



By Wendy Lathrop, LS

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## Eminently Unfair?



A fight is underway in Ardmore, PA to save a number of businesses from condemnation by eminent domain.

eral and state governments supported by allowing these enterprises to take property from involuntary participants in the public improvement. Beneficiaries of this new-found power have included railroads, departments of transportation, and certain utilities, although what the government granteth, the government may also taketh away, and some (like some railroads) have been stripped of this power.

Lately a renewed wrinkle twists the fabric of our private constitutionally protected rights: the use of condemnation for economic growth. In the name of “highest and best use,” some local governments seek to declare certain areas blighted so that they can be condemned, torn down, and rebuilt with something that will provide a “greater good” to the community—not to mention tax ratables. This was common during the 1960s urban redevelopment craze, ripping down old buildings to erect new ones, many now facing the same fate. The neighborhood next to mine is going through similar turmoil in its historic business district, as the desire for downtown revitalization clashes with the desire of the nine threatened businesses to continue operating. The current plan is for a private developer to take control of the stretch of Lancaster Avenue in Ardmore, Pennsylvania after the Township condemns the properties, in order to construct a mixed-use parking structure with storefronts and apartments. Two of the threatened businesses have joined with residents and the newly formed

Once upon a time (as far back as the Roman Empire) in a land far, far away (on the other side of the Atlantic Ocean), it was accepted that the governing body had complete sovereignty over all lands in the empire or kingdom. This government also had the responsibility of delivering water (as by Roman aqueducts) and of maintaining the general population’s access to highways and byways (not just roads, but also waterways) so that people could move from place to place without fear of punishment for trespassing. When private land was needed for such public uses, the government could take it without consent, through the power of eminent domain.

In the colonies, much as we wished to distance ourselves from the overbearing weight of an absentee ruler who

demanding taxes and tribute from overseas, once we gained independence we were not about to reinvent a legal system that had been generally manageable for centuries. Instead, we tweaked the British version, coming up with the Fifth Amendment to our Constitution to prevent our new federal government from taking private property for public use without just compensation and due process of law (neither of which was part of the European version). Our Fourteenth Amendment holds the individual states to this same standard, and each state’s own Constitution contains provisions similar to the federal Fifth Amendment.

### A Renewed Wrinkle

Over the past two-plus centuries, powers of eminent domain were given to certain entities whose activities were thought to serve the public at large and that our fed-

"Save Ardmore Coalition" to file suit in federal court.

They are not alone in their battle to prevent condemnation to enable a developer to take over their property to presumably improve the overall quality of life in their community. Across the Delaware River from Pennsylvania, or rather in the river, 392-acre Petty's Island is a former industrial site that after years of inactivity has become home to a bald eagle's nest, a heron rookery, and protected wetlands. The island is under the jurisdiction of Pennsauken, New Jersey, which is working with Cherokee Investment Partners to improve its riverfront and the island. The current owner, Citgo Petroleum, is legally obligated to clean up the contamination, remove acres of asphalt, oil tanks and piping, and generally restore the brownfields. Citgo has additionally offered to donate the island as permanent public open space and establish a \$2 million stewardship fund for long term maintenance, a gift to a township and county that lack open space. But Pennsauken Township, Camden County, and Cherokee are looking to create an 18-hole golf course

on the island instead. To accomplish this, Pennsauken is threatening to condemn Petty's Island so that it can turn it over to Cherokee for the development that should bring in more taxes.

Watch for backlash from *Kelo v. City of New London*, the case for which the federal Supreme Court issued its opinion in late June. Seven landowners along the harbor in New London, Connecticut refused to accept the city's condemnation of their properties without a fight. Their homes had been labeled "blighted" to start the process of "raze and rebuild". New London can now seize their homes and turn them over to a private developer. The Supremes decided it is fine to use eminent domain to achieve "economic development" even if private business benefits, since this will increase tax revenue and improve the local economy. Justice O'Connor's eloquent dissent warns that no private property is now safe from development. A conservative activist has already proposed to Weare, New Hampshire that Justice Souter's home there be seized for replacement by a hotel.

The pressure to condemn is increasing these days, as money becomes tighter

and local governments seek ways to reduce expenditures and increase income. As a result, courts have faced some innovative applications of this power. One example: from 1989 to 1998, a series of three cases in South Carolina (*Eldridge v. City of Greenwood*, 388 SE 2d 247, 417 SE 2d 532, 503 SE 2d 191) arose from the City's belief that since it had the right to condemn and the Southern Railway had the right to condemn, they could swap strips of land to enable the railroad to relocate and the City to utilize the former rail bed for highway purposes. This land swap, or "substitute condemnation," was acceptable for tracts acquired in fee but found to be unconstitutional for the tracts over which only easement rights for rail purposes had existed (which would expire with a change in use). A growing number of Rails-to-Trails conversions face similar "second taking" verdicts.

Some surveyors consider land use to be peripheral to their work. But encroachments and inconsistent easement use are part of our daily practice. And constitutional challenges should be of interest to every citizen. *AS*

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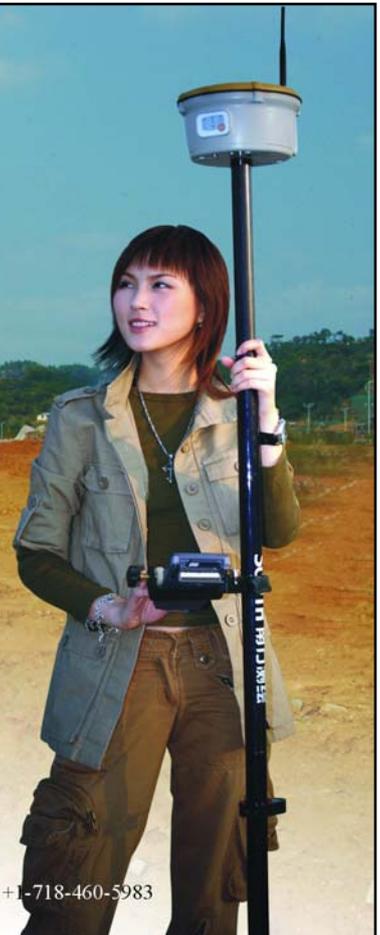
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