

THOU ART CONDEMNED: HOW NEW JERSEY COURTS ARE SACRIFICING PRIVATE LANDOWNERS ON THE ALTAR OF EMINENT DOMAIN

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I. INTRODUCTION

New Jersey is home to six major cities: Jersey City, Trenton, Newark, Camden, Patterson and Atlantic City. Over the past 30 years, these once robust industrial and manufacturing centers have deteriorated into rusty poverty traps and unemployment enclaves.² Abandoned factories and dormant, aging warehouses pollute their dreary landscapes and serve as a symbolic "unwelcome" mat to potential employers.³ Hazardous materials infect acres of urban land.⁴ New Jersey cities are infested with poverty, crime, drugs and poorly-performing public schools, such that private investors have little, if any, incentive to invest the resources required to improve housing stock and eradicate blight.⁵

¹ J.D., Rutgers School of Law-Camden (2005).

² Joseph F. Sullivan, *The Prognosis is Guarded for New Jersey's Ailing Cities*, N.Y. Times, January 15, 1984 at 7, § 4.

To put the job decline in perspective, according to New Jersey Communications Assistant Vice President Steven Wilson, New Jersey has lost 56 percent of its manufacturing jobs since 1979—from 801,000 to 355,100 in December of 2003. The New Jersey Business and Industry Association (NJBIA) is the nation's largest business advocacy association with over 21,000 members. Telephone Interview with NJBIA Assistant Vice President of Communications, Steve Wilson (February 4, 2004).

The author formerly served as NJBIA's Assistant Vice President of Communications.

³ Richard Lezin Jones, *In Rebirth of Silk City a Snag: Mayor's Indictment Tries the Patience of Paterson*, N.Y. Times, January 31, 2002 at B1. For example, Paterson, New Jersey's third-largest city, was once home to over 400 mills and factories. *Id.* All but four are abandoned. *Id.*

⁴ Press Release, Office of the Attorney General, Division of Criminal Justice and Dept. of Environmental Protection Target Urban Dumping & Environmental Crimes (January 24, 2003) at <http://www.state.nj.us/lps/dcj/releases/2003/riverkeeper0124.htm> (last accessed 2/18/05).

The initiative was created to respond to rampant incidents of companies illegally dumping hazardous waste in New Jersey Cities. *Id.* The release cites several instances of PCB contaminated soil dumping, discharge of highly toxic perchloroethylene and other illegal dumping activities. *Id.*

⁵ Jim Haner, *Drugs, Decay and Despair Hover Around City School*, Baltimore Sun, Oct. 4, 1998, at 1A, available in Lexis, News Library, BALSUN file (quoting landlord's lawyer as contending that, "no landlord in the city wants to spend money fixing a house that's

Manufacturing jobs having gone the way of rotary phones, these cities searched earnestly for a way to reinvent themselves.⁶

Beginning in the early 1990's, many cities began developing public-private partnerships as a way to stimulate economic growth and civic vitality within their borders.⁷ One type of public/private partnership being used involves government bodies building stadiums for use by profit-making sports teams.

For example, in New Jersey's capital city, Trenton, Mercer County Executive Robert Prunetti partnered with a private corporation to build Mercer County Waterfront Park, a minor-league stadium seating 6,800 people.⁸ This project was a cornerstone in Prunetti's effort to transform Trenton from a post-manufacturing wasteland into a family entertainment/tourist destination.⁹

Prunetti's effort required political cooperation as well as private participation.¹⁰ Given that one of the purposes of this journal is to help improve the quality of life in urban areas, it is worth noting that Prunetti transcended racial and political lines in his effort to help revitalize New Jersey's capital city.¹¹

anywhere near a blighted property for the simple reason that the blight will likely spread and destroy [the] investment." *Id.*

⁶ Rachele Garbarine, *New Baseball Parks Taking the Field in the State*, N.Y. Times, November 3, 1996, at 7, § 9. This article discusses how North Wildwood, Newark and Trenton are using Minor League Baseball to create a healthy tourism trade in their cities as a way to help fill the economic void created by the manufacturing exodus from New Jersey cities. *Id.* Between 1985 and 1992, thirty-three minor league stadiums were constructed. *Id.* All three elected officials interviewed in the article supported investing public tax dollars in minor league stadiums as a way to keep urban cores viable and to spur economic development. *Id.* The costs to build each stadium are as follows: Trenton, \$13 million; Newark, \$22 million; and North Wildwood, \$10.5 million. *Id.*

⁷ *Id.* These public-private partnerships entailed the assumption of risks and investment of tax dollars in the facilities themselves, with the private entities providing capital to buy the teams, all related Major League Baseball franchising and merchandising fees and all marketing costs. *Id.*

⁸ Robert Strauss, *Hoping Ball Parks Succeed In Speeding Urban Revival*, N.Y. Times Late Edition, September, 26, 1999 at 11. In the interests of full disclosure, readers should note that the author of this note spent several years as a member of Mercer County Executive Robert Prunetti's personal staff.

⁹ Henry Gottlieb, *Two Ways To Play the Game: How Lawyers in Sussex and Mercer Counties Did the Deals that Brought Professional Baseball Back to New Jersey*, New Jersey Law Journal, October 11, 1993 at 1. This article chronicles how private investors and the Prunetti administration brought the Trenton Thunder to New Jersey. It reports that the investors wanted to build the stadium in the suburbs and that Prunetti insisted it be built in the city. *Id.*

¹⁰ *Id.* Garden State Stadium Corp., whose principals included Samuel Plumeri (now deceased) and Joseph Caruso, leased the stadium from Mercer County for 20 years and sublease it to Garden State Baseball Corp., who owns the team. *Id.* The county receives \$1 per ticket sold, but no less than \$125,000 a year, and will receive \$41,000 a year from the sale of 15 "super boxes." *Id.* In addition, by the third year, the stadium lessors will be giving the county \$75,000 from concerts and other nonbaseball events. *Id.*

¹¹ Kamau Kujichagulia, *Prunetti Molds Mercer County: Interview with Robert Prunetti, Mercer County Executive*, Nubian News (November 8, 2001) at

Prunetti, a Republican, also risked his political future by investing significant taxpayer dollars in the city despite vocal suburban critics who vociferously opposed investing public money in Trenton.¹²

Prunetti's gamble paid off.¹³ During their truncated 1994 inaugural season, the Thunder attracted 318,252 fans to 51 games.¹⁴ Just two years later, the Waterfront Park hosted the Double-A All-Star Game, showcasing not just future big leaguers, but also Trenton for a national television audience on ESPN 2.¹⁵ By the end of 1999, the Thunder had sold 2,553,467 tickets over six summers of baseball games at Waterfront Park, making the franchise the fastest to top 2 million in ticket sales in Class Double-A history.¹⁶ Waterfront Park was so successful, that the New York Yankees decided to make it the home of their minor league affiliate—a major league triumph for Prunetti and for Trenton.¹⁷

The success of Waterfront Park's inaugural season also attracted additional private investment in Trenton.¹⁸ Three companies vied for the rights to develop what had been the Cooper Iron Works—a facility that manufactured munitions during the Civil War but had eroded into a dilapidated eyesore.¹⁹ To the pleasure of preservationists and the business community alike, KatManDu partners invested \$3.5 million renovating the building to maintain much of its

<http://www.nubiannews.com/archive/2001/prunetti.htm>. Prunetti, a Republican, forged a close and successful working partnership with the city's Democratic, African-American mayor, Douglas Palmer, who Prunetti worked with to "bring the city back from the ashes." *Id.* Their Trenton effort serves as a model of effective, progressive partnership for elected leaders throughout New Jersey.

¹² Janet Ward, *If you Build it, Will They Come?*, *American City and County*, April 1, 2002 at http://www.americancityandcounty.com/ar/government_build/ (last accessed March 29, 2005). Regional support was critical in Trenton, where Prunetti managed to convince skeptical suburbanites [where Prunetti drew the bulk of his electoral support] that the ballpark belonged downtown. *Id.* "I would only agree to build it in the city because I couldn't justify the economics of sending money to the suburbs," he says. *Id.* "They're already doing well. We needed to use the money as a stimulus in a depressed area. That was our public policy purpose." *Id.*

¹³ Bob Ryan, *Days of Thunder; Trenton a major success in minors*, *The Boston Globe*, July 14, 1995 at 49. In just its second year of existence, the Red Sox' Eastern League affiliate was on target to draw 450,000 people to Waterfront Park. *Id.*

¹⁴ Larry O'Rourke, *1994: Baseball's Comeback in Trenton* at <http://www.capitalcentury.com/1994.html> (last accessed February 18, 2005).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* O'Rourke notes that both the Thunder and KatManDu (a nearby nightclub built because of the Thunder's success) were so successful that owners of both ventures started fighting over the availability of parking spots on game nights. *Id.*

¹⁹ United States Environmental Protection Agency, *Brownfields Showcase Community Fact Sheet* (January 2000) at http://www.epa.gov/brownfields/html-doc/sc_trent.htm

historic character while adding an outdoor deck/bar to take advantage of its riverside location.²⁰

The success of Waterfront Park and KatManDu triggered a flood of investment into Trenton.²¹ Four years after the Waterfront Park's inaugural season, Prunetti built Sovereign Bank Arena (SBA) at Mercer County, a 10,000 seat multi-purpose arena that would be home to the Trenton Titans, a minor-league hockey franchise.²² Waterfront Park was so successful, that when Prunetti proposed spending \$40 million for Sovereign Bank Arena, there was virtually no public opposition.²³ SBA's success equaled that of Waterfront Park.

In less than two years, the arena welcomed its one millionth fan and was ranked one of the top 10 arenas in the world.²⁴ Shortly thereafter, Trenton welcomed a hotel for the first time in 27 years when Marriott opened a \$60

²⁰ *Id.*

²¹ George N. Saliba, *Trenton: Smart Growth in All Directions*, New Jersey Business Magazine (June 2002) available at <http://www.xarenasports.com/njbiz.html> (last accessed February 18, 2005).

²² Rachele Garbarine, *2d Anchor Begun in Trenton's Revitalization Plan*, N.Y. Times, Late Edition, December 14, 1997 at 7, § 11. Article gives a comprehensive overview of how Waterfront Park and Sovereign Bank Arena are part of a bigger urban revitalization plan for Trenton.

Just as Waterfront Park triggered satellite investment, so did Sovereign Bank Arena. Two restaurants—Urban Word and the Conduit—opened directly across the street from Sovereign Bank Arena soon after it opened. For further discussion of this, see Cathy Frank White, *Message from the President*, Mercer Business Magazine, March 2003 available at www.mercerchamber.org/presidentmessage/message0303.asp (last accessed February 18, 2005).

²³ Janet Ward, *If you Build it, Will They Come?*, *American City and County*, April 1, 2002 at http://www.americancityandcounty.com/ar/government_build/.

²⁴ Laura Mansnerus, *Signs of Life Stir in Trenton*, N.Y. Times, February 20, 2000, at 6, § 14NJ. Since the Sovereign Bank Arena opened, Trenton has hosted a wide range of entertainment luminaries such as Elton John, Shania Twain, Pavoratti, Kenny Rogers, CREED, Britney Spears, KISS, Sara Brightman, Boston Pops and Barnum Bailey Circus. *Id.* The arena is consistently ranked among the best in the world. Press Release, Sovereign Bank Arena, *Sovereign Bank Arena Ranked in Top Twenty in World* (January 2004) available at <http://sovereignbank-arena.com/press/pollstar04.html> (last accessed February 18, 2005).

million facility one block from the Capitol.²⁵ Until then, New Jersey was the only state without a hotel in its capitol city.²⁶

The success of Waterfront Park has also attracted non-entertainment investment to Trenton.²⁷ The \$18 million Roebing Market Project, just across the street from the Sovereign Bank Arena, is a successful 110,000 square foot retail complex with a supermarket employing 140 people, a computer retail store, a Radio Shack, a laundromat, a clothing store, and other small businesses employing between four and five people.²⁸

Most recently, Mannex entertainment (which produced special effects for movies such as *The Matrix*) announced that it plans to build a \$60 million production complex expected to create 1,000 jobs across the street from Sovereign Bank Arena.²⁹ Hill Wallock, New Jersey's 29th largest law firm, recently announced plans to build its corporate headquarters in Trenton.³⁰

²⁵ Marci Alboher Nusbaum, *In Trenton; The Changing Face of a State Capital*, N.Y. Times, August 5, 2003 at 7, § C. The \$54 million hotel opened in April, 2002. *Id.*

An average of 150 tradesmen worked each day of the nearly two years of hotel construction, and nearly \$2 million dollars in business went directly to local companies such as engineering, environmental, construction and architectural firms. The Associated Press, *Trenton Hopes Hotel Will Rescue Downtown*, Bergen Record, May 31, 2000 at A8. The hotel now employs 123 associates, 64% of which are Trenton residents. *Id.* For a more updated and detailed discussion of the hotel's economic impact see http://www.dep.state.pa.us/hosting/phoenixawards/Presentations/present_02/Cases/case_02.2.htm (last accessed on February 18, 2005).

²⁶ *Id.*

²⁷ Anthony Birritteri, *Trenton Hits a Home Run with Revitalization Plan*, New Jersey Business, August, 1997 at 21-26. This article discusses the impact of Waterfront Park as part of an integral plan to Trenton's economic recovery.

²⁸ *Id.* Additionally, the success of the arena and Waterfront Park prompted Keating Development Corporation to begin planning several thousand square feet of office space adjacent to the arena. Cathy Frank White, *Monthly Chamber President's Message*, Mercer Business Magazine, March 2003 at www.mercerchamber.org/presidentmessage/message0303.asp. This project includes office buildings, retail shops, a YMCA facility and a parking garage, as well as a renovated historic factory that developers plan to convert into a sports-themed restaurant and sports bar. *Id.*

²⁹ Press Release, Mercer County Executive's Office, Prunetti Welcomes Manex to Mercer County (December 17, 2002) available at http://www.mercercounty.org/pr/arc/12_17_manex.html. (last accessed February 18, 2005). When complete, the Trenton Studios Development Project will have renovated 89,000 square feet of existing building space for administrative offices and post-production studios (to edit films); 85,000 square feet of various lighting and on-location filming equipment for rent and new construction of over 100,000 square feet of state-of-the-art production stages and studios. It will also employ an estimated 1,000 people. Press Release, Manex Entertainment Studios, Manex Entertainment Completes Acquisition of Trenton Studios Complex (June 1, 2003) available at <http://www.forrelease.com/D20030601/lasu008.P2.06012003161243.24181.html>. (last accessed February 18, 2005).

³⁰ Albert Reboteau, *Tax Incentives Help Lure Big Law Firm to Trenton*, Trenton Times, July 29, 2003 available at

Finally on the Trenton horizon, are three big development projects. First is South Broad Street Village, a multi-million dollar 13-acre entertainment-based village, incorporating all new housing, retail shops, professional space, restaurants and night clubs. The village will be within walking distance of Sovereign Bank Arena, Mercer County Waterfront Park and the Camden-Trenton light rail station.³¹

Second is the \$25 million XArena project. This proposed development would center around motorcross race tracks, a restaurant and a nightclub.³²

Third, Advance Realty expects to invest \$100 million in 400,000 square feet of Class A office and retail space, an additional 930-car parking garage, a restaurant on the water and 200 conventional multi-family housing units along the Trenton waterfront near Waterfront Park.³³

These are impressive accomplishments, particularly for Trenton, which not even ten years ago was a ghost town after the state workers left for the evenings and weekends.³⁴ A persuasive argument could be made that Trenton would still be wasting away in the economic ruins of its manufacturing past if the Mercer County Improvement Authority had not taken land from a private citizen to build Waterfront Park.³⁵

<http://www.cdfa.net/cdfa/press.nsf/0/26fa6df99182b32f86256d72005949f9?OpenDocument>. (last visited March 29, 2005). Hill Wallock anticipates bringing 140 employees to the Trenton site. *Id.* The building represents an \$11.8 million investment by Hill Wallock. *Id.* See also, Nusbaum, *supra*.

³¹ <http://www.southbroadstreetvillage.com/home.htm>

When the author served at Deputy Executive Director of the MCI, private investors had committed approximately \$40 million. But since this article was first written in 2004, there has been a political change in the Mercer County administration. Democrat Brian Hughes (son of former New Jersey Governor) replaced Mercer County Executive Robert Prunetti who retired. The status of this project is unknown as of March, 2005. However, copies of the plan can be gotten by contacting the Mercer County Improvement Authority at 609-695-1200.

³² George N. Saliba, *Trenton: Smart Growth in All Directions*, New Jersey Business Magazine (June 2002) available at <http://www.xarenasports.com/njbiz.html>. (last accessed February 18, 2005). The facility will be 230,000 square feet. *Id.*

³³ *Id.* Advance has already invested considerably in this area. Among their assets is a 930-space parking garage.

³⁴ Janet Ward, *If you Build it, Will They Come?*, *American City and County* available at http://www.americancityandcounty.com/ar/government_build/ (last accessed February 19, 2005).

[The ballpark] has been the catalyst for hundreds of millions of dollars worth of development," says [Trenton] Mayor Doug Palmer. "[Prunetti and I] set out to accomplish four goals: We wanted to bring people downtown after 5 p.m.; we wanted to keep people here after work; we wanted to change people's perception of the safety of the city; and we wanted to set the stage for private development. We have accomplished all four goals." *Id.*

³⁵ Jerome Cramer, *So, You Want to Own a Minor League Baseball Team*, *Forbes.com* (Sept. 15, 2003) available at http://www.forbes.com/fyi/2003/0915/082_3.html. (last accessed February

But is sacrificing private property rights too high a cost to pay for the speculative opportunity to breathe life into a dying city? Is the hope of igniting an urban economic revival by building a professional sports stadium such a compelling public benefit that it trumps private property rights? Or is the right to private property so sacrosanct that even a single property owner should have veto power over the economic future of an entire city?

This note will address whether building sports and entertainment facilities satisfies New Jersey's public purpose requirement of eminent domain, and discuss whether the New Jersey courts have been too deferential to the Legislature and other local governing bodies making the power of eminent domain nearly absolute, provided that the condemning agency follows pro forma procedural requirements.

This author will argue that New Jersey courts have too willingly subrogated individual private property rights to the corporate will of the Legislature by emphasizing procedural correctness and foregoing inquiry into the substantive rights invoked in an eminent domain property seizure. To restore balance between government and individuals, both the courts and the Legislature should implement procedural and substantive law changes that better protect private landowners but do not allow individual landowners to confound governmental efforts to undertake projects that will benefit the greater good. Suggested changes to reestablish this balance are made at the end of this article.

II. CURRENT STATE OF THE LAW

A. FEDERAL LAW

I. SUPREME COURT EXPANDS MEANING OF PUBLIC USE

The power of eminent domain is an inherent, fundamental and necessary attribute of sovereignty; superior to all private property rights,³⁶ but this power is

19, 2005). Minor League Baseball franchises generate gross profit margins of approximately 60-70 percent. *Id.*

In the Trenton Thunder example, a government entity owns the stadium, but the baseball team franchise owners have a long-term lease granting them exclusive use of the facility for certain periods of the year. *Id.* The \$12 million, 6,138-seat stadium on Trenton's Delaware River waterfront was financed mostly by a \$9.8 million bond issue that the county will repay over 20 years with the help of a state loan of about \$4 million. Gottleib, *supra* note 8 at 1.

³⁶ See, e.g. 2A-7 Nichols on Eminent Domain § 7.01 (Julius L. Sackman ed., 3d ed. 1998) Eminent domain is the authority to take private property for a public use so long as just compensation is paid to the owner for the taking. *Id.* The United States Constitution and state constitutions recognize this principle. *Id.* Eminent domain authority is available to the federal government by way of the Fifth Amendment to the United States Constitution as well as to each state government as an inherent attribute of sovereignty, subject to limitations found in each state's constitution or statutory law. *Id.*

circumscribed by the public use requirement of the Fifth³⁷ and Fourteenth Amendments.³⁸ Traditionally, the government's use of eminent domain was largely exercised for public use projects such as roads, schools and public buildings.³⁹ The courts also allowed government entities to exercise eminent domain powers for the benefit of private corporations that provided essential quasi-public services such as railroads and utilities.⁴⁰ But beginning in the late 1940's and 1950's, some states began exercising eminent domain powers to clear slums.⁴¹ The Supreme Court expanded and strengthened eminent domain power in its 1954 decision, *Berman v. Parker*⁴² by changing the standard required for exercising eminent domain powers from public "use" to public "purpose."

In *Berman*, the U.S. Supreme Court by changing that single word, affixed a broad meaning to the concept of public use, and allowed the government to take private property from one owner and convey it to a private builder as part of a redevelopment plan.⁴³ The Court did so by upholding a Washington, D.C. statute that endowed a redevelopment agency with eminent domain powers.⁴⁴ The statute authorized the redevelopment agency to declare an entire area blighted

The power of eminent domain may also be delegated to municipal and public services corporations, although specific authorization is necessary for that grant of power. *Id.*

³⁷ U.S. CONST. amend. V. "No person shall... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

³⁸ U.S. CONST. amend. XIV, § 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

³⁹ <http://www.castlecoalition.org>. (last accessed February 19, 2005). The Castle Coalition is an organization whose purpose is to curb what they view as government abuse of eminent domain powers. See also 2A-7 Nichols on Eminent Domain § 7.03 (Julius L. Sackman ed., 3d ed. 1998) (describing the evolution of "public use" in the U.S. Nichols affirms the Castle Coalition's paraphrased, pedestrian summary of the evolution of "public use" in the U.S.). The Coalition is affiliated with the Institute for Justice, an organization who regularly offers legal assistance to targets of eminent domain. <http://www.ij.org/index.shtml>

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Berman v. Parker*, 348 U.S. 26, 29 (1954)

⁴³ *Id.*

⁴⁴ *Id.*

and so it could build housing units by condemning the property of an area that included a profitable department store.⁴⁵

In upholding the District's statute, the majority articulated a hegemonic doctrine of legislative deference in regard to what constitutes public use⁴⁶ and stated that public use encompasses economic revitalization. In the *Berman* case, public use included the ability to take a viable commercial property in a blighted area for the purpose of improving that area in terms of modernized housing stock and beautification.⁴⁷

Under *Berman*, once the government declares an area blighted, the court applies an easily passible rational basis test to the goals the governing body seeks to achieve.⁴⁸ The only constitutional protection left to the property owner is the just compensation clause of the Fifth Amendment.⁴⁹ Because the Court requires just a rational basis test in determining public use, it has been argued that the government's eminent domain power is nearly unassailable.⁵⁰

⁴⁵ Thomas Darren Barker, Note: *Public Use, Private Taking and Economic Growth or Disney's Latest E(minent Domain)-Ticket Attraction*, 21 W. St. U.L. Rev. 547 (1994).

⁴⁶ *Berman*, 348 U.S. at 31-32.

The power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs... We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition.

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating concerning local affairs. This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

Berman, 348 U.S. at 31-32.

⁴⁷ *Id.* at 33.

⁴⁸ *Id.*

⁴⁹ Thomas Darren Barker, *Public Use, Private Taking and Economic Growth or Disney's Latest E(minent Domain)-Ticket Attraction*, 21 W. St. U.L. Rev. 547, 549-51 (1994).

⁵⁰ See, e.g., Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 161 (1985) (stating that "the Supreme Court gave the [public use] limitation a mortal blow in *Berman v. Parker* when it noted that 'the concept of the public welfare is broad and inclusive' enough to allow the use of the eminent domain power to achieve any end otherwise within the authority of Congress" (quoting *Berman*, 348 U.S. at 33)).

The virtual impregnability of the state's eminent domain power was confirmed by the Supreme Court in the unanimous *Hawaii Housing Authority v. Midkiff* decision.⁵¹

In *Midkiff*, the Supreme Court dispensed with the blighted requirement of the Public Use Doctrine by upholding a statute that permitted a state entity to take land from one private party and to transfer it to another private party for reasons of economic efficiency.⁵² At issue was whether land takings initiated by the Hawaii Housing Authority under the Hawaii Land Reform Act violated the public use requirement.⁵³ The Act sought to address what the Hawaii Legislature viewed as an unstable, ossified real estate market created by a small concentration of landowners that owned a disproportionately large share of Hawaiian real estate.⁵⁴ In effect, the Act forced a small cadre of landowners to sell their land to their lessees in order to create a more fluid real estate market and ostensibly to give Hawaiians the opportunity to own, rather than lease, their homes.⁵⁵

Writing for the majority and quoting extensively from *Berman*, Justice O'Connor affirmed the legislature's sweeping discretion to determine what acts constitute public use.⁵⁶ Moreover, the Court stated that a governing body's

⁵¹ *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).

⁵² Gail Lewis, NOTE: *HAWAII HOUSING AUTHORITY v. MIDKIFF: THE PUBLIC USE REQUIREMENT IN EMINENT DOMAIN*, 15 *Envtl. L.* 565, 566-68 (1985). Lewis explains that because of the complex feudal land tenure and ownership scheme practiced in Hawaii until it became a state in 1959, seventy-two individuals owned forty-seven percent of Hawaii's land. *Id.* At the time the suit was initiated, the federal and Hawaiian government owned a combined forty-nine percent of the remaining land, leaving only four percent of the total land available for competitive assignability. *Id.* The Hawaiian Legislature's concern that the scarce land supply available for ownership caused excessive inflation, forced families from their homes and into public housing. *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ "In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" J. O'Connor quoting *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896). *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240 (1984). Once again, the Supreme Court is affirming the state's near de facto absolute power to define public use. As Nichols puts it:

The *Midkiff* ruling thus endorses the use of eminent domain as a tool to redistribute private resources within society to accomplish certain widely drawn public purposes. *Midkiff*, *Berman*, and other federal court decisions also exemplify the expansive interpretation now given the public use requirement on the federal level. Additionally, these cases suggest the limited judicial role in questioning the advisability of eminent domain decisions. LEXSTAT 8A-22 Nichols on Eminent Domain @ 22.02.

purpose in exercising eminent domain need only be "rationally related to a conceivable public purpose."⁵⁷

II. THE NINTH CIRCUIT ANNOUNCES THE OUTER LIMITS OF EMINENT DOMAIN

In the 50 years since the Supreme Court issued its *Berman* decision, only once has a federal court found that a governing body failed to meet the public use requirement.⁵⁸ In *99 Cents Only Stores v. Lancaster*, the Ninth Circuit Court of Appeals held that transferring a private commercial property from one profit-making corporation to another without declaring the area or property blighted was an unconstitutional taking.⁵⁹

In the *99 Cents* case, the City of Lancaster proposed allowing Costco, a retail store, to expand into an adjacent retail space occupied by its competitor, 99 Cents Only Stores.⁶⁰ Costco threatened to leave Lancaster, taking jobs and tax revenue with it, and demanded the city take the property by eminent domain.⁶¹ Since Costco was an anchor tenant in this particular shopping plaza, Lancaster City officials feared the economic consequences of Costco following through with its threat.⁶² The city's strategy was to argue that it wanted to prevent *future*

⁵⁷ *Hawaii Hous. Authority* at 241. : "But where 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."

This language reflects the sentiment expressed by the *Berman* court that defining a public use and the limits of police power under which eminent domain is exercised is inherently ambiguous and eludes precise definition. See *Berman*, 348 U.S. at 31.

⁵⁸ *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (2001).

⁵⁹ *Id.* at 1129-30.

In this case, the evidence is clear beyond dispute that Lancaster's condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another. Indeed, Lancaster itself admits that the only reason it enacted the Resolutions of Necessity was to satisfy the private expansion demands of Costco. It is equally undisputed that Costco could have easily expanded within the Power Center onto adjacent property without displacing 99 Cents at all but refused to do so. Finally, by Lancaster's own admissions, it is was willing to go to any lengths -- even so far as condemning commercially viable, unblighted real property -- simply to keep Costco within the city's boundaries. In short, the very reason that Lancaster decided to condemn 99 Cents' leasehold interest was to appease Costco. Such conduct amounts to an unconstitutional taking for purely private purposes.

⁶⁰ *Id.* at 1125-27.

⁶¹ *Id.*

⁶² *Id.*

blight.⁶³ This prevention strategy departed with the traditional exercise of eminent domain powers which had focused on eliminating *existing* blight.

Although the court expressed its concern that the Lancaster Redevelopment Agency was merely acting as a conduit to transfer property benefits from one private party to another,⁶⁴ the more immediate concern of the court seemed to be procedural. Had the redevelopment agency declared the area blighted when it filed its Resolution of Necessity to Amend the original Amargosa Plan (to revitalize what had been a blighted area),⁶⁵ it appears likely that Lancaster's taking would have been similar to the taking in *Berman* and held constitutional.

B. NEW JERSEY LAW

Like the U.S. Supreme Court, New Jersey courts have interpreted eminent domain powers broadly⁶⁶ and have been exceptionally deferential in allowing the legislature to define what specific activities constitute public use/purpose and in allowing local political subdivisions (towns, independent authorities, etc.) to exercise their eminent domain powers.⁶⁷ This exceptional deference likely

⁶³ *Id.* at 1129.

⁶⁴ *Id.* at 1129-30.

⁶⁵ *Id.* at 1125-26. Presumably, had the Lancaster government declared the area either blighted or determined, prior to initiating eminent domain proceedings that expanding Costco was in the best interests of the community, the Court would have upheld the taking. It should be noted that 99 Cents Stores only leased the property and that the Lancaster government unsuccessfully offered to purchase the property from the owner for a sum of \$3.8 million and to pay the costs of relocating 99 Cents. *Id.* at 1126. Once the outright purchase of the land failed, Lancaster offered to buy 99 Cents leasehold interest for \$130,000. *Id.* This too failed. *Id.* Lancaster's plan was to use \$3.8 million to buy the land then resell it to Costco for \$1. *Id.*

⁶⁶ *Mansfield & Swett, Inc. v. West Orange*, 120

N.J.L. 145 at 150 (1938):

The state possesses the inherent authority -- it antedates the constitution -- to resort, in the building and expansion of its community life, to such measures as may be necessary to secure the essential common material and moral needs. The public welfare is of prime importance; and the correlative restrictions upon individual rights -- either of person or of property -- are incidents of the social order, considered a negligible loss compared with the resultant advantages to the community as a whole.

⁶⁷ *Essex Falls v. Kessler Inst.*, 673 A.2d 856, 860 (Law Div. 1995) affirming that when a municipality adopts an ordinance in the exercise of its power of eminent domain, that determination is usually presumed valid and entitled to great deference. *See also, Burnett v. Abbott*, 102 A.2d 16, 17(1954) (holding that great discretion is usually granted to condemning authorities in determining what property may be taken for public purposes); *Roe v. Kervick*, 199 A.2d 834, 842, 846, 856 (1964) (holding that the determination of what constitutes a public

emanates in part from broad language in the State's constitution, which was amended in 1947 in part to declare that undertaking remedial efforts to address blight is both a public purpose and a public use,⁶⁸ leaving the power to define blight to the Legislature. The Legislature did that when it passed the Blighted Areas Act⁶⁹ in 1949. This Act has been most recently superceded by the Local Redevelopment and Housing Law (LRHL)⁷⁰ in 1992. Among the more significant changes was the Legislature changing the "blight" requirement to read "an area in need of redevelopment."⁷¹ This was interpreted by one judge as broadening the

purpose is primarily a function of the Legislature is self-evident and that a private benefit accruing from the lending of public money does not per se violate "public purpose" element of eminent domain so long as a public purpose is the paramount purpose being served by the public expenditure).

⁶⁸ N.J. Const. art. VIII, § 3, par. 1: The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired. Municipal, public or private corporations may be authorized by law to undertake such clearance, replanning, development or redevelopment; and improvements made for these purposes and uses, or for any of them, may be exempted from taxation, in whole or in part, for a limited period of time during which the profits of and dividends payable by any private corporation.

⁶⁹ "Blighted Areas Act," P.L.1949, c. 187 (C. 40:55-21.1 et seq.) defines blighted areas as areas where any of the following conditions exist:

- (a) The generality of buildings used as dwellings or the dwelling accommodations therein are substandard, unsafe, insanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living;
- (b) The discontinuance of the use of buildings previously used for manufacturing or industrial purposes, the abandonment of such buildings or the same being allowed to fall into so great a state of disrepair as to be untenable;
- (c) Unimproved vacant land, which has remained so for a period of ten years prior to the determination hereinafter referred to, and which land by reason of its location, or remoteness from developed sections or portions of such municipality, or lack of means of access to such other parts thereof, or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital;
- (d) Areas (including slum areas), with buildings or improvements which by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community;
- (e) A growing or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein and other conditions, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

⁷⁰ "Local Redevelopment and Housing Law," P.L.1992, c. 79 (C. 40A:12A-1 et al.)

scope of LRHL, but the New Jersey courts have recently ruled that the term is synonymous with "blight."⁷²

I. THE MECHANICS OF NEW JERSEY CONDEMNATION

County and municipal eminent domain condemnations are largely executed via the LRHL.⁷³ Here is how the procedure works.

The municipal governing body derives its authority to declare a delineated area in need of redevelopment from a legislative statute: the aforementioned LRHL.⁷⁴ Under this authority, a governing body initiates a procedure to realize its redevelopment goals. The governing body begins this process by authorizing the local planning board to investigate preliminarily whether a proposed area is a

⁷¹ N.J. Stat. Ann. §40A:12A-5. Determination of need for redevelopment. A delineated area may be determined to be in need of redevelopment if, after investigation, notice and hearing as provided in section 6 of P.L. 1992, c. 79 (C. 40A:12A-6), the governing body of the municipality by resolution concludes that within the delineated area any of the following conditions is found:

a. The generality of buildings are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living or working conditions.

b. The discontinuance of the use of buildings previously used for commercial, manufacturing, or industrial purposes; the abandonment of such buildings; or the same being allowed to fall into so great a state of disrepair as to be untenable.

d. Areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.

e. A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

⁷² *Forbes v. Board of Trustees*, 712 A.2d 255,257-260 (1998) (finding that the blight definition of the Blighted Area Act was virtually unchanged by the use of the phrase "area in need of redevelopment" in the LRHL). Instead, it was a more palatable substitute for slum or blighted area. *Id.* A comparison of footnotes 68 and 70, *supra*, shows that the salient portions of the LRHL tracks almost exactly the Blighted Area Act. However, such statutory Xeroxing does not preclude a future broadening of the statute's meaning.

⁷³ Barbara Nash Westcott, Note: *Dealing a Fair Hand to Atlantic City Property Owners*, 31 Rutgers L. J. 913, (2000).

⁷⁴ N.J.Stat. Ann. §40A:12A-5.

redevelopment area.⁷⁵ Next, the planning board conducts a public hearing and recommends that the governing body declare or reject whether the delineated area requires redevelopment.⁷⁶ The municipal governing body may then adopt a resolution designating the site to be a redevelopment area if their decision is supported by substantial evidence.⁷⁷ The standards for determining whether an area may be designated in need of redevelopment are set forth in N.J.S.A. 40A:12A-5.⁷⁸ Once so designated, there is a presumption that the designation is valid and the public use requirement is met.⁷⁹ Once the government entity completes the LRHL process, the New Jersey Eminent Domain Act of 1971⁸⁰ is triggered.

The Eminent Domain Act lists four steps to the condemnation process:⁸¹ 1) negotiation (condemnor must offer landowner a fair price for the land); 2) condemnation initiation (if landowner refuses to sell, condemnor can file a complaint with the court to stipulate that condemnor can rightfully exercise eminent domain powers); 3) compensation calculation (three commissioners are appointed by the court to determine fair compensation for the land); and 4) appeal (if landowner is unsatisfied with the amount of money paid, he can seek a review of the award from the Superior Court.)

So long as the governing body follows the procedural formalities necessary to declare an area blighted, the government's eminent domain powers are near absolute.⁸² Let's look at some examples.

⁷⁵ N.J.Stat. Ann. §40A:12A-6.

⁷⁶ N.J.Stat. Ann. §40A:12A-6(b)(5).

⁷⁷ *Id.*

⁷⁸ N.J.Stat. Ann. §40A:12A-5

⁷⁹ *Essex Falls*, 673 A.2d 856, 860 (Law Div. 1995)

⁸⁰ N.J. Stat. Ann. §20:3 1-50 (LEXISNEXIS 2003). A Rutgers Camden Law School graduate summarized the application and purpose of this statute in her note: N.J. Stat. Ann. § 20:3 1-50 (West 1997). The Eminent Domain Act of 1971 applies to every agency having the power of eminent domain within the state of New Jersey, except agencies under compacts between New Jersey and other states. *See id.* § 20:3-49,50. The purpose of the statute is to provide uniform requirements in the condemnation process. *County of Monmouth v. Wissell*, 342 A.2d 199, 203 (1975). Barbara Nash Westcott, Note: *Dealing a Fair Hand to Atlantic City Property Owners*, 31 Rutgers L. J. 913(2000).

⁸¹ N.J. Stat. Ann. §20:3-1 to 50 (LEXISNEXIS 2003). §20:3-6.

⁸² *City of Trenton v. Lenzner*, 109 A.2d 409, 413 (N.J. 1954)(a reviewing court will not upset a municipality's decision to use its eminent domain power "in the absence of an affirmative showing of fraud, bad faith or manifest abuse.") *See also*, Barbara Nash Westcott, Note: *Dealing a Fair Hand to Atlantic City Property Owners*, 31 Rutgers L. J. 913, 926 (2000).

II. NEW JERSEY COURTS ON EMINENT DOMAIN AND PUBLIC USE

One experienced New Jersey property lawyer observed that *New Jersey Housing and Mortgage Finance Agency v. Moses* is to New Jersey eminent domain law what *Midkiff* was to Fifth Amendment takings clause jurisprudence.⁸³ In *Moses*,⁸⁴ several private business owners opposed the acquisition of their properties, which were located within a designated redevelopment area, to build a privately owned Pathmark supermarket.⁸⁵ Citing the legislative deference and public use doctrines of *Berman* and *Midkiff*, the *Moses* court ruled against the business owners.⁸⁶

In so ruling, the *Moses* court found that building a shopping center to provide services to the 93,000 residents who lived within a mile of the proposed Pathmark satisfied the public use requirement even though a private shopping center owner would derive substantial benefits.⁸⁷ The *Moses* court deferred to the "expertise"⁸⁸ of the condemning authority.

New Jersey courts offered this same deference to public use determinations when applied to sports complexes. The court considered whether building sports complexes met public use requirements in *New Jersey Sports & Exposition Authority v. McCrane*.⁸⁹ Defendants in this case challenged the

⁸³ Edward D. McKirdy, *The New Eminent Domain: Public Use Defense Vanishing in Wake of Growing Privatization of Power*, 155 N.J.L.J. 1145 (1999). McKirdy discusses the expansion of public use from a narrow definition meaning taking property for a bona fide public project like a road or school to an extraordinary broad definition that allows governments to transfer land from one private owner to another who can use that land to build profit-making projects such as casinos and shopping centers.

⁸⁴ *N.J. Hous. & Mortgage Fin. Agency v. Moses*, 521 A.2d 1307 (N.J. Super. Ct. App. Div. 1987).

⁸⁵ *Id.* at 1307-08.

⁸⁶ *Id.* at 1310-11.

⁸⁷ *Id.*

⁸⁸ *McKirdy*, supra Note 82, at 1145:

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.

⁸⁹ *N.J. Sports & Exposition Auth. v. McCrane*, 292 A.2d 580 (N.J. Super. Ct. Law Div. 1971), modified by 292 A.2d 545 (N.J. 1972) (holding that the New Jersey Sports and Exposition Authority Law, empowering a government entity to buy land and build a sports arena profiting private owners, is constitutional because the Legislature declared that building such a stadium was a public purpose in the enabling legislation).

constitutionality⁹⁰ of the New Jersey Sports and Exposition Authority Law,⁹¹ which created the Authority to develop a sports complex in the state meadowlands to house one or more major league sports teams, and to build exhibition facilities.⁹²

Noting that the Roman Empire built the "Coliseum and other similar structures for the entertainment and edification of the public,"⁹³ the court stated that building stadiums and structures for public entertainment met the public purpose requirement.⁹⁴

As *Moses* and *McCrane* demonstrate, New Jersey courts have repeatedly pushed the boundaries of public use law, finding that even building stadiums and privately-owned supermarkets is justified so long the Legislature gives its blessing and the condemning governmental entity has a rational basis for exercising its condemnation powers. Then along came *Cynwyd*⁹⁵ and an accidental antihero for the everyman, Donald "You're Fired" Trump.

When Trump tried to use a governmental redevelopment agency to seize the property of an elderly widow so he could expand his gambling business, it seemed that the outer limits of eminent domain had been reached and that the New Jersey courts would apply a heightened level of scrutiny when a condemnation benefited a private party. *Cynwyd* was a complicated, technical case involving competing Atlantic City casinos situated on adjoining property.⁹⁶ Ceasers and the Sands were battling over the price Atlantic City paid to acquire a

⁹⁰ *Id.* at 598-99. This case arose in part because the New Jersey Treasurer refused to transfer \$1.5 million in state funds in seed money to get the Authority up and running. *Id.* The basis for the Treasurer's refusal was that the enabling statute violated the public purpose requirements of N.J. CONST. of 1947, art. VIII, § III, para. 3, which provides: "No donation of land or appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association or corporation whatsoever."

⁹¹ N.J. Stat. Ann. § 5:10-1.

⁹² *McCrane*, 292 A.2d at 583-84.

⁹³ *Id.* at 598 (quoting *Meyer v. Cleveland*, 171 N.E. 606, 607 (Ohio Ct. App. 1930)).

⁹⁴ *Id.* at 598:

Here again, the public will benefit, not just from the new recreational opportunity, but also from new commerce, new employment and new visitors brought into the State as a result of the sports complex.

This multiplicity of new cultural, economic and recreational benefits that will become available to the people of the State through the activities of the Authority leads directly to the conclusion that the Authority is constituted for a public purpose.

⁹⁵ *City of Atlantic City v. Cynwyd Invs.*, 689 A.2d 712 (N.J. 1997)(reaffirming the established principle that where the real purpose is other than the stated public purpose, the condemnation may be set aside).

⁹⁶ *Id.* at 714.

right-of-way to widen a road so that both casinos could get service deliveries.⁹⁷ In *Cynwyd*, the New Jersey Supreme Court suggested that condemnations resulting in a substantial benefit to private parties demanded heightened scrutiny⁹⁸ because the "condemnation process involves one of the most awesome powers of government."⁹⁹ As was mentioned previously, Donald Trump enters the landscape of New Jersey eminent domain law.

Trump was party to the first case¹⁰⁰ testing whether the New Jersey Supreme Court established a heightened scrutiny standard in condemnations involving private party beneficiaries. This landmark case explored the limits of eminent domain powers and involved the Casino Reinvestment Development Authority (CRDA)¹⁰¹ taking land from several private landowners.¹⁰²

The landowners included Vera Coking, a grandmother; the Sabatinis, owners of a family restaurant they operated for 32 years; and Peter Banin, proprietor of a small jewelry store.¹⁰³

Although Trump stood to gain substantially from the condemnation of these properties by increasing the holdings of his casino empire, the CRDA listed the following seven uses as the public use purposes for condemning property: 1) the development of additional hotel rooms in Atlantic City dedicated to housing conventioners using the new Convention Center, 2) redevelopment of a portion of the Corridor Area, 3) the construction of additional parking, 4) the alleviation of traffic congestion in the Corridor Area, 5) establishment of a park--green space--in Atlantic City, 6) creation of new permanent hospitality industry and 7)

⁹⁷ *Id.*

⁹⁸ *Id.* at 721.

⁹⁹ *Id.* See also, *Township of W. Orange v. 769 Assocs., LLC*, 775 A.2d 657, 663-664 (N.J. Super. Ct. App. Div. 2001) rev'd *Twp. of W. Orange v. 769 Assocs., L.L.C.*, 800 A.2d 86 (N.J. 2002): Superior Court, Appellate Division declared that *Cynwyd* held that "Heightened scrutiny applies where there is a third party beneficiary."

¹⁰⁰ *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102 (N.J. Super. Ct. Law Div. 1998) (Attempt by redevelopment agency to condemn private land for future expansion of Trump Casino Court held not a public purpose because the agency specified no time period within which development had to occur.)

¹⁰¹ CRDA is an entity created by the New Jersey Legislature to stimulate economic development and eliminate blight primarily in Atlantic City, but it has been used to fund development in other New Jersey municipalities.

¹⁰² *Trumping Private Property Rights: The Abuse of Eminent Domain*, Institute for Justice available at www.ij.org/private_property/atlantic_city/background.html (last visited February 19, 2005) CRDA issued the property owners notices that said: "YOU MAY BE REQUIRED TO MOVE WITHIN 90 DAYS AFTER YOU RECEIVE THIS NOTICE. IF YOU REMAIN IN POSSESSION OF THE PROPERTY AFTER THAT TIME, CRDA MAY BE ABLE TO HAVE YOU AND YOUR BELONGINGS REMOVED BY THE SHERIFF."

¹⁰³ *Id.* The Institute for Justice helped Banin, Coking and Sabatini fight Trump in the courts. The article at this link summarizes the facts of this case and why the Institute for Justice decided to provide legal and financial assistance.

the creation of short-term construction industry jobs and the promotion of the tourism and convention industries.¹⁰⁴

The reviewing court immediately found that the New Jersey Supreme Court did not establish a heightened scrutiny test in *Cynwyd*.¹⁰⁵

Instead, similar to the *99 Cents Store* case *infra*, the *Banin* court found that what triggered their inquiry into the substance of a transaction that primarily benefited a private corporation was a procedural omission committed by CRDA that may have allowed Trump to avoid using the condemned land for the public uses specified as the reasons for the condemnation.¹⁰⁶ The Court asserted that CRDA's procedural deficiencies in the *Banin* condemnations were "analogous to giving Trump a blank check with respect to future development on the property for casino hotel purposes."¹⁰⁷ For this reason, the *Banin* court said CRDA's condemnation of the Banin, Coking and Sabatini properties violated New

¹⁰⁴ *Banin*, at 727 A.2d 104-05. In New Jersey public purpose "may turn upon an assessment of the consequences and effects of the proposed project. Without a detailed, time-bound development plan such an assessment would be conjectural at best." *Id.*

¹⁰⁵ *Id.* "A careful reading of *Cynwyd* makes it clear that the Supreme Court was not establishing a new "heightened scrutiny" standard of review as argued by defendants. *But see, Township of W. Orange v. 769 Assocs., LLC*, 775 A.2d at 662 where Judge Petrella wrote:

In [*Banin*], the Law Division Judge did not explain why he believed *Cynwyd* did not adopt the heightened scrutiny standard nor is there any rationale for such an assertion. Clearly the eminent domain power must be exercised in the public interest, thus warranting heightened scrutiny when private parties are substantially benefited. Heightened scrutiny is the appropriate standard for such cases.

¹⁰⁶ *Id.* at 109-111. Specifically, the court said: "As this court noted in its decision of May 20, a determination by CRDA that such uses fulfilled a public purpose could only be set aside by the court if it [the decision to condemn] was arbitrary, unreasonable or a perversion of governmental power." [citing *State v. Lanza*, 143 A.2d 571, 580 (N.J. 1958).] The court concluded that such perversion had not been demonstrated by the defendant property owners.

¹⁰⁷ *Id.* at 110-111:

If these properties were to continue to be used for these purposes by Trump, this court would have no difficulty in sustaining these condemnation actions. But that is not what is assured here because Trump is not bound to use these properties for those purposes. In this case a public agency, through the power of eminent domain, if successful, will have effectively created an assemblage of land for future development by Trump under circumstances where CRDA could not do so under N.J.Stat. Ann. §5:12-173.1-8 and where Trump is unable or unwilling to do so itself on the open market. When, how, and if the property is developed in the future will be outside the control of CRDA except for the fact that Trump, a casino hotel operator, will have to develop and use the property consistent with the business in which it is already engaged.

Jersey law. But for private property rights advocates, the victory was a Pyrrhic one.¹⁰⁸

The New Jersey Supreme Court recently affirmed the *Banin* court's reading of *Cynwyd*.¹⁰⁹ So for now, it appears that New Jersey courts will apply a heightened scrutiny analysis only when procedural anomalies or deficiencies arise or when the condemnees can prove that the condemnation is unreasonable or a perversion of government power. Thus, much like the United States Supreme Court, New Jersey Courts have sacrificed private property rights on the altar of legislative deference. However, such generous legislative deference is not without consequences.

III. CONSEQUENCES OF NEW JERSEY'S EMINENT DOMAIN ADDICTION

New Jersey's addiction to eminent domain powers is so prolific and its procedures are so stacked in favor of government that in 2003 New Jersey ranked among the worst states to live because there were so many condemnations pending that will benefit private parties.¹¹⁰ This infamous designation and the courts' repeated efforts to elevate government power above individual property rights have prompted some legislators to act.

IV. CURRENT PROPOSED LEGISLATIVE ACTION

Several New Jersey legislators, troubled by the lopsided disadvantages private property owners struggle under in eminent domain proceedings, have

¹⁰⁸ Stephen J. Jones, Note: *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 Syracuse L. Rev. 285, 301 (2000). [Jones comments on *Banin* and the fact that a lack of post-condemnation accountability precluded a finding of a public use was a legal anomaly. Jones writes:

By relying on a technicality, the court marginalized what could have been a significant victory for private property rights in this highly publicized decision. Thus, courts cannot look to *Banin* as a guidepost in future eminent domain cases, much less as a catalyst for resurrection of the public use clause.]

¹⁰⁹ *Township. of W. Orange v. 769 Assocs., LLC.*, 800 A.2d at 94 (citing *Cynwyd*, 689 A.2d at 721) applies to building a road to gain access to a planned development. "Notwithstanding that the "heightened scrutiny" language in *Cynwyd*, is dicta, we have never held that the standard is other than the manifest abuse of discretion test."

¹¹⁰ Dana Berliner, *Public Power, Private Gain: A Five Year, State-By-State Report Examining the Abuse of Eminent Domain*, 134-143 (April 2003). Published by the Institute for Justice. See also the press release announcing the release of "Public Power, Private Gain." Available at <http://www.castlecoalition.org/report/index.shtml>. (last visited March 29, 2005) The Institute for Justice currently has an ongoing eminent domain struggle in Newark, NJ on its hot list. The Mulberry Street Coalition is fighting an effort by their local redevelopment authority to condemn what is apparently a viable middle class, 270-family neighborhood and transform it into luxury housing. See *Mulberry Street Coalition, Our Story* (2005) at <http://www.mulberrystcoalition.com/OurStory.htm>.

taken steps to re-balance the power scales.¹¹¹ Seeking to put government and private citizens on a more level playing field, bipartisan legislation was again introduced this past legislative session.¹¹² Two Senators have called for establishing a bipartisan commission to evaluate a wholesale overhaul of New Jersey's statutory eminent domain scheme to iron out inconsistencies and establish more effective protections for private property owners.¹¹³

III. CONCLUSION & RECOMMENDATIONS

As the above analysis demonstrates, there is no question that building stadiums satisfies New Jersey's public use requirements for eminent domain. But it has been over thirty years since Legislature and the courts have examined this issue. During that time, New Jersey's eminent domain powers have expanded to the point that private property rights can be defeated by mere administrative formalities. With 64 percent of New Jerseyans claiming that halting sprawl should be a primary goal and that local governments should be the

¹¹¹ The following Senators are sponsors of S-177 discussed *infra* note 111: Gerald Cardinale, Primary Sponsor; Henry McNamara, Primary Sponsor; Martha Bark, Co-Sponsor; Peter Inverso, Co-Sponsor; Joseph Palaia, Co-Sponsor; and Diane Allen, Co-Sponsor. To date, the bill only has Republican sponsors.

¹¹² Senate Bill 177 has been introduced for the 2004-2005 Legislative Session. The statement to S177 states:

This bill would amend the "Eminent Domain Act of 1971," P.L.1971, c.361 (C.20:3-1 et seq.) with the goal of increasing government responsibility and accountability in undertaking condemnation actions and clarifying how active businesses should be treated in condemnation actions by refining the scope of "bona fide negotiations.

Refining the scope of bona fide negotiations will clarify the responsibilities and rights of the parties under the "Eminent Domain Act of 1971" and ensure consistency in the implementation of this aspect of the law. Additionally, the bill would place the onus on the condemnor to justify any condemnation action as to its significance to the public interest in the event that an active business is to be replaced or retired as the result of a condemnation action.

S-177, 211th Legislature, 2004-2005 Session (N.J. 2004) available at http://www.njleg.state.nj.us/2004/Bills/S0500/177_I1.htm.

¹¹³ State Senators Gerald Cardinale (R-39) and Hank Henry McNamara (D-40) introduced SJR 41 during the 2002-2003 Legislative Session. This Resolution would have established the Eminent Domain Revision Commission. The commission duties would have been to reconcile conflicting and overlapping eminent domain provisions; clarify or excise vague, uncertain, confusing and redundant expressions; make amendments and supplements as suggested or considered by court decisions, or otherwise relating to the basis of just compensation and the procedure for fixing and determining just compensation; and ensure that the eminent domain statutes are made as uniform as possible with respect to matters of basic policy and statutory provisions. The commission would have the specific charge of devising a methodology to calculate just compensation that includes damages to, or loss of business as a compensable item. It passed the Senate Community and Urban Affairs committee, but the bill never made to the Senate floor for a vote.

entities stopping it,¹¹⁴ the time is ripe for the Legislature and the Courts to give eminent domain powers a fresh look.

The commission proposed by Senators McNamara and Cardinale is an excellent and reasonable start, but more aggressive reforms are necessary to protect private property rights. Given the recent media attention paid to eminent domain abuses, perhaps the time is ripe to make another attempt at establishing the Eminent Domain Revision Commission. If the Commission is established, I would suggest that they consider the following.

They should modify the Eminent Domain Act of 1971 and statues such as the Local Redevelopment and Housing Law that define "blight" and "areas in need of redevelopment" and empower government units to exercise condemnation powers. Among the modifications the Legislature should make are: 1) re-establishing a distinction between public use (land condemned for highways, parks, etc.) and public benefit/purpose (land condemned for improving housing stock, preserving open space, initiating economic redevelopment, etc.); 2) permit condemnees to seek reimbursement for legal costs incurred in defending their private property rights when a condemnation involves a private, third-party beneficiary; 3) eliminate the presumption of necessity that condemnors currently enjoy and require them to demonstrate that an area is "in need of redevelopment" by adding objective, substantive criteria; and 4) modify how compensation is evaluated to more accurately reflect the seriousness and value of the private property rights necessarily infringed upon when eminent domain powers are exercised.

If the Legislature enacts even some of these suggested reforms, the courts' predilection for legislative deference in eminent domain matters will be preserved, and the courts may be more willing to apply a heightened level of scrutiny to eminent domain proceedings. In the interim, New Jersey courts should still resurrect private property rights in eminent domain proceedings by applying a heightened scrutiny analysis, particularly when there is a private, third party beneficiary.

If the courts are unwilling to apply a heightened scrutiny in all eminent domain proceedings, then the courts should consider reasserting a meaningful distinction between public use and public benefit/purpose. The courts could still apply a rational basis test to public use takings and apply a higher level of scrutiny to public benefit/purpose takings that benefit a private party. This would permit the government to continue smoothly executing its utilitarian functions but give individual property owners additional protection from private developers using government entities as their corporate alter egos.

Enacting these procedural and evidentiary requirements will help discipline New Jersey governments to exercise their awesome powers of eminent domain only when genuinely necessary and help restore private property rights to the constitutional majesty that they demand.

¹¹⁴Shannon Mullen, *The Big Squeeze*, New Jersey Monthly Online Magazine, March 11, 2004 at <http://www.njmonthly.com/issues/Mar04/sprawl.html>. (discussing the impact of New Jersey sprawl).

