Courts Frown on Economic Development Condemnations in 2002

*By Dana Berliner**

While municipalities and states continue to aggressively court private business by offering them other people's land, their efforts met with decidedly unfavorable results in the courts this year. In the first state supreme court decision in recent years to consider the constitutionality of condemnation for private commercial development in the absence of blight, the Illinois Supreme Court rejected the condemnation, commenting that "eminent domain should be used with restraint, not abandon." Other state courts also rejected so-called "economic development" condemnations and projects on statutory and semi-constitutional grounds. Even the federal courts enjoined economic development condemnations. New York, however, maintained its policy of approving economic development condemnations. Despite that, 2002 certainly continues the trend of courts telling redevelopment agencies that it's time to put on the brakes.

The Illinois Supreme Court of course issued the now-widely-known decision in *Southwestern Illinois Development Authority v. National City Environmental*, 768 N.E.2d 1 (Ill. 2002). The court rejected an attempt by the Southwestern Illinois Development Authority (SWIDA) to condemn land for extra parking for the Gateway racetrack next door. The court explained that SWIDA presented "extensive testimony that expanding Gateway's facilities … would allow it to grow and prosper and contribute to positive economic growth in the region. However, incidentally, every lawful business does this." *Id*. at 9 (internal quotation omitted). The court acknowledged that the expansion of Gateway "could potentially trickle down and bring corresponding revenue increases to the region". But, the court held, "revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power." *Id*. at 10-11. It found the condemnation lacked a public use.

Other courts this year sounded warning notes about redevelopment authorities' overzealous pursuit of condemnation actions. The Connecticut Supreme Court rejected two proposed condemnations in 2002. While both cases were decided on statutory grounds, the court's comments indicate a growing skepticism about the use of eminent domain, particularly for the benefit of private parties. In *Aposporos v. Urban Redev. Commission*, 259 Conn. 563, 565-68 (Conn. 2002), the court rejected an attempt to expand an older blight designation to allow condemnation of a local diner for additional commercial development. The original blight designation dated from 1963. In 1988, the city amended the plan to include additional property for a new project that would compete with a mall that had been constructed in another part of Stamford in the 1980s. The 1963 redevelopment plan was due to expire in 1993, but the city extended it to 2000. 259 Conn. at 565-68. The city finally began condemnations in the new area at the end of 1999. The Connecticut Supreme Court held that a new finding of blight was required when new property was added to the project area or when the agency sought to conduct a new project, not originally contemplated. To hold otherwise, the Court found, "would confer on redevelopment agencies an unrestricted and unreviewable power to condemn properties for purposes not authorized by the enabling statute and to convert redevelopment areas into their perpetual fiefdoms." Id. at 577.

Similarly, in *Pequonnock Yacht Club, Inc. v. City of Bridgeport*, 259 Conn. 592 (2002), the court found that the condemnation of a yacht club for private development was not essential to the redevelopment plan. However, in deciding that Bridgeport had not shown the necessity of the condemnation, the Court commented that "[t]he city provided no specific reasons [that the condemnation was necessary], other than to enhance desirability of the area to investors." *Id*. at 605. The Court agreed with the trial court that "just because the property may be desirable to the defendants does not justify its taking by eminent domain." *Id*. at 606. These comments indicate that agencies cannot rely upon total deference by the courts any more.

And while also a statutory decision, the Seventh Circuit's decision in *Daniels v. Area Plan Comm'n*, 306 F.3d 445 (7th Cir. 2002), held that, without a legislative declaration of public use, condemnation of property purely for private commercial development did not constitute a public use. The court left open the question of whether that would be a sufficient reason for eminent domain with a legislative declaration. One of the most interesting aspects of the decision was the court's explanation that because the public benefits of the condemnation would occur only as a result of the private business success of the commercial development, the public benefits were *incidental*, rather than primary. *Id*. at 462. This holding is important because so many states find that public benefits must be more than incidental in order to support a condemnation.

An appellate decision out of California put limits on the use of eminent domain for economic development projects. In *Graber v. City of Upland*, 121 Cal. Rptr. 2d 649 (Cal. App. 2002), the appellate court agreed with the trial court that designation of a redevelopment area was improper. It illegally combined two other areas, and the designation of the area as blighted was not supported by substantial evidence. The city attempted to rely on such characteristics as fading or

peeling paint or sagging screens in finding the area blighted. *Id*. at 440-41.

And a federal court in California granted a preliminary injunction against the condemnation of church property for a Costco, as part of an economic development plan. *See Cottonwood Christian Center v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002). Much of the opinion centered on the Religious Land Use and Institutionalized Persons Act. However, the court also followed last year's decision that the city of Lancaster could not condemn a 99 Cents Store in order to turn the property over to Costco, its competitor. *See 99 Cents Only Stores v. Lancaster Redev. Agency*, 2001 U.S. Dist. Lexis 9894 (C.D. Cal. June 26, 2001). The *Cottonwood* court held that it appeared that defendants had found "a potential user for property they did not own, and then design[ed] a development plan around that new user." Because that was not consistent with the constitutional public use requirement, the court held that, at the preliminary injunction stage, the church demonstrated a substantial likelihood of success on its claim that the condemnations lacked a public use. *Cottonwood*, 218 F. Supp. 2d at 1229-1230.

One trial court case in Connecticut enjoined 11 out of 15 condemnations in an economic development project. While the condemnor knew that four of the homes would be turned into an office building, it had no idea what the other 11 homes would be used for. The court held that eminent domain for economic development could be a public purpose, even without the elimination of blight, and upheld the condemnation of the four homes for the office building. But the court said that property could not be condemned when the condemnor did not know what it was going to do with the property in an economic development project. Under those circumstances, the court could not evaluate whether the property was necessary for the eventual use, since the condemnor did not know the use. It was also impossible to determine if there were assurances of future public use, because, again, no one knew the future use, so the court could not say if it was public or not. *See Kelo v. City of New London*, 2002 Conn. Super. Lexis 789 (Conn. Super. March 13, 2002). The trial court stayed the effect of its decision while the case went up on appeal. It is now at the Connecticut Supreme Court.

In the rubber stamp category, the prize, as usual, goes to New York, which upheld the condemnation of several businesses for a new building for the *New York Times*. The project area is more than 20 years old, and an office building for the *Times* was of course not part of the original plan. The current plan gives the *New York Times* and a private development partner a sharp discount over the market rates for office space in New York. Many of the owners challenged the taking, which New York's Appellate Division upheld in the most cursory fashion. *West 41st Street Realty v. New York State Urban Dev. Corp.*, 744 N.Y.S.2d 122 (N.Y. App. Div. 2002). New York's highest court, the Court of Appeals, denied review on the grounds that there was no substantial constitutional question. 2002 NY Lexis 2384 (N.Y. Sept. 12, 2002). Now, at least one owner has petitioned for certiorari from the Supreme Court. Meanwhile, another court in New York issued a one paragraph opinion upholding another condemnation for "creation of the economic development stimulus to influence the redevelopment of the central business district." *Bendo v. Jamestown Urban Renewal Agency*, 738 N.Y.S.2d 615, 616 (App. Div. 2002). Still, there's always hope for New York in 2004.

Overall then, 2002 saw a number of cases restricting the ability of municipalities to condemn property for transfer to private business interests. The caselaw also saw a continuation of the trend of requiring much stricter procedural and statutory compliance in eminent domain proceedings. Redevelopment agencies should take heed of this sea change. As the Connecticut Supreme Court commented, redevelopment areas are not the agencies "perpetual fiefdom."

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