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Real Estate

The New Eminent Domain: Public Use Defense Vanishing In Wake of Growing Privatization of Power

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A Philadelphia businessman who has large real estate investments in a New Jersey community is excoriated in the press as an "out-of-town land speculator." His properties are taken and turned over to a national corporation for purposes of a quintessentially private project.

When the businessman raises the issue of compensation, he is offered a fraction of what he thinks the property is worth. He is told that if he does not like it, he can litigate, spending years in the process and running up hefty bills for appraisers, planners, engineers and lawyers.

The businessman is told by the condemnor — and maybe even by the courts — that when he disagrees with the take-it-or-leave-it offer, he is seeking a "windfall," or he is standing in the path of progress.

Meanwhile, an elderly couple in a large New Jersey city has owned and operated a small luncheonette for more than 30 years. They never gave up on the municipality, staying put through riots and tough economic conditions alike. The couple worked hard and paid their taxes when due. Then, one day they are told they must give up their property and their business to make way — not for a highway or a park — but for a supermarket.

When the couple objects, they are called "obstructionists" and are cast as villains in the very neighborhood they have served for so many years. What's more, they are told to forget about recovering any payment for their lost business. That, they are told, would be a "noncompensable" windfall.

What's going on here? How did we come to the point where government routinely takes property from one private owner and transfers it to another? And what is this "windfall" stuff anyway? How did a process whose motives are supposedly public-minded, nonetheless result in government agencies increasingly acquiring or trying to acquire property from one private owner for the unabashed purpose of conveying it to another owner?

And how did it come to pass that the property is conveyed to be used for private, profit-making purposes such as shopping centers, supermarkets and even gambling casinos? Yes, casinos. Incredibly, an activity that can get you put in jail in most of New Jersey is declared to be a "public use" in certain sections of Atlantic City. N.J.S.A. 5:12-153 et seq. "The purposes of the Casino Reinvestment Development Authority shall [include] maintain[ing] public confidence in the casino gaming industry as a unique tool of urban redevelopment." N.J.S.A. 5:12-160. Unique indeed.

As for the displaced owner's "just compensation," the law of condemnation is riddled with archaic 19th century doctrines developed to accommodate old-fashioned ideas of public takings, meaning things like highways, railroads and national parks. *Comment, Eminent Domain Valuation in an Age of Redevelopment: Incidental Losses*, 67 Yale L.J. 61 (1957). Thus, certain elements of value are ignored in the calculation of "just compensation." They are, in the jargon of the trade, "noncompensable."

These concepts are unfair and confiscatory in any setting; but they make absolutely no sense in the context of the

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"now" eminent domain. For example, in New Jersey, damages to a business per se are traditionally disregarded in the measuring compensation. *Port of New York Authority v. Howell*, 59 N.J. Super. 343, 347 (Law Div. 1960), aff'd 68 N.J. Super. 559 (App. Div. 1961), cert. denied 36 N.J. 144 (1961).

The theory is that government is taking your real estate, not your business. You can supposedly relocate a few blocks away, out of the highway's path, and continue your business unfazed. In reality, the majority of displaced one-location proprietorships never recover, and this rule simply contradicts modern law. D. Michael Risinger, *Direct Damages: The Lost Key To Constitutional Just Compensation When Business Premises Are Condemned*, 15 Seton Hall L. Rev. 483 (1985).

The new brand of takings, however, does just what government has always denied doing. Whole neighborhoods are routinely bulldozed to make way for today's "public" projects. Indeed, because revitalization of urban areas (a process that includes what used to be called "slum clearance") is the usual rationale for such takings, extirpation of an entire area is frequently a *goal*, not merely an unintended by-product. See, Sonya Bekoff Molho and Gideon Kanner, *Urban Renewal: Laissez-Faire For The Poor, Welfare For The Rich*, 8 L. J. 627 (1977).

The time has come to take a fresh look at this whole body of law to see if any of the rules that limit a condemnor's responsibility make sense in the context of today's takings. It's one thing to expect an owner to suffer some loss for the public good, but there is no justification to inflict such a loss on him to make a developer or mass merchandiser richer.

Public Use or Public Benefit?

Provisions of both the New Jersey and United States Constitutions limit the exercise of condemnation power to those takings for a "public use." Indeed, takings for nonpublic uses may be challenged in the courts by asserting what is known as the "public use defense." Whether that challenge will be successful, however, is another question.

Not too long ago, public use was generally considered to be a use *by* the public. Thus, private property was routinely acquired for traditional public uses, such as highways. These uses were ordinarily associated with government and there was common consensus that they were legitimate government functions. It is unlikely, for example, that the interstate highway system would have been built if left to private development.

Needless to say, this kind of acquisition was almost always accepted by the public whose land was taken. Most people may have been reluctant, but they acknowledged the need to lose their property — even their homes — for such obviously public endeavors.

This situation was not perfect, however. The outer limits of the condemnation power still needed definition. In *City of Trenton v. Lenzner*, 16 N.J. 465 (1954), cert. den. 348 U.S. 972 (1955), the courts for the first time held that the power of condemnation could be invoked for the acquisition of a private parking lot to be run by the government as a public parking lot. The Court's rationale, however, was that the public may be better able to operate a lot than private individuals in order to serve the public good.

"By taking the land the city insures not only that its future use will be public parking, but also that it will be available for the urgently needed increase of its parking facilities by the construction of a suitable ramp garage or otherwise." 16 N.J. at 478.

Nonetheless, it is a fair supposition that the *Lenzner* Court would have been shocked if the acquisition's objective was to take the parking lot from the private operation of Owner A and transfer it for private operation by Owner B.

The next inroad into traditional concepts of public use in New Jersey was *Essex County v. Hindenlang*, 35 N.J. Super. 479 (App. Div. 1955), appeal dismissed 24 N.J. 517 (1957), in which Essex County took property for a parking lot to service the Essex County Courthouse. It was argued that the county's intended use was not for a public facility, but for a facility which would be closed to members of the public generally and only available to certain authorized employees or others associated with the courthouse's operation.

The court determined that this argument put too narrow a meaning on the concept of public use and did not sufficiently comprehend that a "public use" was not only a use *by* the public, but could encompass one that *benefited* the public: "The more liberal view of what is a 'public use' leads us to the conclusion that the proposed parking area is clearly for the public benefit, to the public advantage, and has public utility. The demands of modern society cannot be met by a return to the narrower concept that 'public use' must be limited to 'use by the public.'" 35 N.J. Super. at 491.

The public benefit concept was also a significant factor in *State v. Buck*, 94 N.J. Super. 84 (App. Div. 1967), cert. denied 49 N.J. 359 (1967). In that case, a substantial part of Buck's property was taken by the Department of Transportation for the construction of Route 287 through Harding Township. A small portion of the property was not needed for this conventional public use. This smaller parcel, however, was ideally situated for use as a driveway to provide access to Buck's neighbor, Sheldrick.

The state's Route 287 acquisition had landlocked the Sheldrick property rendering it totally valueless, but using the Buck "sliver" would provide adequate access to Sheldrick. If the state took the smaller Buck parcel, it would be spared the expense of paying for a complete taking on the Sheldrick property. At the same time, the cost of acquiring the small remaining portion of the Buck land would not be much different from acquisition of only the part actually needed for the interstate.

Buck readily acknowledged the need to take the bulk of his land, on which his home and outbuildings stood, for the highway. But he vigorously contested the loss of the smaller piece for conveyance to another private party. The court held that because the benefit to New Jersey was clear, the state could acquire the remnant from Buck, even though the avowed purpose was to transfer the property from Buck to his next-door neighbor for an admittedly private purpose.

"Rather than leave a land segment useless under local zoning and subject the State to payment of damages incident to unacquired remainder land, the Commissioner made a sound and sensible decision to condemn the entire tract at a practically equivalent cost, especially when in so doing he preserved accessibility to adjoining lands which have an apparent potential for development." 94 N.J. Super. at 88.

In *Hawaii Housing Authority v.*

Midkiff, 467 U.S. 229 (1984), the U.S. Supreme Court heard what has come to be widely regarded as the official death knell of the "public use defense." For reasons shrouded in Hawaiian history, land in the Hawaiian islands had for generations remained in the ownership of the original royal families of Hawaii and certain private trusts.

About one-third of all land in the islands was held in this manner. Instead of selling land outright, the charitable trust administering the remnants of the royal lands granted long-term leasehold interests to people who then built homes on that land, with fee title to the land in the trust, and with ownership of the house in the ground lessee.

Hawaiian lawmakers decided that this concentration of land ownership was inimical to the free movement of the real estate market and established a procedure whereby lessees under the ground leases could apply to the state government. The government would then institute an action in eminent domain to take the reversionary interest from the landlord and convey it to the ground lessee.

Naturally, the lessee would reimburse the state for the costs of acquisition. Nothing remotely resembling a traditional public use was even suggested as the basis for these takings, only the legislative vision of a more fluid real estate market.

In a stunning decision affirming the right of Hawaii to transfer land from one private party to another in order to correct a perceived market imbalance, Justice Sandra Day O'Connor, speaking for the Court, held that the power of eminent domain was "coterminous" with the police power. That is to say, any substantial advancement of the health, welfare and safety of the community would be an adequate basis for the exercise of the power of eminent domain. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

"[W]here the exercise of the eminent domain power is rationally related to a *conceivable* public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." 467 U.S. at 241 (emphasis added).

New Jersey's version of *Midkiff* was *New Jersey Housing and Mortgage Finance Agency v. Moses*, 215 N.J. Super. 318 (App. Div. 1987), cert. den. 107 N.J. 638 (1987). In this case, several private business owners — including the owner of a luncheonette and an auto repair shop — opposed the acquisition of their properties for a privately owned supermarket, and lost. In *Moses*, the court held that the prospective "revitalization" of an urban area was an adequate basis for taking private property.

No proofs had been adduced relating the proposed acquisition to the area's supposed revitalization; the condemnor relied on the assertion that the supermarket was necessary to serve residents in the community. No attempt was made to compare the benefits to be derived from the supermarket to those that would be lost by the displacement of the existing uses. Instead, the courts deferred to the perceived expertise of government in matters of housing (the taking agency's primary mission), and, by extension, housing support facilities.

"[T]he expertise developed by the agency to deal with housing matters is sufficiently tied in to the expertise needed to make decisions regarding nonhousing projects providing support services. An appellate court can consider the purposes of the act and reject as arbitrary any condemnation that does not serve those purposes. We conclude that the act provides sufficient standards to guide the exercise of the agency's discretion in condemning property for nonhousing purposes and consequently that the delegation of legislative power was constitutional." 215 N.J. Super. at 328-29.

Interestingly, the *Moses* court held that the loss of substantive rights, i.e., the virtual demise of the "public use defense" in New Jersey, was compensated for by an increased vigilance regarding the procedural rights of landowners. Id. at 328.

While not a public use case in the strictest sense, *Borough of Essex Fells v. Kessler Institute for Rehabilitation Inc.*, 289 N.J. Super. 329 (Law Div. 1995), is nonetheless fascinating and relevant. Kessler Institute sought to develop a 12.5-acre parcel in the Borough of Essex Fells that at one time housed the North East Bible College. The institute wanted to build a skilled nursing facility and transitional living facility on the site.

Although local citizens expressed concerns about having a rehabilitation institute in their community, the borough had little choice under the local land use law to allow the conversion. The borough decided to take the property by eminent domain for purposes of a public park. The Law Division set aside the taking because it found the true purpose was to prevent the owner from developing the property with the rehabilitation facility. The court noted:

"Ordinarily, when a municipality adopts an ordinance in the exercise of its power of eminent domain, that determination is presumed valid and entitled to great deference. Courts will generally not inquire into a public body's motive concerning the necessity of the taking or the amount of property to be appropriated for public use. However, the decision to condemn shall not be enforced where there has been a showing of 'improper motives, bad faith, or some other consideration amounting to a manifest abuse of the power of eminent domain.'" 289 N.J. Super. 337, quoting *Tennessee Gas Transmission Co. v. Hirschfield*, 39 N.J. Super. 286, 288 (App. Div. 1956) (citations omitted).

In *City of Atlantic City v. Cynwyd Investments*, 148 N.J. 55, 73 (1997), the New Jersey Supreme Court strongly declared that a property owner's interests are to be carefully considered when a proposed taking would provide a substantial benefit to a private interest:

"Generally, when the exercise of eminent domain results in a substantial benefit to specific and identifiable private parties, 'a court must inspect with heightened scrutiny a claim that the public interest is the predominant interest being advanced.' ... The power of eminent domain must always be exercised in the public interest and without favor to private interests." 148 N.J. at 73 (citations omitted).

Despite this call for heightened scrutiny, however, the property owner still lost its land to improve the road access to the Sands Casino.

New Jersey is not alone. Throughout the country, traditional notions of what constitutes a public use have been challenged. In Detroit, a whole neighborhood — including a major hospital — was wiped out to make way for a Cadillac assembly plant. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981). But Michigan's courts at least recognized the gross inequity of applying outdated rules of noncompensability to the new breed of takings.

In *City of Detroit v. Michael's*

Prescriptions, 373 N.W.2d 219 (Mich. 1985), the Michigan Court of Appeals held that where the condemnee's business was intimately connected with the neighborhood that was destroyed, he should be compensated for his business losses as well as for the real estate on which the business stood.

Michael's Prescriptions was a pharmacy that had been operated for more than 40 years at the same location before the condemnation action. The court acknowledged the usual "rule" that a property owner is not generally compensated for the value of a business located on a condemned property because the business supposedly can be moved to another location.

However, the court also recognized that a property owner is entitled to the value of a business that cannot effectively be transferred somewhere else. Id. at 224. In this case, Michael's Prescriptions was located directly across the street from a hospital, and a medical clinic was only a block away. There were even medical offices in the same building as the pharmacy. Because this location could not be replaced, the court permitted Michael's to be compensated for its loss of business value. Id. at 226.

Public use was also challenged in *National Railroad Passenger Corp. v Boston & Maine Corp.*, 112 S. Ct. 1394 (1992). In accordance with the Rail Passenger Service Act of 1970 and amended 1973, Amtrak — which is not a government agency — was authorized to enter into agreements that would permit it to operate passenger rail service over freight rail owned by the Boston & Maine Corp.

If an agreement for the use of the freight rail track could not be reached, Amtrak could petition the Interstate Commerce Commission to issue an order recognizing the need for the rail line and Amtrak could then condemn the track. Id. at 1398. Amtrak tried to acquire a portion of the Boston & Maine rail line and convey it to one of Boston & Maine's competitors.

The ICC issued an order stating the section of track was needed, meaning "useful or appropriate" as opposed to "indispensable or necessary." The Boston & Maine railroad appealed, asserting the public use defense. The Court, relying on *Midkiff*, was not impressed. It ruled:

"[Where] condemnation resulted in the transfer of ownership from one private party to another, with the basic use of the property by the government remaining unchanged [the U.S. Supreme] Court held these exercises of the condemnation power to be constitutional, as long as the condemning authorities were rational in their positions that *some* public purpose was served." 112 S. Ct. at 1404 (emphasis added).

In *Thornton Development Authority v. Upah*, 640 F. Supp. 1071 (D. Colo. 1986), the U.S. District Court in Colorado considered whether a taking for a shopping center was for a public use. It found that: "Generally, however, there are two uses which may be deemed public. The first is public employment or actual use by the public. The second is *public advantage* or benefit." 640 F. Supp. at 1077 (emphasis added).

In *Green v. High Ridge Association Inc.* (Ct. App. Md. 1997), the Maryland courts upheld a taking for the extension of a public road so that it would provide necessary access to a private property. The condemnee unsuccessfully raised the public use defense, stating the sole reason for the taking was to benefit the private development. But, said the condemning authority, the roadway will be open to the public and therefore constitutes a "public use." The Maryland Court of Appeals agreed:

"This Court has pointed out that '[n]o satisfactory single clear-cut rule regarding what is a public use, which can decide all cases, has yet been formulated.' ... Moreover, we have held that 'public use' is not limited to circumstances where 'the public ... literally or physically [is] permitted to use to property taken by eminent domain.' ... [W]hile actual use of the condemned property by the general public is not necessary, nonetheless, when the general public is entitled to physically use the condemned property, the use is 'public for the purposes of the constitutional provision' ... Consequently, the condemnation of private property for a public highway, street, or road constitutes a 'public use' within the meaning of the [Maryland Constitution]. Since members of the general public are entitled to use a public highway, street, or road, this Court has, without exception, held that condemnation for such a purpose is constitutionally authorized." 695 A2d 128-30 (citations omitted).

On somewhat similar facts, the Georgia courts found for the property owner. In *Brannen v. Bulloch County*, 387 S.E.2d 395 (Ga. App. 1989), the county condemned property to reroute a county dirt road from one owner's land and make it cross the property of a neighbor. The public purpose stated for the taking was that the roadway would become muddy in the rain, and it had to be moved to alleviate a potential road hazard.

The road hazard could have been corrected without invading the neighboring land, but at substantial inconvenience to the owner of the land through which the roadway originally passed. That landowner agreed to pay the county to condemn the neighbor's land and to redirect the road through that land rather than his own. The court found that condemning land to alleviate an inconvenience to another property owner was not a public purpose and set aside the taking.

Urban Renewal and Judicial Deference

In the meantime, things were happening on a closely related but separate front. Shortly after the conclusion of World War II, it became increasingly evident that many urban areas had fallen into disrepair.

Many urban areas contained substandard, unsanitary and, at times, downright unsafe housing. Commercial users had fled, or the buildings that housed them had grossly deteriorated. The concept of urban renewal envisioned that these blighted areas would be cleared and replaced with new, modern facilities.

However, urban blight does not happen in neat configurations. While large tracts of land might persuasively be designated as blighted, it was not unusual to find interspersed here and there, individual uses that retained substantial vitality. The vision of the urban planner was not always compatible with continued use of these oases of viability.

Thus, in *Berman v. Parker*, 348 U.S. 26 (1954), the U.S. Supreme Court found that Congress could authorize the taking of private property to be placed in the hands of other private parties for the purpose of effectuating a public purpose. In *Berman*, the property owner owned a department store in Washington, D.C.

Congress had passed the District of Columbia Redevelopment Act of 1945 to eliminate substandard housing and other urban blight.

The city's plan was to take the property for the express purpose of placing it in the hands of a private developer. The property owner sought to have his property excluded from the redevelopment efforts because it was taking the property from one businessman (the department store owner) to benefit another (the developer). Even though the evidence was conclusive that the department store functioned perfectly well, the nation's highest court held that its demolition was necessary as part of a larger scale revitalization of the entire area.

This decision and others like it, led to the adoption across the country of legislation authorizing urban renewal programs. The 1947 New Jersey Constitution expressly declares "redevelopment of blighted areas" to be a public purpose, *N.J. Constitution 1947*, Art. VII, Sec. 3, Para. 1.

Typically, redevelopment legislation contains criteria designed to prevent abuse of the power of eminent domain. For example, N.J.S.A. 40A:12A-5 sets forth seven standards for determining when an area is to be blighted or, in modern parlance, is in need of redevelopment.

In practice, however, the courts have shown remarkable deference to the determinations of local governments. In *Levin v. Township Committee of Bridgewater Township*, 57 N.J. 506 (1971), the Township of Bridgewater declared a 120-acre tract to be blighted under N.J.S.A. 40:55-21.1(e) (now N.J.S.A. 40A:12A-5(e)). At the time of this designation, a developer was attempting to assemble the lands for the purpose of developing it as a shopping center.

The developer was planning to gradually develop the lands rather than develop them all at once. The township was unhappy with the manner and timing the owner had in mind for developing his land. It sought more immediate results and blighted the area in hopes of seeing it developed sooner, rather than later. The Court, in upholding the blight designation, stated:

"Judicial review of a blight determination must be approached with an acute awareness of the salutary social and economic policy which prompted the various slum clearance and redevelopment statutes. To effectuate those policies, we are obliged to interpret the powers granted to the local planning board liberally and to accept its exercise of the powers so long as *a necessarily indulgent judicial eye finds a reasonable basis*, i.e., substantial evidence, to support the action taken. In short, while the board's discretion in administering the law is not unfettered, its vista is a broad one." Id. at 537 (emphasis added).

In *Maglies v. Planning Board of East Brunswick Township*, 173 N.J. Super. 414, 419 (App. Div. 1980), the Appellate Division upheld the designation of a single three-quarter-acre parcel as an "area in need of redevelopment," even though earlier cases justified the exercise of the condemnation power to aid private development on the express theory that its purpose was "to deal with substantial areas as distinguished from individual properties." *Wilson v. Long Branch*, 27 N.J. 360, 378 (1958), cert. denied, 358 U.S. 873 (1958).

"The Blighted Area Act has never been specifically restricted to an area covering more than one lot. As the trial judge said, a 'municipality should not be deprived of the statutory authority provided in the Act because the size of the blighted area in that community is not as large in size as blighted areas in other communities.' The blight here was sufficiently advanced, even though confined to a relatively small area, to justify a determination that it should be remedied at this time rather than later when its adverse impact might be more extensive." 173 N.J. Super. at 421-22.

An excellent recapitulation of the legislative history of the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq., is found in *Forbes v. Board of Trustees of Township of South Orange Village*, 312 N.J. Super. 519 (App. Div. 1998). In that case, South Orange — a wealthy Essex County suburban community — had taken "significant steps" to try to keep its central business district viable.

Eventually those steps were deemed inadequate, and the district was designated an "area in need of redevelopment. Local landowners contested the designation on the basis that the prior steps had, in fact, worked. They claimed the area had become "reasonably productive and [was] functioning successfully in economic and planning terms." Id. at 531.

While conceding that if "what the Village did, in effect, was to impose its Utopian-like vision" on the area, plaintiffs would be entitled to relief, the court found that due deference to the municipal findings required that the designation be sustained, although those findings might be "debatable."

"It is not for the courts to second-guess the municipal action, which bears with it a presumption of regularity. We need not determine if we would have concurred in the designation but only if it is supported by substantial evidence." Id. at 532.

Conclusion

The power of eminent domain, while an inherent attribute of sovereignty, is limited in a democracy by tradition, self-restraint or, in the case of the United States, by express constitutional limitation. Societies in which the power of government to take property is not so limited have only a marginal, and perhaps temporary, claim to being thought of as democracies.

This is particularly true where the engine driving such acquisitions is private advantage as well as governmental vision. Too frequently, inadequate attention is paid to what is lost, and government's gaze is too unwaveringly fixed on what it hopes it will gain.

The courts, charged with the responsibility of enforcing the constitutional and legislative limits on the taking power, must temper their deference to governmental action with a healthy respect for the "heightened scrutiny" our Supreme Court called for in *Cynwyd*. The law of unintended consequences will always exist and the courts must accept their share of the burden of vigilance required to assure that vast public projects have been properly conceived within the intent of the statutory criteria.

The best laid schemes of men and governments often go astray. According to Gideon Kanner, professor emeritus at Loyola Law School, for example, the scheme to free up the real estate market in the Hawaiian Islands that led to the *Midkiff* case was a fairly colossal failure. The primary beneficiaries of the legislative plan were foreign, largely Japanese, investors, rather than local homeowners.

(Gideon Kanner, *Do-Gooders' Designs Twist Takings Clause*, Nat. L.J., Jan. 8, 1996, page A19).

The monopolistic aspects of the Hawaiian real estate market remained, but now they are controlled more from Tokyo than from Honolulu. Similarly, in 1972, the city of Yonkers condemned private property solely in order to make possible the expansion of the adjacent Otis Elevator Company facility. Otis had threatened to move its operations from the city unless the city employed its redevelopment power to obtain the needed expansion area. The owner's challenge to the conferring of the private benefit was rejected. *Yonkers Community Development Agency v. Morris*, 335 N.E.2d 327 (N.Y. 1975).

By 1982, Otis had closed down its plant, sold it, and moved away. *City of Yonkers v. Otis Elevator Company*, 844 F.2d 42 (2d Cir. 1988). For another insightful account of the clouded governmental crystal ball, see Kanner, *What To Do Until The Bulldozers Come?*, 27 Real Estate Journal 47, 54 (Summer 1998).

In those instances where, despite the judicious application of "heightened scrutiny," a project is nonetheless demonstrated to have a substantial likelihood of creating a real *public* benefit, the job of the courts is not over. When the public purpose is accomplished through private development, this means that the redeveloper expects to make money. At least in those cases, notions of noncompensability should be jettisoned. All provable economic loss directly flowing from the taking should be paid for, whether that loss comes about through acquisition or damage to real estate, personalty, good will, business or anything else.

Government has, in the past, successfully raised the specter that without artificial limits on compensation, needed public improvements might not be built. Even in the case of government, this proved to be a "parade of horribles." Some archaic noncompensability rules were changed by the Uniform Relocation Assistance Act, and by occasional changes in the judge-made law, but this has had no discernible inhibiting impact on the creation of public works. Private redevelopers can make no such claims.

If the redevelopment project truly cannot stand the freight of paying a fair price for everything that it destroys, maybe this only means that the project should not be built. When what is lost is more valuable than what is hoped to be gained, the project is economically irrational. As for those projects that are so beneficial to the public that they should be built anyway, then the public should subsidize them, not individual property owners randomly selected because the area in which they have located happens to be chosen as the site for such an endeavor.

Shirley Jackson's *The Lottery* is an enormously entertaining short story, but the method the villagers there use to revitalize their community should not be emulated as a useful tool for modern urban planning. Creative policy and legislative responses are also needed. A simple way to harness economic forces and make them work effectively within the redevelopment process would be to give a preference in the designation of a project redeveloper to those qualified persons or corporations who already own real estate within the redevelopment project area.

To the extent that such a preference would lead redeveloper-wannabes to buy large chunks of real estate within the area in order to secure such a preference, this would be a good thing. Familiar principles would guard against gouging (holdouts would still be subject to later acquisition through condemnation) and underpayment (because the acquisitions are voluntary no one would be forced to sell at an unfairly low price). Redeveloper also-rans — those who acquired substantial property but nonetheless not enough to qualify for a dispositive preference — will once again participate in the wonderful world of condemnation, but this time as condemnees. Now, *they* can go after all those assorted "windfalls."

Finally, by harnessing economic forces, decisions on where to locate private projects will be made by the marketplace and not by compliant public functionaries pursuing that proverbial "free lunch." This will reduce both the burden on the court system and the extraordinary transaction costs inherent in most significant eminent domain cases.

Consideration should also be given to forms of compensation in addition to those which have traditionally been used. Redevelopers are, by and large, pretty smart. They do not get involved in projects except in areas that are "ripe" for development. This means they become interested in taking other people's land at a time when its value is just about to escalate.

There is no reason why a landowner who has held his property for years and is on the verge of seeing his investment finally pay off should not share in the financial benefit of his foresight and patience. Why, then, shouldn't redevelopers be required to put aside a portion of the equity in the project to permit the compensation package offered to condemnees to include the equivalent of stock options?

This would allow condemnees to receive some of the rewards of entrepreneurship to which they would have been entitled if their property were not taken, but which are not available in the conventional eminent domain scenario. The trend toward increased privatization of the power of eminent domain is unlikely to come to a grinding halt anytime soon. Indeed, some of the beneficial results of such programs might never have come about otherwise.

It is important, however, to recognize that the current fashion for such "public-private partnerships" presents new challenges as well as new opportunities, and to remember that those who are already in the affected communities have a vital stake; they are entitled to the protection of the law from the overreaching exercise of the takings power, and where acquisition is shown to be justified, from underpayment. ■