EMINENT DOMAIN AND PROPERTY

An appreciation for clear title brought Indiana the 16th U.S. President and the Indianapolis Colts

by SAM STALEY

WHY PROPERTY RIGHTS ARE SUCH A BIG DEAL

The setting would have been ideal for an action film featuring international intrigue. In the mid-1980s, at the height of the Cold War, a private businessman is faced with the seizure of his business by a government. He is rescued in the middle of the night as his property and business is smuggled to safety in a nearby state.

The plot could entice the best and brightest — Harrison Ford, Matt Damon, Angelina Jolie, Tom Cruise — the Hollywood A-list. But those stars are unlikely to sign onto this film because the plot, though real, isn't based on international intrigue.

The scene was vivid enough — dozens of Indianapolis-based Mayflower vans packed up the equipment of the NFL Colts in a midnight move to Indiana. The dramatic action was set in motion not by some East German bureaucracy but by the state of Maryland. Its legislature would have used its power of eminent domain to seize, or "take," the football team for public use in Baltimore. By moving the team's assets to Indiana, the business stayed private.

The protection of property rights has been a key element of Indiana's economic success over the years. Thomas Lincoln, father of our 16th president, moved to Indiana from Kentucky 200 years ago because he could buy farmland and make an honest go at a profitable business here.

In Kentucky, poorly defined and enforced property rights had resulted in three failed farms for the elder Lincoln. He couldn't afford to stick around any longer.

The federal Land Ordinance of 1785 required consistent measurements for land and established the township system of surveying, assuring clear title in Indiana. According to the National Park Service, Abraham Lincoln recalled that his father moved from Kentucky to Indiana "partly on account of slavery, but chiefly on account of the difficulty of land titles in Kentucky." Thousands of others moved "west" to Indiana at the time for the same reason.

Property rights have not fared so well in recent years. Eminent domain is the legal authority of governments to seize, or "take," private property for public use. The action

Abraham Lincoln recalled that his father moved from Kentucky to Indiana "partly on account of slavery, but chiefly on account of the difficulty of land titles in Kentucky."

Samuel R. Staley, Ph.D., an adjunct scholar with the foundation, is director of Urban and Land Use Policy at the Reason Foundation (http:www.rppi.org). He is co-author, with economist John P. Blair of "Eminent Domain, Private Property and Redevelopment: An Economic Development Analysis," recently published by the Reason Foundation. This is an adaption of that policy report.

The City of Indianapolis, which benefitted from Maryland's indifference to property rights, is now using the threat of eminent domain to make way for a stadium parking lot.

is part of the police power and is explicitly granted to governments in the U.S. and Indiana constitutions so long as the taking is for public use and private property owners are given "just compensation." Unfortunately, the courts have interpreted the term "public use" so broadly that even professional football teams can fall into the category.

Indiana's General Assembly and Indiana cities are increasingly following in the footsteps of other cities and states in using eminent domain to seize private property for whatever local government might covet.

"Indiana is growing more aggressive in its use of eminent domain to benefit private parties," notes attorney Dana Berliner in "Public Power, Private Gain," a survey of state and local actions to condemn and take private property for private interests. Berliner defends private property owners in eminent domain cases for the Washington, D.C.-based Institute for Justice. Nationwide, she identified 10,282 cases of "filed or threatened condemnations" for private uses over a five year period in her report. In Indiana, she found at least four instances where cases were filed and 51 cases where eminent domain was threatened.

Cases crop up in big and small cities. In Indianapolis, the city got tired of trying to negotiate with a parking garage owner and seized the property so the city could sell the land to private developers. It served the city's redevelopment goals.

In Mishawaka, the county government used the threat of eminent domain to close the deal on 51 homes that stood in the way of AM General's plan to expand an automobile manufacturing facility.

In Indianapolis, the city, ironically, is now using the threat of eminent domain to remove a 60-year Indianapolis business so as to make way for a parking lot for the new Colts stadium. Apparently, the desire to keep the Colts is more important than preserving and protecting the property rights of longtime residents and businesses.

The message in Indiana as well as the rest of the nation is clear: Private property is not safe if the government wants it, even if the benefits are going primarily to other private businesses and property owners.

The U.S. Supreme Court hasn't been any help either.

One of the most significant cases addressing eminent domain in years, *Kelo vs. City of New London,* was decided this summer. The case pitted property owners against New London's redevelopment authority and the city's plans to revitalize a neighborhood. The city wanted to buy the properties, many of them historic, raze them to the ground, and sell the land at steeply discounted prices to private developers who would build new shops and offices to support a nearby Pfizer research facility.

The city condemned the properties even though it didn't have clear plans or projects for the use of the property at the time. Most of the neighborhood was already gone, but a few residents and business owners dug their heels in and tried to hold on, setting *Kelo vs. City of New London* in motion.

During oral arguments in February, questioning by the U.S. Supreme Court justices was vigorous and heated. At the end of the day, however, the Court did not overturn previous precedent. It continued to grant wide latitude to cities, counties and state legislatures over when and how they can use eminent domain for redevelopment purposes. It would seem that cities now have no limits in this regard.

That would leave everyone's property at risk. As courts have become less and less willing to question the substance of government eminent domain decisions, the targets have moved from poor to middle-income homeowners and businesses, from rundown neighborhoods to stable and growing neighborhoods. Virtually anything in the way of a government redevelopment project can be taken.

A recent case from Mesa, Arizona, illustrates how the process works.

Randy Bailey owned and operated a brake repair shop at the corner of Country Club Drive and Main Street in Mesa, Arizona. The owner of the local ACE Hardware store, Ken Lenhart, wanted to expand his franchise. He thought Bailey's site would be

'City Sees Empty Lots as Assets'

This intriguing headline appeared in the May 8 Fort Wayne Journal Gazette. It describes an article in which the paper's government reporter tries mightily to explain why it is good economic news that City Hall takes claim to 174 vacant lots, all properties left suspended after the collapse of a public housing scheme. It is both ironic and profound that many of the lots are incumbered by government regulations rendering their titles either unsalable or untransferable.

ideal. The city saw this as an opportunity to further revitalize its downtown. It offered to use eminent domain to take the properties and provide them to the hardware store and other private developers. The fact that the property was outside the city's designated redevelopment area was considered a technical matter.

Once Lenhart decided that Bailey's property was suitable for the expansion of his hardware store, the city redrafted Mesa's redevelopment plan to include the land at Country Club and Main. They designated the property "Site 24" and issued a request for proposals to redevelop it.

Three development companies submitted plans. One was Redstone Development, owned by Lenhart. Another was Palm Court Investment, owned by Mesa Discount. The third was Watt Commercial Properties, a national operation, which proposed a complete redesign of the property, including 50,000 square feet of new retail and office space.

The city consolidated the proposals submitted by Palm Court and Redstone, rejecting Watt's bid altogether. It then negotiated a development agreement that included the terms for sale of the property to Lenhart and Mesa Discount once it was acquired by the city. It also agreed to acquire Lenhart's old building and land as part of a land swap.

At the request of Palm Court and Redstone Development, the city proceeded to condemn 21 of the site's 26 parcels, including Randy Bailey's business, which representing half the assessed value of the land. Lenhart was asking the city to acquire property worth two-thirds of the assessed value of his share of the development project.

At first glance, the process seems exceptional. Indiana cities aren't usually as brazen as Mesa. But the process is not all that different from what one finds here, particularly in cases such as AM General that have clearly identified business plans that include expansion. As long as a site is identified as a redevelopment area, cities have wide latitude for using eminent domain for economic development purposes. Existing private property owners are considered incidental to the development process.

This process is indicative of redevelopment efforts in more and more cities throughout the state. Currently, the state of Indiana and city of Indianapolis are facilitating the acquisition of land for the new Colts stadium, even though the primary beneficiaries will be a privately owned NFL team.

Again, city development plans almost always trump private efforts. Local Indianapolis businessman Bob Parker, to provide another illustration, assembled properties in the mid-1980s to develop an industrial park, notes attorney Dana Berliner.

However, the city of Indianapolis later decided it would develop its own industrial park, but its plans were bigger and more expansive. So, rather than incorporate Parker's properties into the larger plan, the city condemned his land and 70 additional acres to create the Keystone Enterprise Park.

Condemnations are just the tip of the iceberg. Often, cities appraise properties well below their value on the open market. In Bob Parker's case, the city offered $349,950 for his 10 acres although he estimated its market value at $3.8 million. The owner of a property in Indianapolis in the way of the Colts Stadium project was offered well below the listed price of $350,000, according to a recent report in *the Indianapolis Star*.

Low-balling appraised values, or providing highly leveraged and subsidized property to private developers, is not unique to Indiana. The city of Mesa's redevelopment agreement with private developers for Bailey's property would have amounted to effective subsidies ranging from $176,000 to $592,000.

In Indiana, at least, property owners are most often approached by local governments before their property is taken. The Baileys, in contrast, were never approached by the owner of ACE Hardware, the City of Mesa or any of the other investors about selling their property before or during the process in which the city issued its request for proposals to redevelop the site. The small businesses affected by the redevelopment project were effectively shut out of the process.

To add insult to injury, Lenhart bought a property adjoining Bailey's building and proceeded to board it up. The set of small office spaces had gone unused for years, contributing to the rundown character of the corner. In a cynical twist, Lenhart, as landlord, was contributing to the blight that

City development plans almost always trump private efforts. Ask Bob Parker about his Indianapolis industrial park.

Legislation was introduced several years ago in the Indiana General Assembly to allow "quick takes" of private property.

the city cited to justify condemning Bailey's property.

What distinguishes the current era of condemnations is the degree to which local governments are willing to use this power to achieve ever wide-ranging public-policy goals. Sometimes they succeed.

Sometimes they're driven back by public protest or the courts. In Lakewood, Ohio, a growing neighborhood was saved from the wrecking ball only after a city-wide vote that rejected the city's development plan for the area. But cities, counties and states across the nation are pushing the boundaries.

Jeff Finkle, president of the International Economic Development Council, a trade association representing development and redevelopment organizations and agencies, believes eminent domain is critical to the revitalization of cities. He argues that few projects in urban areas occur on small, isolated lots, and the costs of negotiating with dozens of property owners are simply too high. In addition, he says, some property owners refuse to sell or set an unreasonable price, scuttling projects with large benefits for the community.

"Lose eminent domain in urban settings," Finkle told Reason magazine, "and the only land that will be developed is green space on the edge of cities."

Even Finkle, however, recognizes that the power of eminent domain should have limits. Taking private property, he says, "should be the last possible tool. If negotiations fail, if the bully pulpit fails, then you go to a takings case."

But Finkle's view is not necessarily the dominant one. When pressed during oral arguments in *Kelo vs. City of New London,* attorneys for the city admitted that they wanted enough freedom to use eminent domain so they could replace a low-budget hotel such as Motel 6 with a luxury hotel such as the Ritz-Carlton. A goal, of course, is more tax revenue.

In the current climate, many of the traditional constraints on public takings of private property have disappeared. Most redevelopment laws explicitly acknowledge that land can be taken even if the beneficiaries will be other private parties. This principle is even articulated in federal law through the 1954 Supreme Court decision *Berman vs. Parker,* which allowed local governments to condemn land for urban renewal and then transfer title to private parties. But even then, local governments didn't have carte blanche; they had to justify the taking as a way to mitigate "urban blight."

Over the years, however, that term has become little more than a name for property a government wants to take. Today, redevelopment agencies enjoy more discretion than ever, and eminent domain is their tool of choice.

In Indiana, legislation was introduced several years ago in the Indiana General Assembly to allow "quick takes" of private property. The legislation was said to be necessary to facilitate government attempts to redevelop land. The bill died in committee but the sentiment is alive.

While a ruling in favor of property owners in *Kelo vs. New London* would have restored substantive judicial review of eminent domain, most protections still would have had to come on the local level. In that respect, there are positive signs.

In 2004, the Michigan Supreme Court reversed its infamous decision in *Poletown vs. City of Detroit,* which unleashed the new wave of takings for economic development purposes. The Poletown decision allowed the city to clear an entire neighborhood so General Motors could build an automobile factory on the site. Economic development was the sole purpose of the taking. In *County of Wayne vs. Edward Hathcock,* the Michigan Court ruled that takings could be justified only for a clear public use and the mere creation of jobs was not sufficient justification.

More courts at least require cities to follow proper legal procedures before they take private property. The Arizona Supreme Court agreed that Mesa could not take Bailey's Brake Service because they had not made a determination of "blight" before condemning the property. Of course, if the City of Mesa had officially determined that Bailey's property was "blighted," the taking would have been legal.

During oral arguments in *Kelo vs. New London,* U.S. Supreme Court justices were clearly sympathetic to the economic development arguments. "More than tax revenue was at stake," Justice Ruth Bader Ginsburg said. "The Town had gone down and down" economically.

Unfortunately, the legal definition of blight and what qualifies for economic development, has become broad. The City of Lakewood, Ohio, condemned an entire neighborhood, declaring it blighted even though the average home there sold for $146,605 and assessed valuation increased 15 percent between 1994 and 2000. Nonetheless, the city argued that eminent domain was justified because it would be able to redevelop the neighborhood and potentially increase the total value of real estate to between $80 million and $131 million (up from an existing total value of $31 million).

Clearly, property rights currently do not get the same level of protection as other fundamental liberties such as free speech, the right to assemble or the right to an impartial jury. Restrictions on other rights have to meet a "means-ends" test, *i.e.,* there has to be a compelling government interest to justify them.

"In eminent domain," notes Notre Dame law professor Nicole Garnett, "there is no means-end scrutiny at all. (The courts) don't even bother to check to see if the government is advancing a public use. They wash their hands of it. They don't ask if economic development could be done another way."

Supporters of eminent domain disagree. "The fact is that in the average community in the typical state, the system is working well," claims the American Planning Association's policy guide to takings. "Property rights advocates are waging a guerrilla war of sound bites, misleading 'spin doctoring' and power politics which characterizes government at every level as evil empires of bad intent."

Finkle, the president of the International Economic Development Council, echoed these concerns. The Institute for Justice in particular, he claims, has "done a great job of taking the absolute horror cases and publicizing them." For the most part, Finkle and other redevelopment advocates claim, eminent domain is used reasonably and appropriately.

Nevertheless, a few recent court cases may signify a trend toward stricter scrutiny of local government decisions. The fact that the U.S. Supreme Court heard *Kelo vs. New London* at least recognized there are several substantive issues that need to be clarified. The courts, however, are unlikely to be much help in reining in abuses of eminent domain. The courts "don't feel comfortable saying, 'We know better than the government' on public use," observes Garnett. When courts intervene, they usually "pick up procedural aspects of the implementation of the law."

For example, in oral arguments in *Kelo vs. New London* Justice Sandra Day O'Conner was uncomfortable with the idea that the U.S. Supreme Court (or any court) should "second-guess" decisions by state and local governments on the substantive importance of eminent domain.

That leaves legislative action as a remedy. The Indiana General Assembly recently passed House Bill 1063, establishing a commission to review the use of eminent domain and takings at the state and local level.

As this commission convenes over the summer to deliberate on reform of Indiana's statutes, members may want to consider the following guidelines to ensure, regardless of the Supreme Court ruling, that Indiana statutes properly balance private property rights and the public interest:

Require a Clear Public Use

Lawmakers should ensure that eminent domain is used only when there is a clear public use that will result from the project. Projects should have public access, or provide a public service or facility (or "public good") that cannot be provided by the private sector.

Use Only as a Tool of Last Resort

Legislators should ensure that eminent domain is used only when other, voluntary options have been exhausted and where the acquisition of the property is essential for the project to move forward.

Use When Faced With Imminent Public Endangerment

Ensure Private Benefits Are Incidental to the Project

Finally, private benefits should not be the primary consequence or benefit of the eminent domain action, nor should it be the primary purpose or intent.

"In eminent domain, there is no means-end scrutiny at all. (The courts) don't even bother to check to see if the government is advancing a public use."

— Nicole Garnett, Notre Dame School of Law

THE COURTS AND PROPERTY

Less scrutiny for eminent domain

The 5th Amendment's limitation on eminent domain guards against the abuse of public authority and the corruption of our democratic process.

The Supreme Court ruled in a 5-4 decision last month that local governments may seize homes and businesses for private economic development. Justice Sandra Day O'Connor wrote the dissent, arguing that cities shouldn't have unlimited authority to take property simply to accommodate wealthy developers.

"Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random," Justice O'Connor wrote. "The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms."

She was joined by Chief Justice William Rehnquist, as well as Justices Antonin Scalia and Clarence Thomas.

This foundation had joined the Cascade Policy Institute as amici curiae in support of the petitioners in the related City of New London vs. New London Development Corporation. The following is a summary of the argument made in that brief.

This U.S. Supreme Court's standard of review in regulatory takings cases should be applied in eminent domain cases.

The reasons that call for heightened scrutiny when a regulatory taking is alleged apply with equal force when the government seeks to condemn private property through its eminent domain powers.

While the public purposes that might be served by eminent domain are the same as those that might be served through the general police power, the eminent domain power is limited by the public use requirement of the 5th Amendment.

This limitation serves to protect property owners from being singled out, recognizes that fair market value will often not make property owners whole, assures that the fundamental right to exclude will not be violated without a compelling public purpose, and guards against the abuse of public authority and the corruption of our democratic process.

Reliance on heightened scrutiny in eminent domain cases will not significantly handicap the government in the pursuit of its legitimate purposes. Numerous states have applied heightened scrutiny on the basis of their reading of either the 5th Amendment or of the comparable provisions of their own constitutions. Notwithstanding their heightened scrutiny in public-use cases, all of these states have been able to promote economic development, protect their environments, and pursue other public purposes in competition with the other states.

In reviewing the claims of property owners under the public use limitation of the 5th Amendment, the Court should demand that governments utilize the least burdensome means available. In the instant case, the Court should find that the City of New London has exceeded its legitimate authority in condemning the petitioners' property for immediate lease to private developers. Individual lives and livelihoods should not be so easily sacrificed to the profits of other private parties and the abstract prospect of economic development and increased tax revenues.