

sleeping with the enemy

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Private ownership of real property is guaranteed by the U.S. Constitution but is subject to certain restrictions known as the four powers of government: Taxation, Eminent Domain, Police Power and Escheat. Eminent domain is the right of government to take private property for public use upon the payment of just compensation. Laws made by the legislative branches of government tend to define these powers. The process of making such laws has been compared to the making of sausage, something that most people don't want to see.



A recent Colorado law, House Bill (HB) 04-1203, was passed this year by the Colorado Legislature and signed by its Governor Bill Owens on June 4, 2004. Its passage was the product of an interesting coalition between conservative property rights legislators joining liberal labor supporters to rally against local governments struggling to maintain tax revenues that sustain services in a struggling economy. At the heart of the battle was a specific condemnation case peripherally involving the nation's largest economic engine, Wal-Mart. The elements of this scenario almost set up a perfect storm in eliminating a valid user of eminent domain, urban renewal. The outcome of the law was less dramatic. The law itself did not eliminate urban renewal but provided a powerful lesson in what may happen when traditional foes join forces against a symbolic Goliath backed by local government.

Wal-Mart is a monster. Without imparting whether you like or don't like Wal-Mart, its size alone qualifies it for that term. Simply put, Wal-Mart is huge. According to published economic data, approximately

\$1 in every \$9 spent in the United States, excluding real estate and automobiles, is spent at Wal-Mart or its subsidiaries such as Sam's Club. That amounts to \$256 billion in annual sales. Having its roots in rural retail centers has not limited Wal-Mart's sights in growing to be the nation's largest retailer. It is the nation's largest corporation, period. Already the largest grocery store and third largest pharmacy in America, Wal-Mart's vision has it becoming even more dominant within a few years by converting or abandoning its retail centers with the construction of new Super Wal-Mart stores in urban and suburban America as well as the rural areas.

Becoming this big cannot be done without stepping on a few toes. Famed for its low cost products and legendary pressures on producers to cut costs past imaginable levels, Wal-Mart is also known for its anti-union sentiment and low wages. Combating this image, Wal-Mart has created a marketing campaign hyping employees, morale and an optimistic career path within the company. However, an August 2004

study from the University of California at Berkeley Labor Center reports that state taxpayers in California subsidize Wal-Mart at about \$86 million per year due to substandard wages and benefits. This subsidy was in the form of health and social service benefits such as food stamps, Section 8 housing, low income energy assistance programs and others. This same study referred to a report by the Democratic Staff of the Committee on Education and the Workforce of the U.S. House of Representatives, prepared for Congressman George Miller (2004) estimating that a typical 200-employee Wal-Mart store costs federal taxpayers \$420,750 per year or about \$2,103 per employee. This does not include the impact on the local mom and pop stores that made Wal-Mart infamous in the first place.

In April 2003, a representative of Wal-Mart notified the Arvada Urban Renewal Authority that approximately one-eighth of a privately owned lake would be needed for a new Wal-Mart building. This building is intended to replace a vacant Home Base structure located in the Arvada

Urban Renewal Project Area. In June 2003, a condemnation case is filed after impasse has been reached over negotiations to acquire the site. The annual taxes collected from this redevelopment would generate about \$2.5 million, a far cry from the \$15 property tax levy on the lake.

Upon hearing that the lake's existence was in question, at least temporarily, a grassroots group of citizens gathered to protest the lake's possible demise. Calling press conferences at the water's edge, placards reading "Save Our Lake," "Stop Arvada's Wal-Mart," and "Stop Eminent Domain" started appearing in local newspapers or the nightly news with regularity. It would not be hard to imagine pro-labor/union representatives organizing and facilitating the events.

The lake in question is about 8-acres in size, nestled between an office complex, big box retail center and the I-70 interchange with I-76 in the northwest Denver metropolitan area. The lake provides an amenity



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to the abutting office complex but has little environmental significance in terms of species, wetlands or public use. After all, the lake is privately owned. Notwithstanding this non-descript existence, this lake becomes the centerpiece in a lawsuit and public debate concerning the use of eminent domain for urban renewal in Colorado. While the case did not specifically address the issue of condemning private property for a public use based on economic need, the Colorado Supreme Court reaffirmed the position that Colorado Urban Renewal Law required an urban renewal plan to be adopted to eliminate or prevent the spread of blight. This was contrary to the position taken by the Arvada Urban Renewal Authority which believed that it could condemn a property simply if the authority was dissatisfied with a particular retailer's economic performance.



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week. This success has attracted other venues to the area including a sports arena, amusement park, aquarium, and enlarged convention center and performing arts venue. Who wouldn't want this for their city? The baseball metropolitan district condemned the land where home plate is located and seemed to start the whole thing rolling.

In other areas redevelopment may never be possible to occur on its own due to multiple fractured ownerships, poor street configurations, weak or decaying infrastructure and other symptoms of what is called blight. It is clear that the elimination of physical blight or prevention of the spread of such decay is considered a public use and an appropriate target of eminent domain. There are innumerable examples of urban renewal projects which benefit the affected communities.

What encouraged a city to look towards economic relief is pressure to create more revenues, a stagnant economy, and honestly, the courts. The door was cracked open in *City of Chicago v. Gorham* (1980) where the court stated: “[T]he fact that the statute provided an impetus to economic development satisfied the requirement of public purpose. Similarly, in the case at bar, the city's determination to promote the commercial rebirth of its downtown area is a public purpose. In so holding, today's decision denotes that the publication of the public-purpose doctrine to sanction urban redevelopment can no longer be restricted to areas where crime, vacancy, or physical decay produce undesirable living conditions or imperil public health. Stimulation of commercial growth and removal of economic stagnation are also objectives which enhance the public weal (Emphasis in original.)”

The creator of HB 04-1203 is Shawn Mitchell, a young Republican legislator from Longmont, Colo. He is also a former Senior Fellow of the Independence Institute, a free-market think tank located in Golden, Colo. This think tank is renowned as a conservative organization. Its opinions are generally critical of local governments and its president was quoted in an editorial stating that, “Condemnation is the atomic bomb of governmental power and shouldn't be used for social engineering projects.” Previously, Mitchell had introduced legislation requiring that condemning authorities pay for the landowner's attorney's fees if the final award exceeds the final offer by 30 percent or more.

HB 04-1203 was introduced in the Colorado House of Representatives and assigned to the Information and Technology Committee whose chair happens to be sponsor of the bill. Its initial version stated, “. . . notwithstanding any other provision of law, no private property acquired by condemnation by an authority after the effective date of this Paragraph (e), as amended, shall be subsequently transferred to a private party. . .” According to its sponsor, the bill was necessary to limit governments that want to choose who owns property and who is qualified to develop it.

As the bill progressed from being introduced and assigned to a committee, it underwent fairly rigorous scrutiny and pressure to reduce its impact on the existence of urban renewal in Colorado. A special measure was attached during committee hearings relating to a situation occurring in the southern Colorado town of Telluride. This provision prohibits the use of condemnation to acquire land for park

or open space purposes by a city outside of its incorporation limits. The sponsor of the bill stated he was willing to work to remove this provision as it may end up jeopardizing the passage of his bill.

During this period, the cities of Colorado were not standing still. Understanding the elements of the storm brewing, the message for the legislators was “Mend it, don't end it.” Many cities were working through the Colorado Municipal League developing strategies and providing examples where the use of eminent domain was appropriate and productive to help bolster support among friendly legislators. Additionally, efforts were made through each city's representatives and senators to create a foothold against the impending maelstrom. Some cities considered whether to accelerate their urban renewal projects to beat the effective date of the new law.

What has been driving cities to look towards eminent domain to help redevelopment occur is a fundamental understanding of how and when redevelopment will occur. One side believes the free market mechanics will take care of the issue, the other side believes the governmental efforts are necessary. In Colorado, the acquisition of a major league baseball franchise, the Colorado Rockies, and subsequent acquisition and construction of a new baseball stadium, Coors Field, has often been cited as the catalyst for the revitalization of lower downtown Denver, called Lodo. In a matter of 10 years, downtown Denver has been transformed into a vibrant economic enterprise attracting people of all ages and interests to the area in time frames offsetting the traditional Monday through Friday, eight-to-five work

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In *Poletown Neighborhood Council v. City of Detroit* (1981), the trend continued from using physical blight as a premise for condemnation to an economic blight. This case raised a question of paramount importance to the future welfare of the state and its residents: Can a municipality use the power of eminent domain granted to it by statute to condemn property for transfer to a private corporation to build a plant to promote industry and commerce, thereby adding jobs and taxes to the economic base of the municipality and state? Essentially what was challenged was the constitutionality of using the power of eminent domain to condemn one person's property to convey it to another private person in order to bolster the economy. The court said yes. That was then, this is now.

If things weren't bad enough for the cities with conservative republicans creating stifling legislation, pro-labor/union advocates fighting individual projects, a national organization had been making headway in the fight against the use of condemnation for urban renewal projects. This organization called the Institute for Justice, a Washington-based property-rights law firm has been active nationally documenting the use of eminent domain on a state wide basis. This organization has been vocal in rallying public support against the use of eminent domain and was an outspoken advocate for private property owners in the "60 Minutes" television spot highlighting

inappropriate uses of eminent domain by local governments. Furthermore, the Institute for Justice filed a friend of the court brief in the recent reversal of the *Poletown* case in Michigan.

A project for the Institute for Justice, the Castle Coalition, is a nationwide network of property owners and community activist that seeks to prevent government and private parties from taking private property through eminent domain for private use. The project takes its name from the principle that everyone's home (or business) should be their castle - a place where they are safe and free from abusive government power. You can obtain an "Eminent Domain Abuse Survival Guide" kit from this organization on their Web site, www.castlecoalition.org. The Web site will also refer you to a local attorney who specializes in representing property owners. This organization bears watching if you are involved in urban renewal projects because it is developing a reputation for its ability to attract media and influence publicity. There is a saying that you should be close to your friends, but closer to your enemies.

If you look up Colorado in the Castle Coalition Web site, you will find the attorney representing the owner of the Arvada Lake desired by Wal-Mart and filed on by the Arvada Urban Renewal Authority. Having contested the immediate possession hearing unsuccessfully,

the attorney resorted to a last ditch effort and petitioned the Colorado Supreme court for relief from the Order of Immediate Possession under Rule 21 of the Colorado Rules of Civil Procedure. Summarizing her petition, the attorney stated, "For all of the reasons identified herein, respondents urge this Court to grant its petition. Only by doing so can a great injustice be prevented, a flagrant abuse of condemnation powers be enjoined, and a further erosion of private property rights for private economic gain be stopped." Out of the 300 petitions to 400 petitions filed before the Colorado Supreme Court annually only about 10 are granted. This was one of those 10.

The Colorado Supreme Court in March 2004 reversed the trial courts order for immediate possession and remanded the case back to the trial court for dismissal. Among the issues relevant to the decision were an outdated blight study and the fact that the Authority had issued a certificate of completion and renunciation of right of re-entry on the Lake Property. The case was over.

Quickly, advocates of urban renewal announced that the court system was capable of handling abuse and the makers of the new legislation were warning of future unseen dire consequences if the bill was not passed. Regardless, without casting a vote in either direction, the

momentum of using condemnation for economic reasons was broken.

By the end of June, the lake was saved -- a new eminent domain bill was passed increasing the level of blight necessary for the use of eminent domain, including requirements for business interruption payments and relocation benefits. The participants retreated to plan for the next day's battle. In what could have been considered a benefit to bring a major retailer to replace an empty big box retail store, this case turned into a lightning rod, attracting national attention in the use of eminent domain. The lesson learned in the past year was that in politics, one cannot assume that traditional foes are going to be against each other in every case, they may join forces against you. In other words, the enemy is unknown. Politics does make strange bedfellows. ♦

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