

MEMORANDUM

TO: W. Calvin Horton, Town Manager
FROM: Ralph Karpinos, Town Attorney
SUBJECT: Wicked Burrito and Exercise of the Power of Eminent Domain
DATE: March 25, 2005

The purpose of this memorandum is to provide information related to a petition presented to the Town Council regarding the Wicked Burrito property on West Franklin Street.

BACKGROUND

On February 14, 2005, the Chapel Hill Downtown Economic Development Corporation submitted a petition asking the Town Council to “consider condemnation procedures with respect to the Wicked Burrito property located on West Franklin Street.” A copy of the petition is attached.

The term “condemnation” may refer to two separate types of legal proceedings in North Carolina:

1. The term can refer to the determination by a public authority that a particular property, usually a dwelling or commercial structure, has so deteriorated that it is no longer safe for the property to continue to be occupied and used for its intended purpose. Under such circumstances the property is posted with a notice that it is condemned. Measures are required to either secure such a structure or, if certain conditions are met, have the structure demolished. I understand that the Wicked Burrito property has been inspected and that you have or will soon receive a report from the Inspections Department regarding the condition of this structure.
2. The term “condemnation” also can refer to the exercise by a public authority of the power of eminent domain. This memorandum addresses this second meaning of the term “condemnation” and its possible application to the West Franklin Street property.

DISCUSSION

Municipalities in North Carolina are created by and receive their authority from the North Carolina Legislature. Among the powers of municipalities granted by the General Assembly is the power of eminent domain. Eminent domain refers to the power of governmental agencies

(and public utilities) through the filing of a legal proceeding in Court, to take privately owned property or an interest in such property, from a current owner who does not wish to voluntarily sell the property to that authority, for a public use and the obligation to pay just compensation for the interest so acquired.

State statutory authorization for the exercise of eminent domain does not include the use of such power for economic development projects. Please see the attached excerpt from **Economic Development Law for North Carolina Local Governments** (Lawrence, UNC-CH Inst. of Gov't, 2000). Thus, if the Town were interested in acquiring this property for economic development purposes, assuming a voluntary purchase were not possible and condemnation (eminent domain) were necessary, a local bill would need to be enacted by the General Assembly.

Moreover, even if the Town were to ask for legislative authority for this purpose, there is a substantial constitutional question regarding the use of the power of eminent domain for economic development. A case argued just last month in the Supreme Court of the United States may provide guidance on this question. Please see the Lawrence excerpt and the attached news account of the recently argued case.

The property does not qualify for acquisition through eminent domain under the State's Urban Redevelopment Law, Article 22, Chapter 160A, North Carolina General Statutes. That law is intended to provide a way to respond to "blighted areas", defined as areas with a "predominance of buildings" in a state of "deterioration, dilapidation or obsolescence".

An alternative to acquiring the property through eminent domain for economic development would be for the Town to determine that the property were needed for some Town use, such as a police substation, Town Hall annex or as a downtown pocket park. Clearly the Town would have the statutory and constitutional authority to use eminent domain if the property were needed for such a use. I would be concerned, however, if the "need" of this property for such a use were to be developed in response to the petition.

CONCLUSION

The Town does not currently have the statutory authority to acquire this property using eminent domain for economic development. The constitutionality of such an action is an open question.

roads and other kinds of private companies.²⁵ Perhaps significantly, government made these investments to further economic development.²⁶ These earlier practices, however, may offer less support than they appear to at first. That the state or local governments may own shares in a railroad corporation, a type of enterprise already quasi-public in character, does not necessarily mean it may own shares in a corporation that manufactures railroad engines.

Third, economic development programs frequently seek to provide financial assistance to small businesses, which are recognized as vital generators of new jobs.²⁷ One way of doing so is to make loans to such businesses or to subsidize private loans made to them.²⁸ But small businesses are often in fragile financial condition and may have difficulty in repaying loans; many don't meet loan underwriting standards. If a government's goal is to help such businesses financially, providing equity rather than loans may be the most feasible way of doing so.

Finally, in *Maready* the state supreme court seemed to want North Carolina and its local governments to be on a level playing field with other states in the economic development realm. Seemingly the court's policy is that in the absence of a specific constitutional bar, if other state or local governments are using an important economic development tool, North Carolina and its local governments should not be prohibited from using the same tool.²⁹ Other states operate economic development programs that support companies by acquiring equity interests;³⁰ to be able to compete, North Carolina governments should have the same capability.

Eminent Domain for Economic Development

The *public purpose* doctrine limits governmental expenditures. The closely related *public use* doctrine limits government's power of eminent domain. Just as government may not expend moneys on activities that do not serve a public purpose, so too it may not condemn property for projects that do not serve a public use. The *Maready* litigation determined that it was a public purpose for a local government to expend public moneys on economic development incentives. The case did not directly address whether it would serve a public use if a local government were to use its power of eminent domain to condemn a site for an industrial location or expansion, but the litigation may have indirectly answered that question in the affirmative as well. Although there is no current statewide authority for local governments to use eminent domain for economic development projects, the General Assembly has enacted at least one local act permitting this use of eminent domain, and therefore the issue of constitutionality may well arise.³¹

Arguments in Favor of Constitutionality

In recent years the North Carolina Supreme Court has treated the terms *public purpose* and *public use* as essentially synonymous. For at least fifty years, the court has regularly used *public purpose* in discussing whether a government could condemn for a particular project, blurring any distinction between the two doctrines.³² More recently, in a 1960 eminent domain case, the court not only used the terms interchangeably, it also cited a public purpose case (involving the constitutionality of an expenditure) in support of its conclusion that condemnation for an urban renewal project did serve a public use and was therefore constitutional.³³ Finally, in 1968 the court used the congruence of the two terms to support its first decision invalidating industrial revenue bonds. In *Mitchell v. N.C. Industrial Development Financing Authority*,³⁴ the court wrote:

In passing upon the validity of an act, this Court must consider the consequences of its decision. Were we to hold that Authority serves a public purpose when it acquires a site, constructs a manufacturing plant, and leases it to a private enterprise, we would thereby authorize the legislature to give [the] Authority the power to condemn private property as a site for any project which it undertook.³⁵

The court now has held that it is a public purpose to subsidize industries in order to further economic development. If future decisions follow the logic of the *Mitchell* opinion, it also now would be a public use to use condemnation to acquire sites for industries, again in order to further economic development.

Upholding eminent domain for economic development would accord with the case law in about half the states that have considered the issue. Four cases illustrate the decisions that uphold condemnation for economic development projects. In *Prince George's County v. Collington Crossroads, Inc.*,³⁶ the Maryland Supreme Court upheld the use of eminent domain to acquire the site for a 323.5-acre county industrial park. In *Poletown Neighborhood Council v. City of Detroit*,³⁷ the Michigan Supreme Court upheld the use of eminent domain to acquire several thousand acres to be conveyed to General Motors for a new Cadillac automobile assembly plant.³⁸ In *City of Duluth v. State*,³⁹ the Minnesota Supreme Court upheld condemnation of an existing (but currently unused) industrial facility in order to provide a site for a privately owned paper mill, noting the congruence of public use and public purpose.⁴⁰ And in *City of Jamestown v. Leever's Supermarkets, Inc.*,⁴¹ the North Dakota Supreme Court upheld the use of eminent domain to acquire downtown parking lots to be conveyed to the developers of a new grocery store.⁴²

Arguments against Constitutionality

Despite the existing pattern of equating public purpose and public use, and despite the national case law that supports eminent domain for economic development projects, the North Carolina courts still might refuse to extend *Maready's* public purpose holding to eminent domain. After all, there is something unsettling about a government condemning property owned by private owner A simply because the government believes that future private owner B could use the property more productively.⁴³ The court's equation of public purpose and public use in *Mitchell* was to some extent rhetorical: making the equation strengthened the court's argument against the constitutionality of industrial development bond financing. In discussing eminent domain in *Mitchell*, moreover, the court went on to argue: "That the power of eminent domain should or could ever be used in behalf of a private interest is a concept foreign to North Carolina, and it transcends our Constitution."⁴⁴ That attitude toward the use of eminent domain might well outlast the court's change of heart about the constitutionality of expenditures for economic development.

A comparable constitutional attitude lies behind those cases from other states that have rejected use of eminent domain for economic development. For example, in *City of Little Rock v. Raines*,⁴⁵ the city proposed to condemn property in order to develop an industrial park; the Arkansas Supreme Court held that the condemnation did not serve a public use. Similarly, in *Karesh v. City Council of City of Charleston*,⁴⁶ the city proposed to condemn a half block of downtown property and then lease the property for up to sixty years to the private developer of the remaining half of the block, who would construct and operate a parking deck and convention center on the site. The South Carolina Supreme Court viewed the long-term lease as equivalent to conveying the fee and held that it was not a public use to condemn the site for the benefit of the private developer. The developer planned to include street-level shops in the parking structure, and the court remarked that "[w]e cannot constitutionally condone the eviction of the present property owners by virtue of the power of eminent domain in favor of other private shopkeepers."⁴⁷

Each state that has rejected eminent domain for economic development has upheld expenditures for the same purpose. That is, the courts in those states have used a different standard for public purpose than for public use. Some of those courts have explicitly uncoupled public purpose and public use in order to distinguish between expenditures for economic development and eminent domain for that purpose. A set of cases from Maine are illustrative. In *Opinion of the Justices*,⁴⁸ the Maine Supreme Judicial Court held that the city of Bangor's proposal to condemn land within an industrial district for reconveyance to manufacturing companies would serve neither a public purpose nor a public

use. The court supported its holding with the common argument that government should not condemn one private use for the sole purpose of helping another:

An existing shoe factory or paper mill, let us say, within the proposed industrial area or park could not, for reasons clear to all, be authorized under our Constitution to acquire additional facilities by eminent domain. That such a course could well be of great value to the particular enterprise and so to the city or community would not affect the application of the law.⁴⁹

Twenty-five years later, however, the Maine court was willing to uphold expenditures for economic development projects, even when those expenditures directly benefited a private company. In *Common Cause v. State*,⁵⁰ the court allowed both the state and the city of Portland to spend large amounts of money in order to bring a ship-building facility to Portland's harbor. In explaining its conclusion, however, the court emphasized that it no longer equated public purpose with public use; its holding allowing expenditure of public moneys did not thereby offer support for eminent domain for comparable projects.⁵¹ Although current North Carolina case law supports holding that condemnation for an economic development project serves a public use, it remains possible that North Carolina courts could, like those of Maine, uncouple public purpose and public use when and if a case reaches the appellate level.⁵²

Property Tax Exemptions and Abatements

The Constitutional Provisions

State and local governments throughout the country use property tax exemptions and abatements as an economic development incentive. Exemptions, which remove a class of property from the property tax base, are normally established by statewide legislation; abatements, which reduce or forgive property taxes for several years, often are granted by local government and apply only to specific parcels of property or to the property of a single owner. Abatements often are given through a contract under which a private company makes an investment on the property in return for a specific abatement. In South Carolina, for example, a manufacturing company that constructs a new plant or expands an existing plant with an investment of at least \$50,000 is eligible for an abatement from county and municipal property taxes for up to five years. In addition, South Carolina law permits abatements for significant investments in distribution facilities, research and development facilities, and corporate headquarters and office facilities.

The North Carolina General Assembly has enacted a number of statewide

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Land war goes before Supreme Court

Homeowners ask justices to block city's use of eminent domain

From Bill Mears
CNN Washington Bureau

WASHINGTON (CNN) -- A fight by homeowners to save their New London, Connecticut, neighborhood from city officials and private developers -- an important property rights case with an unusual twist -- will reach the U.S. Supreme Court on Tuesday.

At issue is whether governments can forcibly seize homes and businesses, for private economic development. Under a practice known as eminent domain, a person's property may be condemned and the land converted for a greater "public use." It has traditionally been employed to eliminate slums, or to build highways, schools or other public works.

The New London case tests the muscle of local and state governments to raise what they see as much-needed revenue, which they argue serves a greater "public purpose." Legal analysts said they see the case as having major implications nationwide in property rights and redevelopment issues.

Eminent domain is a practice indirectly sanctioned by the U.S. Constitution. The Fifth Amendment's protection against unwarranted government interference adds a caveat: "Nor shall property be taken for public use, without just compensation."

A recent study by the property rights group Institute for Justice, which is representing the New London homeowners in court, found about 10,000 cases from 1998 to 2002 of local governments in 41 states using or threatening to use eminent domain to transfer home and properties from one private owner to another. Courts in at least six states have upheld the practice.

Such battles have long been a staple of U.S. westward expansion. In the 19th century, farmers, railroads, miners and ranchers competed for the opportunity to exploit rural resources.

Today, the disputes have become more urban-based, focusing on stadiums, office parks and shopping centers. Courts and legislatures around the country have had widely differing standards on when eminent domain can be used.

City, homeowners square off

In the New London case, city officials there argue that eminent domain also should apply to "economic development" even if done privately since it would increase tax revenue and improve the local economy.

Susette Kelo and six other homeowners have said the move is more about enriching well-connected developers.

"It's obvious they don't want us here, and they've done everything in their power to make us leave," Kelo said. "They are simply taking our property from us private owners and giving it to another private owner to develop."



Kelo said she and her husband, Tim, bought their two-bedroom pink Victorian in the city's Fort Trumball waterfront neighborhood in 1997 for \$50,000. The area is in a working-class section of New London, overlooking the Thames River and Long Island Sound.

"It was like I'd been here all my life. It was just a warm and inviting feeling," she said.

But city officials disagree with that label.

"New London has been and is classified by the state of Connecticut as a distressed municipality," City Attorney Thomas Londregan said. "When we lost the naval base, we lost about 18,000 jobs."

Londregan said that while the city has never claimed the Fort Trumball neighborhood is blighted, the area has suffered economically. It has been zoned since 1929 as industrial despite the presence of existing private homes.

"This area had a junkyard, which had to be cleaned up at great expense," Londregan said. "They had oil tanks, commercial big storage tanks. There is a railroad yard down there."

Pfizer plant spurred city action

In 1998, pharmaceutical giant Pfizer Inc. agreed to build a \$270 million global research facility next to the area in dispute. Two years later, the New London City Council sought to accommodate Pfizer's investment and adopted a redevelopment plan to transform 90 acres of Fort Trumball.

The city and state would contribute millions of dollars. Eminent domain power was transferred to the New London Development Corp., a private, nonprofit group of citizens, business owners and community leaders.

It wants to build a conference center, hotel complex, offices, condominiums, and eventually, an aquarium in New London, which is about 125 miles east of New York City.

The day before Thanksgiving 2000, Kelo said, a notice was posted on her East Street home, informing her and her husband that they had four months to move out or police would remove them and their belongings.

"I really didn't want to sell my property so I wasn't interested at all in the offer," she said. "And they simply told me if you're not going to sell, we're going to take your property by eminent domain."

Most of Kelo's neighbors have moved on, leaving large parts of Fort Trumball bulldozed amid rubble. About 80 homes and businesses are gone, leaving only seven property owners and 15 parcels remaining.

The city government said it offered Kelo and her neighbors a fair price for their properties.

The Connecticut Supreme Court agreed with New London, ruling that promoting economic development outweighed private property rights. Homeowners argued that since their neighborhood is neither a slum nor crime-ridden, it does not meet legal standards for application of eminent domain.

The case is Kelo v. City of New London (04-0108). A ruling is expected by June.

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