aside, the majority then rejects the evidence as to the traffic safety concerns. The majority states,

"We are unpersuaded that these facts alone are sufficient to satisfy the public use requirement, especially in light of evidence that Gateway could have built a parking garage structure on its existing property." Slip op. at 11.

The majority's conclusion is not supported by the record. Wolter testified at trial that the racetrack had an immediate need for 2,000 to 5,000 parking spaces. Pook testified at trial that Gateway had considered building a raised parking garage at the racetrack. However, {***69} building such a garage was not economically feasible. NCE introduced no evidence that building a raised parking garage with 5,000 parking spaces was feasible, economically or otherwise. Given the number of parking spaces at issue and NCE's failure to present any evidence on this matter, the majority's conclusion demonstrates either a general misapprehension of the nature of appellate review or a deliberate choice to substitute the judgment of this court for the record and proper inferences to be drawn therefrom.

Moreover, in questioning the necessity of the taking, the majority applies the wrong standard of review. As noted above, this court has previously recognized that

"The agency on which the power has been conferred also has the authority to decide the necessity for its exercise. In the absence of a clear abuse of this authority the courts will not inquire into the necessity or the propriety of its exercise." ***Keller,* 61 Ill. 2d at 325** (citing ***McNeal,* 33 Ill. 2d 248, *Wike,* 3 Ill. 2d 49, 119 N.E.2d 734, *Vaccarro,* 408 Ill. 587, 97 N.E.2d 766,** and ***Zurn,* 389 Ill. 114, 59 N.E.2d 18).**

The {***70} legislature has vested in SWIDA the power of {*268} eminent domain to assist in the development of commercial projects including racetracks and parking facilities. The acquisition of the Property being in

furtherance of three distinct public purposes, SWIDA did not abuse its discretion by the use of its eminent domain powers. The evidence at trial is not contrary and judicial intervention is unwarranted.

CONCLUSION

I agree with the circuit court that SWIDA properly exercised its power of eminent domain. The taking of the Property was for a public use, not a private use. The majority errs in its application of the standard of review. The majority also errs in its willingness to dispense with strong evidence at trial supporting the circuit court's decision. Lastly, the majority commits great disservice to the State of Illinois and its citizens in engrafting upon the public use doctrine the requirement {**26} {****266} that property taken by eminent domain must be accessible to the general public as of right. This requirement is the death of social legislation in furtherance of economic development and revitalization. I respectfully dissent.

JUSTICE McMORROW joins in this dissent. {***71}

ATTACHMENT B

Excerpt, J. Glanz and E. Lipton, "The Height of Ambition,"
***The New York Times Magazine*, September 8, 2002, pp. 32-37**

. . .

From its inception, the World Trade Center was sustained by the mysterious but undeniable power of bigness – extreme, overwhelming, irresistible bigness. Its story begins on Oct. 31, 1955, with a meeting between two supremely powerful New Yorkers. David Rockefeller, the 40-year-old grandson of America's first billionaire and a vice president of Chase Manhattan Bank, invited Robert Moses, New York's public-works czar, for a lunchtime chat in the executive dining room of the bank's headquarters near Wall Street. Rockefeller was working on a big project – or what he *thought* was a big project – the construction of what would become the sixth-tallest office tower in the world, a building that would serve as the new headquarters for Chase Manhattan. But Rockefeller needed a favor. In order to build the new headquarters downtown, he needed Moses to rub out a narrow blocklong street to allow Chase to squeeze the enormous building into Lower Manhattan's tight patchwork of pre-Revolutionary streets.

Not a problem, Moses told Rockefeller . . .

. . .

Big thinking was not a foreign concept to the Rockefeller family. In New York, they had long acted as a rough equivalent of the Medici family, donating the money to buy the land for the United Nations headquarters, working with Moses to build Lincoln Center for the Performing Arts and creating Rockefeller Center, the city's first mega-office complex. Now David Rockefeller had a chance to give birth to something that would dwarf them all.

In January 1960, a downtown group that Rockefeller had formed announced plans for "a World Trade Center in the heart of the port District." The group proposed erecting five million square feet of office space – some 115 acres of desks, filing cabinets and exhibition floors – on a 13.5-acre site along the East River in Lower Manhattan. The scale of it fit what Rockefeller would later dub "catalytic bigness," something so oversize that it would not only keep Lower Manhattan vibrant (and Rockefeller's property values high) but also inspire other development to follow – and thus ensure that New York remained a critical global hub for international trade.

Other players quickly appreciated the boldness of the plan. Austin Tobin, executive director of the Port of New York Authority (today called the Port Authority of New York and

New Jersey), made the case in May 1960 that his agency – until then a desperate witness, if not an actual accomplice, to the shriveling of New York's port – should be the one to build the project. "The world today stands on the brink of a new era in international trade," Tobin said, declaring that New York and the Port Authority should lead the way. As a state-sponsored entity, the Port Authority had a powerful tool at its disposal: the ability to take ownership of land by eminent domain.

. . .

It didn't take long before the grand proclamations of Rockefeller, Tobin and Tozzoli collided with prosaic reality. Although nothing big in New York gets built without some resistance, this particular project would spark a series of messy all-out brawls. The first objection came from the State of New Jersey, which with New York finances and gives legislative approval to Port Authority projects. As soon as the Port Authority issues a detailed proposal in March 1961 for a trade center along the East River, New Jersey politicians balked. "What's in it for us?" they wanted to know.

The Port Authority came up with a quick maneuver to make the project more attractive to New Jersey: moving the proposed trade center to the West Side, to a site occupied by the terminal for a failing commuter railroad that linked Manhattan and New Jersey. . . .

There was another problem with the West Side: in its new location, the trade center would obliterate Radio Row, a crowded bazaar for cut-rate electronic gadgetry that was one of Manhattan's most vibrant shopping areas. The uproar from Radio Row was like nothing the Port Authority had ever encountered. Merchants paraded down Greenwich Street with a black-draped coffin on their shoulders. "Here Lies Mr. Small Businessman," read a placard at the foot of the coffin. . . .

But the Port Authority had a solution that would take care of both the railroad's looming financial losses and, with some shrewd public-relations work, the ruckus on Radio Row: get bigger still. With the help of Gov. Nelson Rockefeller, David's brother, who backed new legislation, the Port Authority vastly increased the retable office space, bringing the total to a staggering 10 million square feet – double what David Rockefeller originally proposed.

. . .

But now that the scale of the project had grown so spectacularly, it drew the ire of a new and more potent enemy: Lawrence A. Wien, an owner of the Empire State Building and a lawyer, entrepreneur, philanthropist and baron of New York real estate. In circles of the polite and the powerful, Wien was not as easily dismissed as the Radio Row protestors. He was a confident, polished orator who seemed to dominate any room he walked into, and he turned his lush, thickly carpeted headquarters on the 48th floor of the Lincoln Building into an elegant spearhead of resistance to the trade center.

. . .

Wien's voice, along with the protests from Radio Row and a growing number of legal challenges, represented a profound threat to the project. An even more potent voice joined the chorus of critics in 1966: that of Major John V. Lindsay, who had just been elected with a promise to stand up for the little guy against the city's back-room "power brokers." Lindsay said that the city was being shortchanged under the financial deal of his predecessor, Robert F. Wagner, worked out with the Port Authority on the trade center. For a while, it looked as if the trade center might be "deader than a dead duck," as one Radio Row merchant hopefully put it.

The solution came to Guy Tozzoli one morning as he was shaving, and it was, by now, a familiar one: get even bigger. He would expand his canvas still further, he decided, far beyond even the enormous size that had so incensed Wien – and this time the expansion would not be vertical, into the sky, but horizontal, into the river. Tozzoli proposed taking the dirt excavated from the trade-center construction site and creating a brand-new piece of Manhattan – he would pour it into an enclosure in the Hudson River right next to where the center would be built. The complex, run by its own authority, would be called Battery Park City. Gov. Nelson Rockefeller, eager to help the trade-center project, would soon propose putting thousands of state-sponsored apartments in Battery Park City, along with yet another cluster of huge office skyscrapers.

Tobin was delighted, and he touted the new chunk of Manhattan as "the brainchild of Guy Tozzoli." Lindsay was promised millions in new fees from the development there, and his negotiator, Deputy Mayor Robert Price, finally extracted from the Port Authority an increase in payments for the original trade-center site. The city and the authority struck a tentative deal in August 1966.

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