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Condemning Condemnation: Alternatives to Eminent Domain

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EXECUTIVE SUMMARY

The power of eminent domain was granted to governments for the purpose of constructing public infrastructure but has increasingly been used as a redevelopment tool to transfer private property from one owner to another. Although there are legitimate reasons for invoking eminent domain, the current practice of condemning private property in the name of redevelopment is rarely about building public infrastructure and regularly about turning areas that produce little tax revenue into high revenue generators. Taking a property owner's brake shop or barber shop because it is *too small, too old, too ugly*, or another party has a "better" use for the land violates fundamental constitutional principles, creates uncertainty about property rights, and can deter individuals from opening or expanding their businesses.

However, two recent developments are promising. First, in 2003, the Arizona legislature imposed restrictions on the exercise of eminent domain by local governments. The new legislation provides protection by requiring local governments to give several notices to a property owner prior to condemnation. Also, two-thirds of the local governing body must determine that eminent domain is necessary and "critical" to the proposed project. The legislature also restored the term "slum or blighted" and deleted the term "redevelopment" in most relevant Arizona statutes. Second, in 2003, the Arizona Court of Appeals ruled in *Bailey v. Myers* that taking private property from one private party and transferring it to another private party for a private use was unconstitutional. The ruling prompted one Mesa council member to state that the time had arrived to allow the private sector to determine future developments using free market mechanisms.

Across the country, municipalities and developers are finding attractive paths to redevelopment that respect private property rights. Without resorting to eminent domain, the city of Seattle redeveloped its downtown. From 1996 to 1998, the project redeveloped three city blocks, creating more than one million square feet of new retail space known as Pacific Place. Just months after the debut of Pacific Place and the opening of a new Nordstrom department store, downtown retailers experienced a 15.8 percent increase in taxable sales, double the previous average growth rate. Today, Seattle ranks among the top cities of its size when it comes to retail, dining, and entertainment. Seattle's success and the options suggested in this report serve as a starting point for thinking about alternative ways to redevelop without resorting to abuses of the power of eminent domain.

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Introduction: Migration as an Indicator of Success and Failure

“The essence of Government is power; and power, lodged as it must be in human hands, will ever be liable to abuse.” —James Madison

The Fifth Amendment to the U.S. Constitution provides that “No person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.” Such language was designed to limit federal authority and reinforce common law protections of private property. First, the “due process” clause provides protection of private property by ensuring that government will not abuse its police powers. Second, the “takings” clause ensures that any government taking of private property must be for a “public” use and requires fair compensation to the owner.² The language echoes the concerns of Coke, Blackstone, and Locke that government must compensate persons when eminent domain deprives owners of their private property.³

The Arizona Constitution provides further protection by prohibiting the taking of private property for private use.⁴ Only four other state constitutions contain substantially similar language.⁵ The language is supposed to ensure that a broad definition of what constitutes a

“public use” is not read into the power granted to the state.⁶

Courts, however, have given legislative bodies great discretion in determining what constitutes public use. For example, in 1965, the Arizona Supreme Court held in *City of Phoenix v. Civic Auditorium and Convention Center* that public necessity included public convenience and advantage.⁷ In 1972, the court held that condemning property for historic preservation and leasing the property to a private corporation was a public use as well.⁸ Finally, in 1983, the court declared:

It is generally accepted, however, that the taking of property in a so-called slum or blighted area for the purpose of clearing and “redevelopment,” including sale before or after reconstruction to a private person or entity for operation of a public or private business, is a “public use.” We see no reason to depart from this rule.⁹

As a result of that deference, local governments have used the power of eminent domain as a first, rather than last, resort in redevelopment projects.¹⁰ That decision spurred a takings rampage that resulted in more than 3,200 condemnation cases¹¹ being filed across Arizona between 1998 and 2002.¹² Although using eminent domain to

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condemn private property can be legitimate in some instances—such as to build public roads or parks—the process of condemning private property has regularly been about turning areas that produce little tax revenue—such as churches, old neighborhoods, and small businesses—into revenue smorgasbords such as strip malls, Targets, Wal-Marts, and Costcos.¹³ This phenomenon greatly accelerated after the 1954 U.S. Supreme Court case *Berman v. Parker*.¹⁴

In the past few decades, the definition of what constitutes a “public use” has expanded to include privately owned economic development projects because of the supposed benefits of additional jobs and increased tax revenue.¹⁵ Municipal-finance experts have referred to this practice as the “fiscalization of land use.”¹⁶ Property rights advocates view eminent domain abuses as corporate handouts in the guise of economic development.¹⁷

However, two recent developments promise to better protect private property and give cities alternatives to eminent domain. First, the Arizona legislature restricted municipal powers of eminent by requiring that a local government must provide several notices to a property owner prior to condemnation,¹⁸ and two-thirds of the local governing body must determine that eminent domain is necessary and “critical” to the proposed project.¹⁹ Second, the legislature restored the term “slum or blighted” and deleted the term “redevelopment” in most statutory instances.²⁰ These changes are an

important step toward making it more difficult for cities to use redevelopment as an excuse to destroy existing homes and businesses for tax and revenue purposes.²¹

Second, the Arizona Court of Appeals ruled in *Bailey v. Myers* that taking private property from one private party and transferring it to another private party for private use was unconstitutional.²² The case centered on brake shop owner Randy Bailey. The City of Mesa brought a condemnation action to acquire his business in an attempt to turn his property over to a private hardware store operator. In declaring that the City of Mesa’s actions constituted an unconstitutional taking of property, Judge John C. Gemmill stated:

Based on the language of the first and third sentences of Article 2, Section 17 we hold that when a proposed taking for a redevelopment project will result in private commercial ownership and operation, the Arizona Constitution requires that the anticipated public benefits must substantially outweigh the private character of the end use so that it may truly be said that the taking is for a use that is “really public.” The constitutional requirement of “public use” is only satisfied when the public benefits and characteristics of the intended use substantially predominate over the private nature of that use.²³

Property rights advocates view eminent domain abuses as corporate handouts in the guise of economic development.

In making its decision, the court emphasized that the determination of private-versus-public use for purposes of condemnation analysis is a judicial question, not a legislative determination.²⁴ Thus, local governing bodies will no longer have broad discretion to determine which properties can be condemned under eminent domain.

Judges are recognizing that eminent domain abuse not only violates the public trust but also a long-held principle that governments and laws that applies to should not hand out favors and preferences to individuals or identifiable groups.

Meanwhile, courts across the nation are becoming more wary of governmental abuse of eminent domain powers. Proponents of private property rights have achieved significant victories in Illinois, Massachusetts, and Pennsylvania.²⁵ Increasingly, judges are taking city officials to task for trampling on the rights of private property owners.²⁶ Judges are recognizing that eminent domain abuse not only violates the public trust but also a long-held principle that governments and laws should not hand out favors and preferences to individuals or identifiable groups.²⁷ Justice Samuel Chase articulated the principle in 1798: “[I]t is against all reason and justice for a people to entrust [government] with the power to . . . [take] property from A and give it to B.”²⁸ These recent court decisions demonstrate that the tide is turning against eminent domain abuse.

Additionally, proposals to condemn property for the benefit of another private property owner are meeting with more public resistance. For example, in cities around the nation, legal and public pressure have defeated recent attempts to use eminent domain to redevelop. Facing strong public pressure, San Jose,

California dropped plans to condemn property for a regional shopping center.²⁹ Residents of Lakewood, Ohio ultimately voted to remove the “blight” designation from a residential neighborhood after the proposed condemnation of family homes for the benefit of a private developer became national news.³⁰

Case Study: Arizona

The *Bailey v. Myers* decision affirms the principle that government cannot take property from one private owner for the explicit benefit of another private owner. Arizona’s constitution and judiciary, as well as public policy, require that the exercise of eminent domain must withstand careful scrutiny to protect private property from government overreach.³¹ Thus, local governments that have used eminent domain to the compel land transfers from one private entity to another must now consider alternatives.

Getting cities to relinquish their iron-fisted grips on redevelopment will be difficult. Arizona officials credit eminent domain with providing cities with a number of amenities, including Bank One Ballpark in Phoenix, Mill Avenue in Tempe, Mission Palms Hotel in Tempe, the Arizona Cardinals Stadium in Glendale, and the expansion of Sky Harbor Airport in Phoenix.³² This laundry list of highly visible projects suggests to many that successful property redevelopment could not happen without government action.

But the reality is very different. According to Bill Hudnutt, senior fellow at the Urban Land Institute of Washington, D.C., the best thing cities can do to achieve redevelopment is to get out of the way of private developers.³³ It is clear that when property owners realize that the fruits of their labor and investment can be taken away arbitrarily, their productive activity is deterred. The prospect that a city might take an individual's brake shop or barber shop because it is *too small, too old, too ugly*, or another party has a "better" use for the land deters many individuals from opening or expanding their businesses.³⁴

For example, the "redevelopment" label for an area in downtown Scottsdale made it difficult for owners to improve or sell their property.³⁵ Property owners and tenants said that they were reluctant to make major improvements or investments because their property could be condemned at any time.³⁶ The redevelopment designation also kept property owners in limbo because of the fear that their properties would be razed. This lowered property values and made it difficult to sell. It also discouraged reinvestment by private property owners in the area.³⁷ After years of struggling to lift the designation, Scottsdale finally freed downtown property owners from the redevelopment designation.

Gilbert, Arizona, the fastest-growing city in the country, has implemented a policy of purchasing small parcels from voluntary sellers, avoiding the use of eminent domain.³⁸ For instance, the city

is going to spend \$1.4 million to purchase and demolish a downtown apartment complex. Putting aside the issue of whether local governments should be making such investments, the city is not condemning the property, but purchasing it from a voluntary seller.³⁹ Recently, Gilbert officials accepted an offer from Oregano's Pizza Bistro to purchase a parcel owned by the city. The city originally purchased land from private property owners and did not use eminent domain to acquire the property.⁴⁰ Although the process has been fair, some have criticized town officials for not making downtown Gilbert more productive.⁴¹ However, the town's redevelopment policy respects the Constitution and private property rights.

Mesa, borrowing a page from Gilbert's playbook, is considering the possibility of purchasing Bailey's brake shop that was earlier subject to the condemnation action. After the *Bailey* decision, the city did not appeal the appellate court decision. As one council member stated, the time had arrived to allow the private sector to determine future developments using free market mechanisms.⁴² As part of its redevelopment efforts in other areas of the city, Mesa is now considering business improvement districts⁴³ and enhanced code enforcement to revitalize the area around Fiesta Mall.⁴⁴

In 2004, Mesa voters approved adding the requirement that a special public hearing must be held before any property is seized. Once seized, the

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property cannot be sold to a corporation, developer, or resident for 10 years.⁴⁵ The legislation is intended to protect private property rights by ensuring that land that is acquired from one private property owner is not going to be turned over to private developers.⁴⁶ Proponents of such legislation argue that it forces cities to find other methods for acquiring land for the benefit of private developers.

Some Arizona cities are still considering using the power of eminent domain as a primary redevelopment tool. In the past year, Tempe promised private developers that it would use eminent domain to seize land near the Loop 202 freeway for a redevelopment project.⁴⁷ The city has also contemplated seizing private homes in order to transfer land to a developer who wants to build. Nearby Chandler planned to use eminent domain in its downtown redevelopment plans.⁴⁸

Many city leaders and planners have complained that they lack the redevelopment tools that are available in other jurisdictions.⁴⁹ Recent developments in several Arizona cities prove that eminent domain is not necessary to achieving economic redevelopment. The best example, however, involves a city that faced similar constitutional restrictions and nonetheless redeveloped a vibrant downtown: Seattle.

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Case Study: Seattle's Pacific Place

The Arizona Constitution's eminent domain clause, Article 2, section 17, was modeled after a similar provision in the Washington Constitution.⁵⁰ The Arizona Supreme Court has long held that the Washington decisions in cases involving eminent domain are persuasive.⁵¹ Local governments in Washington are subject to the same restrictions that are meant to protect private property from private use.

Similar to the way case law developed in Arizona, Washington courts have failed to clearly delineate when a taking is for private versus public use. For example, the state supreme court held that eminent domain could be used for an expansion of the state convention center because the benefit to a private developer was incidental to the overall public nature of the project.⁵² On the other hand, the Washington State Supreme Court struck down a statute that provided mobile home park tenants a right of first refusal when a park owner decided to sell. In striking down the statute, the court held that the statute itself was invalid, no matter the amount of compensation provided to park tenants, because it transferred a valuable right from one citizen to another.⁵³

Accordingly, it is beneficial to examine how developers in Seattle used land swaps, private investors, and corporate investments, such as Nordstrom's commitment to stay downtown, to convince property owners to join the redevelopment plan. Thus,

Seattle accomplished a redevelopment without using eminent domain.

Redeveloping Downtown Seattle

When Chicago developer Jeffrey Rhodes moved to Seattle he couldn't help but notice the deteriorating state of Seattle's downtown retail district. The historic Frederick & Nelson department store was abandoned in 1992. Two years later, the former I. Magnin building stood vacant across the street. Crime was on the rise and the sidewalks emptied at dusk.⁵⁴ Nordstrom Inc., the national retailer based in Seattle, was considering moving its flagship store and corporate headquarters to Seattle's suburbs.

Mr. Rhodes brought in two former colleagues from Chicago, and Seattle native Matt Griffin, to form Pine Street Associates and implement a private redevelopment plan.⁵⁵ To help finance the project, a group of local investors was formed, including the chairman of Costco Wholesale Corp. and the famous saxophonist, Kenny G.⁵⁶

The group arranged to buy the former Frederick & Nelson building and trade it to Nordstrom for its former smaller store and the adjacent building Nordstrom was using for office space. In addition to rebuilding a parking garage, the plan called for Pine Street Associates to refurbish the old Nordstrom store and fill it with retail and office tenants.

The redevelopment project sparked

a series of separate redevelopment and renovation projects, ranging from the expansion of the Washington State Convention & Trade Center to the construction of Benaroya Hall.⁵⁷ One of the most noticeable improvements was the increased number of national retailers and restaurants that now line the streets. Major retailers such as Niketown, Tiffany & Co. and The Cheesecake Factory occupy key corners.⁵⁸

Today the intersection of Sixth Avenue and Pine Street is at the heart of a resurgent downtown Seattle. The sidewalks fill with pedestrians during peak shopping hours. Around downtown, shops and restaurants stay open into the night. Property crime is down, the population is climbing, and people can be seen walking the streets long after dark.⁵⁹ According to the president of the International Downtown Association, Seattle ranks among the top cities of its size when it comes to retail, dining and entertainment, and attractions.⁶⁰

Downtown Seattle is a redevelopment project that city planners and private developers often cite. Between 1996 and 1998, the project redeveloped three blocks, creating more than one million square feet of new retail space. Just months after the debut of Pacific Place and the new Nordstrom, retailers with downtown stores experienced a 15.8 percent increase in taxable sales, double the average growth rate.⁶² The number of downtown retail jobs grew by an estimated 4.4 percent

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between 1995 and 2000. The center is expected to be 100 percent leased in 2004.⁶³

The resurgence of downtown Seattle can be attributed to numerous factors. However, it began with the new Nordstrom flagship store and the development of Pacific Place. In 1995, Seattle residents voted to reopen Pine street to vehicles in order to increase traffic. Additional clean-up and public safety plans were also implemented. The opening of new stores and additional traffic had a snowball effect on redevelopment. It is little wonder that when Eddie Bauer recently announced that it would be vacating its premises, another retailer quickly moved into the vacant spot.⁶⁴ As one real estate broker described it, “Whether Pacific Place worked is not irrelevant . . . the fact is that it’s there. It changed the entire energy of downtown.”⁶⁵ With such improvements, Seattle’s Convention and Visitors Bureau now advertises the entire downtown area as a visitor attraction.⁶⁶

Case Study: Pittsburgh’s Fifth and Forbes

In 1999, Pittsburgh mayor Tom Murphy proposed a plan to redevelop the city’s downtown. In carrying out the \$500 million proposal, 64 properties would have to be acquired and the overwhelming majority of them would be demolished.⁶⁷ Opponents of the proposed plan criticized it as an abuse of eminent domain and an attempt to give

local businesses to a politically connected developer.⁶⁸ While threatening litigation, the Washington D.C.-based Institute for Justice also waged a battle in the court of public opinion.⁶⁹ After years of activism, opponents of the proposal declared victory when Mayor Murphy announced that the city would not use its condemnation power to redevelop downtown.⁷⁰ In making the decision, the mayor cited downtown Seattle as a redevelopment that was accomplished without the use of eminent domain.⁷¹

Seattle’s redevelopment involved four property owners, but Pittsburgh officials were eyeing a redevelopment area that had more than 60 individual property owners in its footprint. While not all of the properties needed to be acquired—and some of the substantial property owners were already backing the Plan C Task Force proposal—Pittsburgh officials conceded that acquiring all the property without resorting to condemnation would be difficult.⁷² Although there was some speculation that eminent domain would be used, Mayor Murphy continues to insist that it will not.⁷³

Thus, the city is contemplating several different approaches to redeveloping its downtown. Among the various proposals, some have suggested hiring a manager to market the district and its assets as well as starting programs to help local entrepreneurs. Others have suggested investing in safety and “attractiveness” measures to ensure employees and patrons feel comfortable

in the area. Some people are wary of additional government involvement and contend that labeling the area as part of a redevelopment plan places a cloud on the title of businesses in the area. This prevents further investment and disrupts the ordinary free-market from operating.⁷⁴

The proposed use of eminent domain created much controversy in Pittsburgh. As a result, redevelopment has not occurred, and plans and strategies for redevelopment are still being debated. As was the case in Scottsdale, Arizona, threatening to use eminent domain created uncertainty in the market and caused problems for existing businesses. If city officials had considered alternatives to redevelopment that didn't include the use of eminent domain, controversy could have been avoided and residents could be enjoying a revitalized downtown.

Twelve Market Based Alternatives to Eminent Domain

Local governments wishing to use the power of eminent domain to condemn properties for redevelopment face many challenges. They must address impediments in both the courtroom and in the court of public opinion. As Pittsburgh officials learned, legal authority to undertake a project doesn't guarantee support in the court of public opinion. Additionally, recent attempts in Arizona indicate that city-driven redevelopment efforts often fail.⁷⁵ Thus,

alternatives must be considered.

The most effective land-assembly and purchasing techniques are unavailable to the public sector. Local governments cannot assemble contiguous parcels or purchase property through the use of straw buyers, as modern developers often do.⁷⁶ Additionally, most successful land assemblages not using eminent domain are accomplished prior to project publicity, through a series of parallel purchases or negotiations with property owners on an independent basis. Ordinarily, public proposals for redevelopment projects may not be as successful as those in the private sector because of publicity and heightened expectations.⁷⁷ Publicly led projects may also have a higher potential for holdouts, inflated asking prices, and settlement costs.⁷⁸

Without using the power of eminent domain, city officials and developers must structure arrangements to the satisfaction of the property owners. So, before developers attempt to assemble land needed for a redevelopment projects, they need to conduct exploratory interviews with individual owners whose properties are located in the footprint of the proposed project. Closing the deal requires treating property owners with fairness, dignity, and respect, and making a good faith effort to accomplish the owner's objectives. Serious attempts to understand needs, objectives, and overall willingness to participate must be made if the proposed project is to succeed.

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Developers and local governments can also use creative land assembly techniques that do not rely on eminent domain or the condemnation of any property. A discussion of such methods follows. These methods are a starting point and not comprehensive. Other, more creative contractual arrangements may be structured when a property owner has special needs that must be accommodated. In many of the transactions, an arrangement for preferential occupancy treatment could be negotiated. This often happens when an existing retailer is willing to sell the property required for the redevelopment project and wishes to be a tenant in the completed project. The retailer's concerns could be worked out as a separate contractual agreement or may be included in the real estate conveyance.

The following methods allow projects to proceed without resorting to eminent domain and without trampling on the property rights of those in the shadow of the project.⁷⁹

Negotiated Purchase

The simplest acquisition technique is to negotiate the fee simple transfer of the property from the present owner to the developer.⁸⁰ Purchase agreements can involve various contingencies, options, rolling options, or other triggering techniques that allow both parties the time necessary to accomplish various due diligent efforts or adjust to changing circumstances. Contract purchase agreements can also delay settlement

periods and tax events; use or occupancy agreements with provisions to transfer title later can also be structured; purchase money mortgages or other financing techniques can accommodate the specific cash flow desires of buyer or seller; but usually property purchase agreements presume conveyance of title and cash at settlement, with settlement occurring in the near future.

Long-Term Lease

Conveyance of use and development rights without conveyance of title is often accomplished with a long-term lease. The lease term is often 99 years, or at least a period long enough to cover the amortization of debt on the original development with at least one, and possibly more refinancing periods.⁸¹ A lease transaction can avoid an otherwise onerous tax event for the seller, and can avoid the buyer's need to finance a larger amount of up-front cash. Sellers often want to incorporate a future revenue stream into estate or corporate planning rather than have a cash asset. Leases also often countenance a property value that may be higher than the predevelopment fair market value of the property, providing an additional benefit to the existing property owner, or lessor. Leases also provide additional flexibility that can favor one or more parties involved in the transaction, and often overcome a key financing obstacle that might otherwise make the project infeasible.⁸²

Escalating Leases

A long-term lease instrument can

also be structured with a lower up-front payment that may be more in line with the current property value, and with an escalating payment stream that recognizes certain value created on the property by the redevelopment project. Escalation periods can be arbitrary, at the five- or ten-year anniversaries of the lease, for example, or they could be tied to milestones in the redevelopment project (construction completion, leasing 75 percent of the space, gross or net revenue thresholds, etc.).⁸³

Participating Lease or Performance-Based Lease

This lease is typically structured around the presumption of value created by the reuse or redevelopment of the property. It gives the lessor a greater stake in the project's success, and could include other upward or downward adjustments in land rent payments depending upon project performance. Payments could be tied to gross or net revenue streams, be in superior or inferior positions in the hierarchy of operating expense obligations, and can otherwise be structured to provide greater returns to the property owner in the event of a highly successful, profitable redevelopment project.

Convertible Lease

A convertible lease may include one or more buyout provisions, often at the option of the lessee, or it can include provisions to convert a leasehold interest into an ownership position at predetermined points or performance

thresholds in project maturation. For example, normal lease payments might be made from developer to owner during the first few years while the new project is constructed. At a predetermined occupancy threshold, for example, 75 percent of the space leased, landowners may have the option to convert their interest into ownership positions in the project, with potential for larger payments through distributions. That ownership interest could be an appreciating capital asset that allows the original owner to "cash out" when there is a refinancing or sale of the project.⁸⁴

Partnership

The property owner could become a partner with the developer, and as a general partner, would be at risk for certain future events (e.g., could be required to provide cash at future cash calls if the development needs them; would participate in value creation as the project succeeds; could result in significantly larger capital asset value and remuneration in the event of refinancing or sale). The developer can still exercise a necessary measure of control over the development and leasing process by becoming the managing general partner.

Limited Partnership

A more often used mechanism is a limited partnership structure whereby the owner's property is put into the agreement and converted to a certain number of limited partnership shares

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through a valuation and negotiation process. The limited partner may be insulated from future cash calls and downside liability, but may also have a predetermined participation that requires a highly successful project for adequate or anticipated remuneration. The property owner clearly has less control, but also much less risk and less initial cash demands, but would conceivably benefit greatly in the event of a highly successful development. In essence, the property owner is “betting” on the strength of the market, ability of the developer, and ultimate success of the project.

Joint Venture

A number of joint venture structures are possible. Basically, the property owner is considered a co-developer who brings land to the deal and could be required to bring other assets such as cash or loan guarantees. Again, the developer may control the construction and leasing process through the joint venture structure, but generally the joint venture partner has greater risk and greater profit potential than under many other partnership structures.

Corporate Structures

Land required for a development could be converted into shares in a stock corporation that is established solely for that development project. Remuneration would be through the dividend mechanism, as well as through value appreciation of the stock as the project succeeds. If the property owner is

primarily interested in an asset play rather than initial cash flow, this mechanism could be favored. However, the property owner is again “betting on the development” for eventual compensation for his or her property asset.

Preferred Stock Deal

A project-based corporation could be structured with a preferred stock issue, with a certain number of preferred stock shares transferred to a party in exchange for land assets. The preferred stock could receive preferential treatment in the form of dividends and distributions that are more favorable than those associated with the corporation’s common stock. Various conversion and buyout provisions could also be included.

Land Swap

If the property owner is in the real estate business, or is a retailer who is actively seeking an alternate location, some type of land swap arrangement may be preferred. The developer could purchase another property, conceivably at the owner’s request, and immediately swap that property, perhaps with the retailer’s desired improvements in place. A swap might also involve other properties or other assets of the developer in more complicated arrangements.

Tax-Free Transfer

A swap can also be structured as a

“like-kind exchange,” or tax-free transfer, allowing the property owner to avoid or minimize an otherwise onerous tax event. In the instance of value differences between the two properties, a partial payment or “boot” can cover the value difference.

partnerships, joint ventures, and land swaps. By employing methods that don't rely on eminent domain, governments not only respect the rights of property owners, but ensure stability within the market.

Conclusion

Experiences in cities such as Seattle and Gilbert are demonstrating that eminent domain does not need to be the primary tool for urban redevelopment. These successful redevelopments demonstrate that alternatives to eminent domain are not only available, but effective.

Downtown Seattle's successful redevelopment is an example to other communities. The redevelopment project moved ahead without the local government resorting to eminent domain. As a result of improvements, Seattle ranks among the top cities of its size when it comes to retail, dining, and entertainment. Downtown retailers have experienced increased sales and the number of retailers is growing. With such improvements, the Seattle visitor's bureau is now advertising the entire downtown as a visitor attraction.

Local governments and developers can learn from the Seattle example and use creative land assembly methods that do not require the use of eminent domain. Such methods include private investment, escalating leases, limited

The added market stability that results from using alternatives to eminent domain is not only a benefit to property owners, developers, and local economies, but it demonstrates that the government's role in maintaining a successful economy should be to protect private property owners and investors, not to confiscate and reallocate at will. When government powers of eminent domain and burdensome regulation are restrained, redevelopment and revitalization can likely be more efficient and successful.

Local governments and developers can learn from the Seattle example and use creative land assembly methods that do not require the use of eminent domain. The added market stability that results is a benefit to property owners, developers, and local economies.

NOTES

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1. James Madison, Speech in the Virginia State Convention of 1829-1830, on the Question of the Ratio of Representation in the two Branches of the Legislature, December 2, 1829 (Madison, 1865, IV).
2. The term “public use” has been broadly construed by federal courts. However, two recent decisions in the Ninth Circuit provide hope. In *99 Cents Stores v. City of Lancaster*, 237 F. Supp.2d 1123 (C.D. Cal. June 27, 2001), the U.S. District Court permanently enjoined Lancaster from initiating eminent domain proceedings against a 99 Cents Store for the purpose of expanding a Costco onto the property. The court held that taking private property for private use is unconstitutional no matter the amount of compensation provided. The Federal District Court reached a similar decision in *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp.2d 1203 (C.D. Cal. August 6, 2002). In enjoining the city’s eminent domain proceedings, the court recognized that the “public use” requirement is an explicit limit on the power of government to take private property.
3. Bernard H. Siegan, *Property Rights: From the Magna Carta to the Fourteenth Amendment*, (New Brunswick: Social Philosophy and Policy Center, Transaction Publishers, 2001) 112.
4. Ariz. Const. Art. 2, § 17, “Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made. . . . Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.”
5. State constitutions with similar eminent domain clauses are Washington, Colorado, Mississippi, and Missouri. See James M. Dolliver, “Condemnation, Credit and Corporations in Washington: 100 Years of Judicial Decisions—Have the Framers’ Views Been Followed?” 12 *U. Puget Sound L.Rev.* 163, 175 n. 52 (1989).
6. In *Inspiration Consol. Copper Co. v. New Keystone Copper Co.*, 16 Ariz. 257, 260, 144 P. 277, 278 (1914), the Arizona Supreme Court stated that “[Public use] instead of having a common definition, because of local conditions, has acquired at least two

meanings; one is user or right of use by the general public without the consent of the owner, and the other is public welfare, or public benefit or advantage. These definitions have been adopted in the different jurisdictions as the local conditions and necessities demanded . . . but no such necessity exists under our Constitution.”

7. *Phoenix v. Phoenix Civic Auditorium & Convention Ctr. Ass’n*, 99 Ariz. 270 (1965).

8. *Cordova v. Tucson*, 16 Ariz. App. 447 (1972).

9. See *Cordova v. City of Tucson*, 16 Ariz.App. 447, 449,494 P.2d 52, 54 (1972); 2A Nichols, Eminent Domain § 7.51561 (3d ed. 1981). *City of Phoenix v. Superior Court ex rel. County*, 137 Ariz. 409 (1983).

10. In 1997, the Arizona legislature provided local governments an additional tool to threaten property owners. The “redevelopment statues” authorize municipalities to use eminent domain to acquire real or personal property necessary or incidental to a redevelopment project. This legislation was changed in 2003.

11. “Condemnation” is the process of taking private property for public use by the state or other local governmental body through the power of eminent domain.

12. For more on eminent domain abuse nationally, see Dana Berliner,

“Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain,” Castle Coalition (April, 2003). The report details that from 1998 through 2002, government bodies filed or threatened to file condemnation actions in over 10,000 cases for the benefit of private parties.

13. Steven Greenhut, “The Blight of Eminent Domain,” *Ideas On Liberty*, Foundation for Economic Education’s Monthly Magazine, September, 2002.

14. *Berman v. Parker*, 348 U.S. 26 (1954). Originally, the U.S. Supreme Court took a much narrower view of what constituted a “public use.” See *Kohl v. U.S.*, 91 U.S. 367 (1875) where the Court held that the government could exercise eminent domain when it was “important to appropriate lands or other property for its own purposes, and to enable it to perform its functions—as must sometimes be necessary in the case of forts, light-houses, and military posts or roads.” The Court explained that eminent domain was a right belonging to a sovereignty to take private property for its own uses, and not for those of another.

15. Tim Jones, “Eminent Domain Battles Heat Up; What is Public Good?,” *Chattanooga Times Free Press*.

16. Ibid at note 11.

17. “Nationwide Trend: Judicial and Grassroots Movement Curbing Eminent Domain Abuse; Recent Victories in

Arizona and New York Accompanied by Ohio and Connecticut Lawsuits and *60 Minutes* Coverage,” Institute for Justice Web Release (October, 2003).

18. Ariz. Rev. Stat. §§ 36-1473(B), 1474(B), 1479(E) and 36-478(B).

19. Ariz. Rev. Stat. §§ 36-1487(B) and (C); 36-1474(A)(3)(d).

20. Ariz. Rev. Stat. §§ 36-1476.

21. According to the House Fact Sheet for HB 2308 (2003), the legislation provides that areas within a municipality that “constitute a serious and growing menace, injurious and inimical to the public health, safety, morals and welfare of the residents” may be acquired by a municipality to eliminate such conditions. Local governing bodies must designate a redevelopment area by adoption of a resolution. Redevelopment plans must include the boundaries of the redevelopment area, a map, a land use plan, anticipated costs, a proposed method of financing and a method for relocation for individuals displaced by the plan. The plan must then be forwarded to a planning commission for review and recommendation and public notice and hearings are required. Laws 1997 (Chapter 132) relating to redevelopment changed all statutory references to slum and blighted areas as “redevelopment areas.” HB 2308 restores all statutory references to slum and blight areas and imposes limitations and conditions on municipal use of eminent domain powers.

22. *Bailey v. Myers*, 76 P.3d 898 (Ariz. App. Div. 1 2003). City of Mesa brought condemnation action against Bailey’s Brake Service in order to acquire property for a redevelopment project. Bailey counterclaimed, alleging that the action was unconstitutional. Maricopa County Superior Court judge Robert D. Myers entered judgment for City of Mesa. Bailey petitioned for special-action relief. Arizona Court of Appeals judge John C. Gemmill vacated the trial court’s order, and held that the city’s taking of property was not for “public use.”

23. *Ibid.* The holding is based on the language of the first and third sentences of *Ariz. Const.*, Art. 2 § 17. First sentence: “Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes.” Third sentence: “Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.” The determination of private-versus-public use for purposes of condemnation analysis is a judicial question, not a legislative determination.

24. *Ibid.*

25. In *Southwestern Illinois Development Authority v. National City Environmental*, 768 N.E.2d 1, 24-26

- (Ill. 2002), the Illinois Supreme Court refused to accept the redevelopment authority's argument that the use of eminent domain to increase economic growth was a public use. In *City of Springfield v. Dreison Investments*, 2000 Mass. Super. Lexis 131 (Mass. Super. Feb. 25, 2000), the Massachusetts Superior Court found that the "all-consuming" goal of attracting a baseball team was primarily for private interests and disallowed a taking of private property to build a private baseball stadium. The Pennsylvania Commonwealth Court reached a similar result in *Condemnation of 110 Washington St.*, 767 A.2d 1154 (Pa. Commw. Ct.), review denied, 2001 Pa. Lexis 1544 (July 19, 2001). The court held that it was an unconstitutional delegation of authority to provide condemnation power to a private developer.
26. William R. Maurer, "The Westlake Project was the subject of a number of lawsuits that ended up at the state supreme court and the City only proceeded in a constitutionally legitimate way after getting taken to the woodshed by the folks in black robes." Maurer is an attorney and executive director of the Institute for Justice Washington State Chapter (2003).
27. Bernard H. Siegan, *Property and Freedom: The Constitution, the Courts, and Land-Use Regulation*, (New Brunswick & London: Transaction Publishers, 1997).
28. *Calder v. Bull*, 3 U.S. 386 (1798).
29. Sharon Simonson, "City quits court battle with Tropicana owners," *Silicon Valley Business Journal*, October 22, 2003. See also, Timothy Roberts, "Tropicana owners to fight eminent domain vote," *Silicon Valley Business Journal*, November 22, 2002.
30. V. David Sartin, "Developers want tax break for Lakewood retail project," *Plain Dealer*, April 20, 2004, B4.
31. *Bailey v. Myers*, 76 P.3d 898 (Ariz. App. 2003).
32. Alia Beard Rau, "Eminent Domain Gets New Scrutiny: Property Owners Hope Ruling Boosts Cases," *Arizona Republic*, October 3, 2003, B8.
33. Peter Corbett, Elvia Diaz, and Catherine Reagor-Burrough, "Downtown at a crossroads: Business leaders fear stagnation, push development," *Arizona Republic*, June 9, 2002. ("Phoenix must offer tax incentives, expedite zoning changes and get out of the way of the private sector." Statement of senior fellow Bill Hudnut, Urban Land Institute of Washington, D.C.).
34. By threatening condemnation or including properties within a "redevelopment" district, private property owners are deterred from making investments or improvements to their properties. See Laurie Roberts, "City lifts Noose but Keeps Gallows Intact," *Arizona Republic*, June 13, 2001.
35. A similar designation in San Jose, California resulted in the Santa Clara

- County Association of Realtors warning that homes located within a new “Strong Neighborhoods Initiative” boundary would be difficult to sell and may lose their value as a result. See Sharon Simonson, “Realtors fear effect of city plan,” *Silicon Valley Business Journal*, September 20, 2002.
36. NE Valley Editorial, “End Condemnation Threat,” *Arizona Republic*, August 31, 2002.
37. Jason Emerson and Bill Bertolino, “Study Cites Eminent Domain Abuses,” *East Valley Tribune*.
38. Brian Powell, “Remarks Rile Gilbert Officials,” *East Valley Tribune*, September 26, 2003.
39. Brian Powell, “Gilbert Eyes Area for Redevelopment,” *East Valley Tribune*, March 15, 2003.
40. Brian Powell, “Gilbert accepts Oregon’s Proposal,” *East Valley Tribune*, April 7, 2004.
41. *Ibid* at 38.
42. Editorial, “A New Direction: Thwarted Redevelopment Goal Means a Better One Can Evolve,” *East Valley Tribune*, October 11, 2003.
43. A “business improvement district” is an area where local businesses agree to tax themselves to pay for litter control, advertising and special events.
44. Jason Emerson, “Can Fiesta Mall be Saved?,” *East Valley Tribune*, April 15, 2004.
45. Jason Emerson, “Mesa Voters Limit Eminent Domain,” *East Valley Tribune*, March 10, 2004.
46. Alia Beard Rau, Elvia Diaz, and Tom Zoellner, “Cities, property owners face off over bill to limit eminent domain,” *Arizona Republic*, April, 9, 2003.
47. Alia Beard Rau, “Dueling Over Dirt, Irked Landowners Thwart Tempe Project,” *Arizona Republic*, February 25, 2004.
48. Jason Emerson and Bill Bertolino, “Eminent domain win buoys homeowners,” *East Valley Tribune*, October 3, 2003.
49. Kristen Go, “Redevelopment is key to the future,” *Arizona Republic*, March 28, 2003.
50. Toni McClory, *Understanding the Arizona Constitution*, (The University of Arizona Press, 2001), 26.
51. *Bailey v. Myers*, 76 P.3d 898, 903-904 (Ariz. App. Div. 1 2003) “In addition to our independent analysis of Article 2, Section 17, we also recognize that this constitutional language was derived from and is nearly identical to a provision in the Washington Constitution, and our supreme court has long held that decisions from that state, although not controlling, are quite

- persuasive. See *Solana Land Co. v. Murphey*, 69 Ariz. 117, 124, 210 P.2d 593, 597 (1949); *Cienega Cattle Co. v. Atkins*, 59 Ariz. 287, 292, 126 P.2d 481, 483 (1942). The Washington Supreme Court has “consistently held that ‘a beneficial use is not necessarily a public use.’ *Manufactured Housing Communities of Washington v. State*, 142 Wash.2d 347, 13 P.3d 183, 189 (2000) (citations omitted). We agree.”
52. *State of Washington v. Evans*, 966 P.2d 1252 (Wash. 1998).
53. *Manufactured Housing Communities v. Washington*, 13 P.3d 183 (Wash. 2000).
54. Todd Bishop and Christine Frey, “Resurgent downtown still faces challenges,” *Seattle Post-Intelligencer*, Monday, February 10, 2003. “You could clearly do some great shopping there—as long as you were looking for stuff that was illegal.” (quote from developer Matt Griffin).
55. Ibid.
56. Costco Wholesale Corp. Chairman, Jeffrey Brotman. (The investors were joined by the Multi-Employer Property Trust pension fund).
57. Supra note 54.
58. Ibid.
59. Ibid.
60. Ibid. “If you look at what Seattle has accomplished, it certainly is one of the best success stories that we have to tell.” (quote from David Feehan, president of the International Downtown Association).
61. Data from the City of Seattle’s finance department.
62. Puget Sound Regional Council analysis of state Employment Security Department data.
63. “Malls expand in expectation of retail rebound,” *Puget Sound Business Journal*, January 2, 2004.
64. “Downtown Opportunity,” *The Seattle Times*, November 17, 2003, p.B6.
65. Ibid at 54.
66. Ibid.
67. Dan Fitzpatrick, “Fifth/Forbes Market Place planners answer their critics,” *Pittsburgh Post-Gazette*, October 22, 1999.
68. Tom Barnes, “D.C. group says city abuses eminent domain,” *Pittsburgh Post-Gazette*, March 1, 2000.
69. The Institute for Justice is a libertarian law firm that litigates cases involving economic liberty, free speech and property rights. Its grass roots campaign against eminent domain abuse in Pittsburgh included billboards and public forums.

70. Tom Barnes, “Murphy backs off eminent domain Aims to win support of Fifth/Forbes foes,” *Pittsburgh Post-Gazette*, November 28, 2000.

71. Dave Copeland, “Seattle can identify with Pittsburgh’s Plan C,” *Pittsburgh Tribune-Review*, April 4, 2002. “I would encourage you to go look at other cities in America, because you can see the good of what can happen and the bad of what can happen. There are areas in Seattle that looked very similar to Fifth and Forbes five or seven years ago that have been completely rejuvenated.” Quote from Tom Murphy, Mayor of Pittsburgh, Pennsylvania.

72. Ibid. “I believe it will be difficult, and I think finding a developer willing to go forward without eminent domain will be difficult, but the mayor is very adamant that he doesn’t want to use eminent domain.” Quote from Mulugetta Birru, Executive Director, Urban Redevelopment Authority.

73. “Murphy responds to Plan C report, rules out eminent domain,” *Pittsburgh Business Times*, April 2, 2002.

74. Patricia Lowry, “Proposals abound for Fifth and Forbes,” *Pittsburgh Post-Gazette*, February 8, 2004.

75. Jordan R. Rose, “Eminent Domain Abuse in Arizona: The Growing Threat to Private Property,” Goldwater Institute Policy Report no. 174, August 16, 2002.

76. The term “straw buyer” is referred to in commercial and property contexts when a transfer is made to a third party, (the straw buyer) simply for the purpose of retransferring to the transferor in order to accomplish some purpose not otherwise possible or permitted.

77. Robert Robb, “Count on city-driven projects to fail,” *Arizona Republic*, September 21, 2001. Editorial writer Robert Robb discusses several public project failures including those in Scottsdale, Mesa, and Tempe.

78. A “holdout” is a property owner who refuses to sell their property. Recent examples include five property owners in Cincinnati who refused to sell their property to developers who wanted to transfer their neighborhood into a blend of new shops, homes and office buildings. See, Ken Alltucker, “Rookwood is link in I-71 chain of development,” *Cincinnati Enquirer*, April 17, 2004. Another holdout situation has developed in Bristol, Connecticut where two elderly family members refuse to vacate their house. See Ken Byron, “Mayor: Holdouts to be leaving soon,” *Hartford Courant*, April 14, 2004.

79. Many of these techniques were proposed by a developer for bringing property into downtown Pittsburgh’s redevelopment plan. Donald E. Hunter, Hunter Interests Inc., February 26, 2002. Plan C Task Force Memorandum proposing techniques other than eminent domain for bringing property into a redevelopment project.

80. Fee simple is a freehold estate of virtually infinite duration and of absolute inheritance free of any condition, limitations, or restriction to particular heirs. See *Coleman v. Shoemaker*, 78 P. 2d 905, 907 (Kan. 1938).

81. Refinancing periods, e.g., 50 or 60 years.

82. Most leases require subordination, which is an additional risk, but a risk often accepted by lessors who view the conveyance as similar to a sale.

83. Leases can also have kickers or cash payments made from lessee to lessor at predetermined times or events in the maturation of the subsequent redevelopment project.

84. Sometimes a “put-call” arrangement is structured when the project performance stabilizes, where the developer has to buy out the landowner at a predetermined price or a value determined then (inflated value), or a property owner has to convert his/her interests into equity then.

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