

# Municipalities pushing envelope on condemnations?

## ATTORNEY SAYS JUSTIFICATION IS SLIM FOR PRIVATE PURPOSES

Local governments usually have a public purpose in mind when they try to take private property through eminent domain, although that is not always the case — as any observer of the attempted Detroit land acquisitions for casinos knows.

In one of the more recent cases, the City of Novi attempted to take land from one property owner, the Novi Expo Center, to create a “driveway” or “industrial spur” for another neighboring owner. The owner took the case to court and won in a three-day trial in Oakland County Circuit Court. Now Novi is appealing.

The issue is whether a “taking” necessarily must involve a public purpose, or whether it can involve a private, or quasi-private purpose. According to Adam Cohen, an expert in condemnation law and an attorney with Steinhardt, Pesick and Cohen, municipalities and other government entities have overstepped their rights in condemning properties by assuming that a private purpose, such as a casino or a private driveway, is nearly as good as a public purpose as justification for the taking, or it is at least an adequate justification. That remains to be seen. The Journal recently talked to Cohen about what municipalities are doing, and what the courts are saying.

**Why has the casino issue not settled the public purpose issue once and for all?**

You are probably aware that the City of Detroit tried to take land for casinos along the riverfront through eminent domain, and most of the landowners challenged that on the grounds that it violated the constitutional public-purpose doctrine. The court never reached that issue, because it dismissed the cases based on the landowner’s jurisdictional challenges. The cases were defective for two reasons, and the courts never reached the public purpose issue, because it reached the other issue first.

**Do we know how the courts would react on such an issue?**

We can speculate. We will probably never find out for sure, because without a pending case, the court has no reason to decide the issue. My strong feeling is that the cases would have been dismissed for lack of public purpose, otherwise known as lack of public necessity, either at the trial level or at the appeal level. I think most people would agree that a casino is the ultimate private use — just the notion of taking private property from one person, for the direct benefit of another private person’s business agenda, smacks of an unconstitutional taking, and the public-purpose issue has been challenged on other grounds as well. Michigan has a long and storied history of scrutinizing the alleged public purpose behind various takings.

**We understand that the Poletown taking two decades ago may have set the stage for some of the misconceptions.**

One of the most notorious cases was the City of Detroit’s taking of Poletown, an entire neighborhood of historical and cultural importance, for direct transfer to



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Adam Cohen

General Motors in 1980, and the Michigan Supreme Court in that case found that the taking was constitutional. But it went out of its way to stress the singularly unique facts of that case, and tripped over itself to warn everyone that the same

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holding would not occur in future cases. And since that case, the Michigan Court of Appeals and the Michigan Supreme Court, on several occasions, have dismissed attempts to take private property for less than public purposes. There is a litany of cases to that effect. I think the casino cases would have been dismissed on those grounds.

There is a case that I argued in the Michigan Court of Appeals, just a couple of weeks ago, where the City of Novi attempted to take my client’s property for creation of a driveway for a next-door neighbor. I represent the Novi Expo Center, and the city of Novi wished to take some of the Novi Expo Center’s undeveloped land to build what the city called an industrial spur, which was really nothing more than a driveway to connect the business next-store, to a new road. It would be taking private property for a driveway for a next-door neighbor. You can’t do that. And I expect the Court of Appeals will say that they can’t do that.

**Would they have the ability to do this for a property that is landlocked somehow?**

This property is not landlocked, but based on Michigan law, even if it was landlocked, you could not take the next-door neighbor’s property to open up

access for that land. That law varies from state to state. Michigan takes the position that the rights of the property owner are paramount, and in that case, even if the next-door neighbor was landlocked, the taking would not be permissible.

**The casino issue has gone dormant for now. But the issue of public purpose could come up again if Detroit decided it needed to assemble riverfront property for some other purpose.**

Yes, it could. Over the past 10 to 15 years, government agencies have really been flexing their muscles on this issue, trying to push the line between public and private use to its extreme, which has created a lot of discussion and speculation among lawyers for landowners and government agencies alike, as to what is really permissible here. The more the cities feel they can sow their oats, the more you can see abusive tactics, like attempting to take property for a casino development. What could be more unconstitutional than that? What in the world is more private than a private casino?

**Is the definition of “public” ever-broadening, then?**

It is ever-broadening in the minds of government agencies. I don’t think it is every broadening in the minds of the courts that decide those issues.

**So the courts haven’t shared in this vision of what public means?**

I think the answer to that, is that Poletown caused a number of municipalities to believe that the law of public purpose had changed forever, but since then, during the last 20 years, the courts have bent over backwards to demonstrate that this was not the case, and in fact, the law remains the same. Poletown was an exception based on the facts of that case.

**Why were the facts so different?**

The biggest difference is that Detroit was mired in a recession that was threatening to bottom out into a regional depression, and General Motors made it abundantly clear that, in the event that this property was not made available to them, they were leaving the city of Detroit, they were leaving the State of Michigan. The Rust Belt was about to give way to the Sun Belt for the purposes of automotive production, and the city could not afford to see that happen. Although the Michigan Supreme Court’s majority could not bear to see that happen either, the minority said, this is a horrible day in the landscape of Michigan condemnation law, and we certainly hope it never happens again. And I don’t think it will.

