THE WALL STREET JOURNAL.

To: Joe, Duane, Gary, Jack + Alex
From: Lee, FYI

WSJ 8/3/05

Eminent-Domain Uproar Imperils Projects

By Michael Corkery And Ryan Chittum

PROPERTY REPORT

When the U.S. Supreme Court ruled that governments had broad power to take private property to boost economic velopment, real-estate executives cheered.

But an unexpected backlash against the ruling pped the cheering and threatens to derail some ojects that depended on the use of eminent domain to seize property.

In the St. Louis suburb of Florissant, Mo.—a historic city that boasts what is said to be the oldest Catholic urch between the Mississippi River and the cky Mountains—developer **MLP Investments** lled out of a planned $30 million project to build ndos, lofts and retail space when the owner of a ece of vacant land refused to sell. The city could ve used eminent domain to force the sale of the nd—a "dump" according to Mayor Robert G. Lowy—but MLP wanted no part of that. The project, hich was supposed to raise tourism, is now stalled.

MLP did not reply to calls seeking comment at has publicly blamed soil and flooding probms, in addition to the eminent-domain issue, for pulling out. City officials, however, say the real reason was eminent domain. "The company did not want the adverse publicity," says the mayor. "People don't understand what eminent domain is. They think it's always taking grandma out of her house, and that's not true. I wouldn't touch anything like that. That's political disaster."

Laura Elizabeth Pohl/Post-Dispatch

Bernice Cenatiempo (center) **protesting** *a project threatening her property in Sunset Hills, Mo.*

In the six weeks since the Supreme Court's ruling in the Kelo v. New London case, bills have been introduced in Congress and in more than half of the state legislatures that would restrict, to varying degrees, the use of eminent domain for private development. Delaware has gone the furthest, passing a law restricting the use of eminent domain. In Alabama, legislation curbing eminent domain for economic purposes has passed both houses and awaits the governor's signature.

Real-estate and economic-development officials are growing increasingly concerned that the backlash will block more projects, potentially causing big losses for developers and canceling long-planned projects.

In Washington, D.C., a proposed federal ban on giving federal money to communities that use eminent domain for private developments could imperil the Skyland Shopping Center project, which has been 15 years in the making. "There are a lot of things against us every step of the way," said Kathy Chamberlain, vice president of a nearby neighborhood association. "Why is it so hard for us to get a shopping center we can use?"

The project, in the southeast part of the city, would replace a cluster of nail salons, a

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Uproar Over Eminent Domain Threatens Proj

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liquor store and check-cashing facility with a big-box discount retailer, a restaurant and bookstore. City economic-development officials, who say the project could still go through without federal money, have notified six owners that their property will be condemned to make way for the center, which is designed to improve the neighborhood's shopping and create jobs.

But the backlash against the Supreme Court ruling has emboldened land owners to fight the seizures. In Washington, the business and property owners had already been fighting the seizure. Elaine Mittleman, a lawyer for some of them, says the city never proved the area was blighted to support its use of eminent domain. "Why should they lose a business just so people can shop at Target?" she asks.

Real-estate developers and government officials are frustrated that they have not responded more effectively to the forces fighting eminent domain. But disparate interests within the groups that depend on eminent domain have made that difficult. The International Council of Shopping Centers won't take a stand on the issue because some members are at risk of being forced to sell by eminent domain, while others benefit from the action.

"Our position is we believe in private-property rights, but at the same time we recognize that eminent domain has a use in the private cycle," says Malachy Kavanagh, a spokesman for the group.

Others say the benefits of eminent domain should be emphasized. Developers who focus on urban areas say the current backlash could slow the revitalization of cities, in particular the recent boom in urban housing.

"To do any kind of urban redevelopment without eminent domain is to eliminate half of the potential sites for redevelopment," says William S. Friedman, chief executive officer of **Tarragon** Corp., a New York developer specializing in urban housing. He says the use of eminent domain is overstated. "Rather than use eminent domain, you bend over backwards because of the political repercussions," he says.

Mr. Friedman's company is building 1,100 rental and condo apartments in the old industrial city of Hoboken, N.J., across the Hudson River from Manhattan, using property taken through eminent domain. But instead of tossing people from their homes, Mr. Friedman says the scenarios are often like the one he encountered where a group of relatives inherited a rooming house and could not organize themselves to decide to sell—a common scenario in urban redevelopment, where properties often have multiple and disparate owners. Under the threat of condemnation, the family members settled before going to court.

In Hoboken, the city is condemning the one remaining property that didn't settle, a former casket company.

Leading the charge against eminent domain is the Institute for Justice, a nonprofit law firm based in Washington that argued and lost the Kelo case in the Supreme Court but has scored big in the court of public opinion.

The group has a Web site cataloging hundreds of eminent-domain cases around the nation and offering "Eminent Domain Abuse Survival Guides." The group has printed T-shirts, with a picture of a huge hand about to squash a home. It says the Kelo decision focused the public's attention on a longstanding, but little-known, power of government.

"It's finally dawning on homeowners and small businesses that this could happen to me," says Dana Berliner, a lawyer at the Institute for Justice.

Whether the Institute for Justice can take credit or not, the issue has struck a nerve with Americans. In Connecticut, where the Supreme Court case originated, a Quinnipiac University poll shows just how much the eminent-domain issue resonates. By an 11-to-1 margin, those surveyed said they opposed the taking of private property for private uses, even if it is for the public economic good. According to the poll, 89% of those surveyed were against condemnations for private economic development, compared with 8% for them. Douglas Schwartz, head of the poll, says he has never seen such a lopsided margin on any issue he has polled.

Real-estate and economic-development executives say it's difficult to counter the emotional side of the argument that focuses on individual property rights. "It makes better headlines if there is an 85-year-old grandmother who is losing her house because of a highway," says Jeffrey Finkle, president of the International Economic Development Council, a nonprofit group based in Washington.

The group has posted an eminent-domain resource kit on its Web site and is talking to members of Congress about the importance of using eminent domain to redevelop cities and attract business.

Quick Action

In the six weeks since the Supreme Court gave local governments broad power to take property for economic development, states have rushed to limit the power of eminent domain. Nevada and Utah took action just before the decision.

- **Alabama:** Legislation to curb eminent domain passed House and Senate overwhelmingly, awaits governor's signature
- **Delaware:** House and Senate unanimously passed bill and governor signed it—restricts use to a "recognized public use"
- **Texas:** Bill passed both houses prohibiting eminent domain for economic-development purposes, with exceptions, but bogged down in committee
- **Oregon:** Bill passed the House yesterday to restrict eminent domain if public doesn't own project
- **Nevada:** June 2005, toughened the requirements to meet a determination of blight to use eminent domain in anticipation of a Kelo ruling
- **Utah:** June 2005, struck authority of economic development agencies to use eminent domain

Source: National Conference of State Legislatures

July 22, 2005

Members
122nd Maine Legislature
State House Station
Augusta, Maine 04333

RE: Recent U.S. Supreme Court Eminent Domain Decision

Dear Legislators:

On June 23, 2005, the U.S. Supreme Court issued a decision involving the scope of state authority under the Fifth Amendment of the U.S. Constitution to take private property by eminent domain, *Kelo v. New London*, 2005 U.S. LEXIS 5011 ("*Kelo*"). I have received calls from a number of legislators asking what impact the *Kelo* decision has on the exercise of eminent domain under Maine law, particularly its use by municipalities with respect to residential property.

The Maine Legislature has enacted a variety of statutes, both specific and general in their scope, authorizing the exercise of the eminent domain power. And while the *Kelo* case offers guidance about the applicability of the Fifth Amendment to the U.S. Constitution, the similar but distinct provision in Article I, § 21 of the Maine Constitution is of course not addressed in that decision and is subject to interpretation by the Maine Law Court. As a result, any analysis of the legally permissible scope of the eminent domain power is dependent on the facts, the statutory provision involved, and judicial interpretation by Maine's courts.

Within these limitations, I offer the following information on what the Supreme Court decided in the *Kelo* case, the holdings in relevant Maine case law precedents, and the range of eminent domain statutes in current Maine law. It should be emphasized at the outset that the Supreme Court expressly recognized the ability of the states to establish limits more restrictive than those that flow from the Fifth Amendment.

Summary of *Kelo v. City of New London*

The *Kelo* case involved the City of New London's plan to re-develop an economically depressed district by constructing a new hotel, restaurants, retail stores, residences and office space. To allow for the new construction, the City authorized the acquisition of property in the development area by eminent domain. A Connecticut statute expressly authorized the use of eminent domain to promote economic development. Several landowners in the area of the planned development challenged this use of the City's eminent domain authority. The landowners argued that the development plan failed to serve a *public purpose*, and therefore failed to satisfy the Fifth Amendment's requirement that government may take private property only for *public use*.

The Supreme Court found that the development plan served a public purpose and therefore constituted a public use under the Takings Clause of the Fifth Amendment. In reaching this conclusion, the Court determined that the plan did not benefit a particular class of identifiable individuals. The Court noted that the City's determination of whether economic rejuvenation was justified under the circumstances was entitled to deference, and that there was no basis for excluding economic development from the concept of public purpose. Importantly, the Court's opinion only addresses the limits that the United States Constitution places on the exercise of eminent domain authority, and is careful to point out that states are free to place restrictions on the use of this authority that go beyond the Federal Constitutional limits:

> We emphasize that nothing in our opinion precludes any state from placing further restrictions on its exercise of the takings power. Indeed, many states already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. *Kelo v. New London*, 2005 U.S. LEXIS 5011 at 36-37 (citations omitted).

Limits on State Eminent Domain Authority under Maine Law

A. Maine Constitution

Article I, Section 21 of the Maine Constitution provides: "Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." This language differs from the takings clause of the U.S. Constitution with the additional requirement of "public exigencies." The U.S. Constitution's takings clause simply states: ". . . nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

B. Maine Caselaw

The language of Article I, § 21 of the Maine Constitution establishes a two-pronged test: private property can only be taken for a public use, and only where public exigencies require it. The Law Court has recently described the "public use" requirement as follows.

Webster's "exigent" - requiring immediate aid or action
"exigency" - that which is required in a particular situation

> The distinction between a public and a private use to a large extent depends on the facts of each case…As a general rule, property is devoted to a public use only when the general public, or some portion of it (as opposed to particular individuals), in its organized capacity and upon occasion to do so, has a right to demand and share in the use…The public has to be able to be served by the use as a matter of right, not as a matter of grace of any private party.

Blanchard v. Department of Transportation, 2002 ME 96, ¶ 29 (citations omitted).

The "public exigencies" prong of the test, which is not part of the Fifth Amendment, is subject to a less stringent standard of judicial review.

> …the question of determining *exigency* has long been considered to be a political decision for the Legislature to make, free from judicial review (unless it can be said there is no rational basis upon which exigency could be found)….in authorizing a taking by eminent domain the Legislature may make a finding of public use and delegate the determination of exigency to the municipality or public-service corporation which exercises the taking authority.

Ace Ambulance Service, Inc. v. City of Augusta, 337 A.2d 661, 663 (Me. 1975)(citations omitted).

A brief review of the case law under the Maine Constitution's takings clause reveals two decisions that address the exercise of the eminent domain power for purposes of economic development. In a 1957 *Opinion of the Justices*,[1] the Maine Supreme Judicial Court found that a proposed statute which would authorize a city to acquire property by eminent domain to resell or lease for industrial development, was unconstitutional because its basic purpose was private and not public. The Court noted that the action would be for the direct benefit of private industry and the proposal amounted to no more than the taking of one party's property for sale or lease to another party on the ground that the second party's use of it would be economically or socially more desirable. *Opinion of the Justices*, 131 A. 2d 904 (Me. 1957).

In *Maine State Housing Authority v. Depositors Trust Co.*, the Maine Supreme Judicial Court found constitutional the law authorizing the Maine State Housing Authority to use eminent domain to acquire blighted areas and construct low-income housing. The Court declined to review the Legislature's determination of what may be considered a public exigency, declaring that whether a public exigency exists that requires the taking of private property is a matter to be determined by the Legislature. The Court thus limited its review to the question of whether the use for which a taking is authorized by the Legislature would be a public use. Mindful of the presumption of constitutionality of statutes, and giving deference to the Legislature's judgment, the Court found that the Maine State Housing Authority's use of eminent domain in the manner authorized by the statute would be a public use, and therefore the statute authorizing that taking did not violate the Maine Constitution. *Maine State Housing Authority v. Depositors Trust Co.*, 278 A. 2d 699 (Me. 1971).

[1] An opinion of the Justices is not binding precedent, but rather reflects the opinions of the individual Justices on the question(s) presented.

C. Relevant Maine Statutes

There are numerous Maine statutes authorizing the taking of property by eminent domain. The following discussion, while not intended to be a comprehensive listing of these statutes, provides examples that illustrate the range of circumstances in which municipalities[2] are authorized to use eminent domain, with particular attention to those relevant to economic development.[3]

The general municipal eminent domain power statute is found at 30-A M.R.S.A. § 3101, which applies only to takings not authorized by another statute. Section 3101 permits a municipality to acquire real estate or easements for "any public purpose" using the condemnation procedure for town ways, subject to two very significant limitations: 1) the municipality may not take any land without the consent of an owner if the owner or the owner's family reside in a dwelling house located on the land; and 2) land taken under this provision may only be used for the purpose for which it was originally taken.

Kelo held that owner occupied residential property could be taken by eminent domain consistent with the Fifth Amendment. That result could not occur in a taking under Section 3101 because of the requirement of owner consent; however, § 3101 expressly states that it does not apply to any taking authorized "by any other law." Accordingly, we must look to the precise terms of the particular statute that forms the legal basis of a taking. Maine law contains quite a number of such statutes. Examples include: 23 M.R.S.A. § 3022-3023 (local highways and easements); 30-A M.R.S.A. 3402 (sewers and drains); 30-A 3510 (transportation districts); and 30-A M.R.S.A. § 4746 (housing authorities).

Several statutes are relevant to economic development efforts of municipalities. An urban renewal authority created by a municipality may use eminent domain power to acquire property to prevent, clear and redevelop blighted areas; this may include the transfer of the acquired property to a redeveloper, pursuant to 30-A M.R.S.A. §§ 5101-5122. A municipality may also adopt a community development plan to provide either low and moderate income housing or public facilities to expand economic opportunity under 30-A MRSA §§ 5201-5205. Under the latter statutes, a municipality has general authorization to acquire by eminent domain "any vacant or undeveloped land" and "any developed land and structures, buildings and improvements existing on the land located in designated slum or blighted areas for the purposes of the demolition and removal or rehabilitation and repair or redevelopment of property so acquired." 30-A M.R.S.A. § 5203(3)(A). Land taken by municipalities under their authority pursuant to § 5203 may generally not, within 10 years of the date of acquisition, be sold undeveloped or unrehabilitated without first offering it to the prior owners.

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[2] While we focus here on municipalities, we note that the state and its agencies are authorized to acquire property by eminent domain under a number of statutes. *See, e.g.,* 1 M.R.S.A. § 814 (expansion of state government in the Capitol area), 12 M.R.S.A. § 1812 (parks and historic sites), 20-A M.R.S.A. § 3305 (schools), 23 M.R.S.A. § 153-B (highway related projects), 23 M.R.S.A. § 8003 (Northern New England Passenger Rail Authority), 37-B M.R.S.A. § 301 (military facilities), and 38 M.R.S.A. § 1364 (mitigation of uncontrolled hazardous substance sites). In addition, private utilities are given certain limited eminent domain powers; *see, e.g.,* 35-A M.R.S.A. § 3136 (electric transmission and distribution lines), 35-A M.R.S.A. § 4710 (natural gas), and 35-A M.R.S.A. § 6408 (water).

[3]This description of relevant statutes does not attempt to include the procedures by which a municipality reaches its decision to proceed with a particular project or the need to take property to effectuate that project. These procedures of course provide an important opportunity for citizen input.

Perhaps the broadest statutory authority for economic development that incorporates eminent domain authority is found in 30-A M.R.S.A. §§ 5221-5235, which govern municipal development districts. Designation of a development district is subject to several conditions, including the following:

> At least 25%, by area, of the real property within a development district must meet at least one of the following conditions:
>
> (1) Must be a blighted area;
> (2) Must be in need of rehabilitation, redevelopment or conservation work; or
> (3) Must be suitable for commercial uses.

30-A M.R.S.A. § 5223(3)(A).

Conclusion

We cannot overemphasize the need for a detailed set of facts, like that available to the Supreme Court in *Kelo,* as a basis to conduct a meaningful analysis of the limits of eminent domain authority under the takings clauses of the Maine and U.S. Constitution. The unique factual circumstances of each case, together with the detail of the authorizing statute, will dictate the outcome. Therefore, it is not possible to predict the outcome of the next legal challenge to an exercise of eminent domain authority in the abstract. This is even more true in light of the fact the Maine's Law Court has not had occasion in recent years to address the application of the takings clause of Maine's Constitution to eminent domain in the context of economic development.

It is also important to emphasize, as the Supreme Court did in *Kelo*, that the Legislature is free to place additional restrictions on the use of eminent domain in Maine. The *Kelo* decision may be viewed as providing a floor, rather than a ceiling, for the exercise of the eminent domain power upon which the Legislature is free to enact further conditions (provided that they are consistent with the other protections of the Maine and U.S. Constitutions). To the extent that you or other members of the Legislature are interested in proposed legislation, we are available to provide advice to you.

I hope this information is helpful.

Sincerely,

G. STEVEN ROWE
Attorney General

GRS/djp

CONFIDENTIAL Memorandum

Department of Planning and Development

To: **Mayor and Members of the City Council**

From: **Lee D. Urban, Director/Department of Planning and Development**

cc: **Joseph E. Gray, City Manager**

Date: **May 12, 2004**

Subject: **Bayside Scrap Metal Yards/ "Takings" Option**

On May 11, I joined with Mayor Smith, Councilor Cloutier, City Manager Joe Gray, Corporation Counsel Gary Wood, Associate Corporation Counsel Donna Katsiaficas and Assistant City Manager Larry Mead in a discussion of the impact of two Maine law cases regarding a municipality's authority to condemn private property for the purpose of economic development where that private property is proposed to be conveyed to another private property owner. Such authority comes into question if the City were to "take" the scrap metal yards in Bayside. As noted in his attached legal memorandum, Corporation Counsel is of the opinion that recent Maine law cases have established that, notwithstanding any apparent Maine State Statute authority to the contrary, the City could not "take" the scrap metal yards and then convey those parcels to a private developer for economic development. If, however, those parcels were "taken" for the purpose of constructing public facilities thereon, such "taking" would be constitutional.

Staff, particularly me as the staff negotiator, needs guidance on whether the City Council supports "taking" the scrap metal yards for the construction of a public parking garage as one way to facilitate the revitalization of Bayside.

By this memorandum, I will describe the current status of our negotiations with the scrap metal yard owners and will describe at least three alternatives for the relocation of the scrap yards.

I. Current Status of Negotiations with Scrap Yards Owners

Events to Date Regarding Both Scrap Yards

September 5, 2003 City signed contract with Peter W. Sleeper Associates of Arlington, Massachusetts, for relocation consulting services.

September 25, 2003 City began process of requesting quotes for appraisal services. Maine Valuation Company has agreed to do the appraisal and Eastern Appraisal and Consulting Inc. has agreed to do the review appraisal.

October 22, 2003 City sends letter (Notice of Intent to Acquire) to the two scrap yard owners declaring City's interest in buying the properties and officially initiating the process.

November 17, 2003 City and its consultants meet with Alan Lerman, owner of E. Perry Metal and Iron Company, and his attorney, David Hirshon. City explaina the process and requested access to the site for its consultants.

November 18, 2003 City and its consultants meet with representatives of New England Metal Recycling LLC/Prolerized New England Company/H. Finkelman. The City explains the process and requested access to the site for its consultants.

December 11, 2003 City signs contract with Tewhey Associates of Gorham, Maine for environmental consulting services. Tewhey Associates will prepare the Phase II Environmental Assessment and perform soil testing.

January 12, 2004 City sends a letter to the owners informing them that if access to the site for purposes of appraisal, relocation planning and environmental assessment is not granted by January 23, the City would seek an administrative warrant from the court.

January 20, 2004 City receives a letter from attorney David Hirshon, who represents E. Perry Iron and Metal Co., granting access to the site for the appraiser and relocation specialist.

January 21, 2004 City Council votes to designate the Bayside Development District, a municipal development district under Maine law that allows the City to exercise its power of eminent domain. City Council receives letter from New England Metal Recycling's attorney Peggy McGehee offering to work collaboratively with the City to relocate her client.

February 6, 2004 City staff meets with New England Metal Recycling representatives Peggy McGehee and Michael Zaitlin. They agree to allow the City's relocation consultant to assess the relocation needs.

February 19, 2004 Sleeper Associates conducts site visit to E. Perry Iron and Metal Co. to assess relocation needs.

February 26, 2004 Real Estate appraisers (Maine Valuation and Eastern Appraisal and Consulting) conduct site visit to E. Perry Metal and Iron Co. to start appraisal process.

March 4, 2004 Sleeper Associates conducts site visit to New England Metal Recycling to assess relocation needs.

March 18, 2004 Sleeper Associates sends letters to both scrap yards owners listing possible relocation sites.

E. Perry Metal and Iron Company

Alan Lerman of E. Perry Metal and Iron Company ("Perry") has been a little more cooperative than New England Metal Recycling in allowing the City access to its property in Bayside. Perry has allowed the relocation consultant on site to assess relocation needs, and Perry has allowed the real estate appraiser on site to conduct the initial appraisal. Perry has not allowed the City's environmental consultant on site to conduct the Phase II assessment. Therefore, the appraisal can't be completed.

Mr. Lerman has two major concerns: first, that the results of the environmental assessment may be used against Perry in the future if the City's acquisition doesn't go forward for some reason; and second, that the City may not be able to find an adequate relocation site within Portland.

Mark Adelson has been leading the negotiations to date and is of the opinion that complete voluntary cooperation from the owner of Perry will not be obtained until an appropriate relocation site has been found.

New England Metal Recycling LLC (H. Finkelman)

Although New England Metal Recycling (a/k/a H. Finkelman) ("Finkelman") has not granted the City assess to its site as requested. A letter received from Finkelman's attorney, Peggy McGehee, dated January 21 of this year stated Finkelman is "willing to relocate in a way that is not detrimental to either the City or to New England (Metal Recycling LLC)". The letter also commended the City for agreeing to move forward collaboratively instead of through the threat of condemnation.

Attorney McGehee has proposed that Finkelman would be willing to move voluntarily if Finkelman is able to retain its property on Somerset Street for development purposes. She has indicated that Finkelman would consider a development partnership with the City or a private developer.

Attorney McGehee expressed disappointment with the relocation sites identified to date and has asked for additional information on the Guilford sites in the vicinity of Warren Avenue. Guilford has not responded to the City's inquiry in regard to the availability of those sites.

If Finkelman agrees to move voluntarily and retain its land on Somerset Street, the City can still assist with relocation expenses. HUD terms this action as a "Voluntary Relocation." Because the relocation would not be triggered by the acquisition of land, federal law does not apply. HUD does require that the City establish a local policy for dealing with cases of voluntary relocation to ensure owners are treated consistently.

As with the Perry negotiations, Mark is of the opinion that Finkelman will not be cooperative until a suitable relocation site is found.

Relocation Consultants

Peter W. Sleeper Associates have three major tasks as the relocation consultant for the City:

1. develop a specific relocation assistance plan for each property, including the components of the move, the costs and estimated relocation payment to be offered in accordance with federal law;

2. assist the City and owner in identifying suitable relocation sites; and

3. advise the City on the process to be followed under federal law.

The consultant continue to work with the property owners to develop the relocation budgets. This work includes conducting site visits and obtaining cost estimates from contractors for such items as moving balers an scales and utility set ups. The consultant has sent each property owner a list of possible relocation sites.

Appraisals

Both the appraiser and review appraiser have conducted an initial site visit to the Perry site. The appraiser (Maine Valuation) is now in the process of establishing appropriate comparables for valuation purposes. The appraiser is also waiting for remediation costs to be established by John Tewhey Associates so that such costs can be factored into the appraisal. Perry, however, has not cooperated in letting the environmental consultant on site to conduct the soil tests. Therefore, we have advised the appraiser to complete his report as if the site were clean; and the City will factor in the remediation costs at a later date.

The owners of Finkelman have refused to allow the appraiser to conduct a site visit, so this appraisal has not begun.

Environmental Consultant

John Tewhey Associates has not been allowed to enter either of the sites to conduct soil sampling. The purpose of the Phase II environmental assessment is to determine the extent to which the sites need to be environmentally remediated.

II. Three Alternatives For the Relocation of the Scrap Yards

A. Collaborative Negotiations

The City could continue to negotiate with Perry and Finkelman; and although there is always the opportunity to arrive at the proverbial "win-win" solution, negotiations have not been speeding along.

B. Purchase by Someone in the Private Sector

Over the past five years, staff has received inquiries from developers from the private sector about the possibility of purchasing either or both of the scrap yards. One of those developers may be in the process of negotiating with representatives from Perry or Finkelman for the purchase of one or both of those sites for the construction of commercial structures and perhaps housing, but we do not know if, in fact, such negotiations are taking place or whether they will end up being successful. Meanwhile, the existence of the scrap yards continues to deter development in the area.

C. "Takings"

Developers have indicated to staff that two things need to happen before they will invest in Bayside – the scrap yards need to move and at least one parking garage needs to be built. If negotiations between the City and scrap yard owners look to become unproductive, and if one or more developers in the private sector are unable to complete its negotiations, a third alternative is "taking" the scrap yards on the northerly side of Somerset Street for the construction by the City of a public parking garage to facilitate development around such a garage. We have federal funds to assist in the construction of such a garage; but if those funds are not expended in the near future, the City runs the risk of losing those funds. And that is why the matter of the relocation of the scrap yards needs to be concluded sooner rather than later.

As part of staff's negotiations with the scrap yard owners, staff needs to know if the sense of the Council is that a viable alternative to continuing those negotiations is the "taking" of the scrap yards for the construction of a public parking garage.

Attachments

Copy of Gary Wood's May 12, 2004 Memorandum to the Council
Tax Map Delineation of Scrap Yard Parcels
List of Scrap Yard Property Owners

ATTACHMENT

CONFIDENTIAL

CITY OF PORTLAND
MEMORANDUM

COPY

TO: Mayor and Council

FROM: Gary C. Wood

DATE: May 12, 2004

RE: **Use of Municipal Condemnation Power to Condemn Junkyards in Bayside**

I have been asked to provide a legal opinion on the use of the City's condemnation power to take the junkyards in Bayside using our eminent domain power, particularly that contained in the Municipal Development District law (30-A M.R.S.A. § 5251 to 5261, § 5253(3) contains the ED authority).

Question 1

Can the City use its condemnation power under the MDD law, or any other law, to condemn the junkyards and subsequently transfer the property to another private owner for the purpose of economic development?

Answer

No.

Question 2

Can the City condemn the junkyards if the property is subsequently retained in public/municipal ownership and used in substantial part by the public?

Answer

Yes.

The above answers grow out of an analysis of the key cases addressing municipal condemnation for both economic development purposes and other purposes. Those cases are Craig, et al v. Kennebec Regional Development Authority, Superior Court CV Docket No. RE-00-032 (2001), Blanchard, et al v. Department of Transportation, et al, Me. 96; 798 A.2d 1119 (2002), and Crommett et al v. City of Portland, et al, 150 Me.217; 107 A.2d 841 (1954).

In the Craig case Justice Studstrup of the Maine Superior Court held that a condemnation of private property by the Kennebec Regional Development Authority for inclusion in an industrial park that the KRDA was building for economic development purposes was unconstitutional. The KRDA was acting pursuant to a Private and Special Act of the Legislature that contained language essentially identical to the Maine Development District law. The Court found that such a taking and use violated Article I, § 21 of the Maine Constitution which states as follows:

> **Section 21. Private property, when to be taken.** Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it.

Justice Studstrup concluded that the taking and subsequent use in this case did not meet the public use requirement as articulated in Brown v. Gerald, 100 Me. 351, 61 A. 785 (1905) or the Crommett case cited above. In reaching his conclusion Justice Studstrup quotes the Brown case as follows:

> Taking the decided cases generally, we (the Law Court) think that the weight of authority does not (emphasis added) sustain the doctrine that a public use such as justified the taking of private property against the will of the owner, may rest merely upon public benefit, or public interest or greater public utility.
>
> The test of public use is not the advantage or great benefit to the public. A "public use" must be for the general public, or some portion of it, who may have occasion to use it (emphasis added), not a use by or for particular individuals. It is not necessary that all of the public shall have occasion to use it. It is necessary that everyone, if he has occasion, shall have the right to use it (citing Payne v. Savage, 126 Me. 121, 126 – Id at 446-47) and Opinion of the Justices, 152 Me. 440, 131 A.2d 904 (1987)

In that same Opinion of the Justices, the Supreme Court goes on to state that:

> The plan calls as we have seen for the acquisition of property against the will of the owner if need be, with its placement in industrial use by private enterprise.
>
> In our opinion, the Act attempts what is forbidden by our fundamental law, and is unconstitutional.

This opinion by Justice Studstrup and the cases he cites essentially holds that economic development is not a sufficient public use in itself to justify a taking under the Maine Constitution.

After reading the case I sent it to both the Maine Municipal Association and the Attorney General's office to see if they agree with Justice Studstrup as the case clearly creates a big legal problem in situations like the one we face in Bayside. Both MMA and the AG's office concurred with Justice Studstrup's conclusion that the constitutional requirements must be met and are additional and over and above any other requirements included in a State statute that authorizes a condemnation. I have attached a copy of the letter that I sent to those organizations on this issue.

MMA was particularly helpful in its analysis and pointed us to the Blanchard case which is the most recent Law Court declaration on the concept of public use. In that case a majority of the Court concluded that a condemnation by the Town of Cumberland to create a parking lot whose use was dedicated exclusively to residents of Chebeague Island did meet the public use requirement even though the "public" that were allowed to use the property in that case was small in number.

In that regard, Blanchard is consistent with its predecessors in that the majority states:

> As a general rule, properties are devoted to a public use only when the general public or some portion of it, (as opposed to particular individuals), in its organized capacity and upon occasion to do so, has a right to demand and share in the use (citing Brown, supra). The public has to be able to be served by the use as a matter of right, not as a matter of grace of any private party. The use must also be public at the time of the taking, "not only in a theoretical aspect, but rather in actuality, practicality, and effectiveness, under circumstances required by the public exigency." (citing Brown v. Warchalowski, 471 A.2d 1026, 1033 (Me. 1984).

The dissent by Chief Justice Saufley and Judge Alexander states that in their minds such a limitation of use does not meet the constitutional requirement. The basic point here is that the Law Court is still very focused and aware of the public use requirement and what its past decisions have stated. They have not wandered from the legal direction set out by their predecessors.

Based on the Craig case and the Law Court cases that it rests upon, it is clear to me that if we want to condemn the junkyard property and use it in relation to economic development in Bayside **we need to dedicate the use of that property to a use by the public in some form**. Such a specific use could be to locate a public parking garage on that site. As long as a reasonable amount of space in the garage is available at reasonable times for use by the public, I do think we could designate some of the spaces to specific businesses in the development area.

The Blight Removal Exception/ The Crommett Case

If we do not allow or provide use of the condemned property by the public, in order to condemn the property and transfer it to a private owner for private use and development we would have to rest exclusively on a determination that the property is blighted. That is the holding of the Crommett case in which the old Portland Renewal Authority condemned and

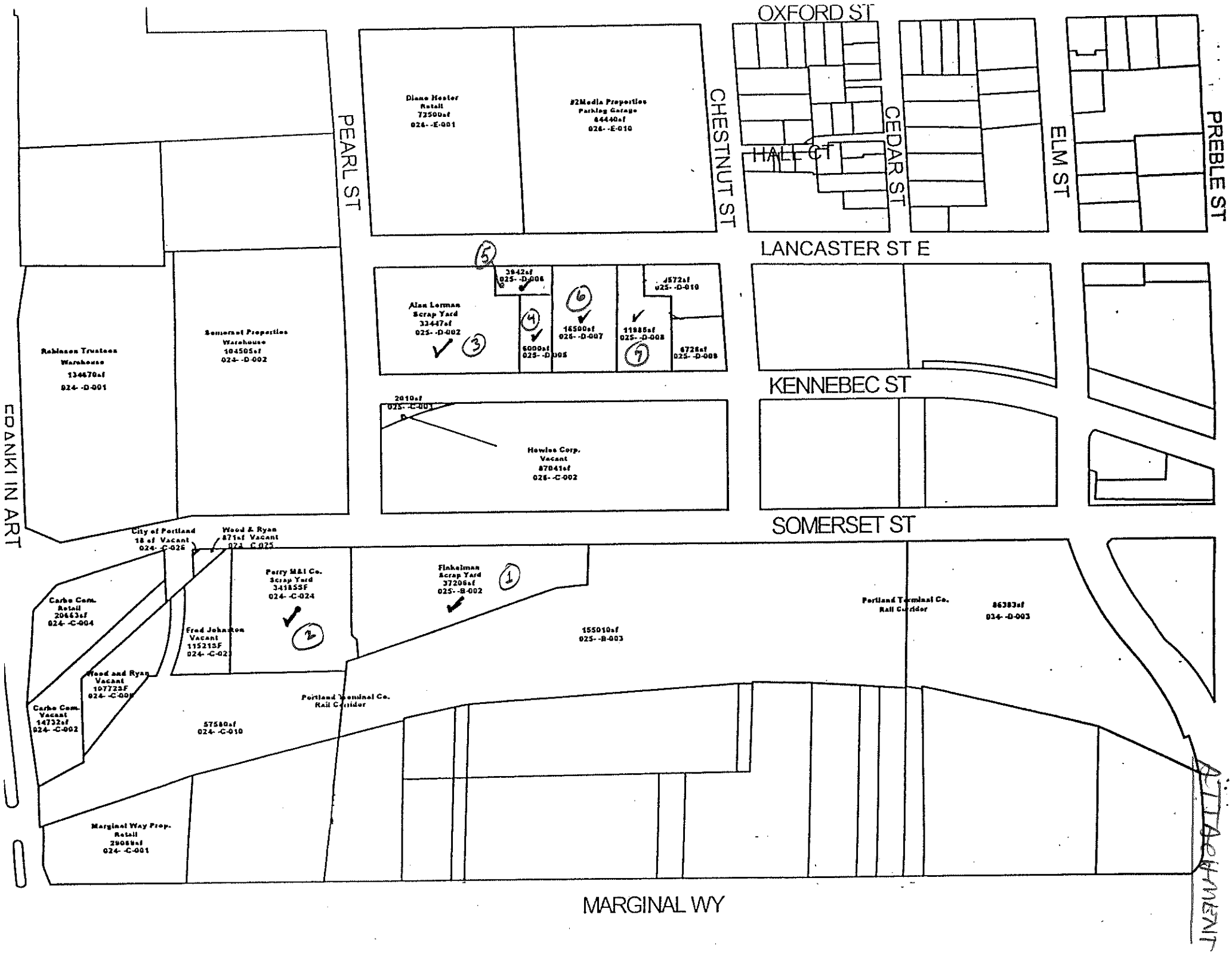
eliminated a number of buildings in a Portland neighborhood, based on the conclusion that the condition of the buildings was such that the slum posed a major public health, safety and welfare risk to its inhabitants and other inhabitants in the City. In that case the Court did hold that the removal of blight in and of itself could constitute the public use required by the Constitution but it clearly related the findings and conclusions of blight to public health and safety factors which at this point we do not possess regarding the scrapyards in Bayside.

Visual blight, in my opinion, would not be a factor that the court would consider. In relation to the environmental blight that may well exist on or because of those junkyards, the law is clear that we would have to identify the environmental threat with evidentiary specificity and give the owners an opportunity to clean it up before we could legally use environmental blight as a basis for condemnation.

Finally, all of the court decisions have made it very clear that the determination of whether a public use exists to support a condemnation is a question of law for the courts. It is not something that we can legislate around with Council determinations and findings of fact. A landowner will always have a right to go to court and have the court review whether the use for which the property was taken and the use to which it was actually put meet the public use requirement as articulated in the court distinctions.

GCW:tlb

O:/Gary/Memos/Mayor and Council/Condemnation 05.12.04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PEARL ST
CHESTNUT ST
CEDAR ST
ELM ST
PREBLE ST
HALL CT
LANCASTER ST E
KENNEBEC ST
SOMERSET ST
MARGINAL WY
FRANKLIN ART
ALTAMONT
Diane Hester
Retail
72500sf
026- -E-001
#2Media Properties
Parking Garage
64440sf
026- -E-010
Robinson Trustees
Warehouse
134670sf
024- -D-001
Somerset Properties
Warehouse
104505sf
024- -D-002
Alan Lerman
Scrap Yard
32447sf
025- -D-002
2842sf
025- -D-006
16500sf
026- -D-007
11885sf
025- -D-008
4572sf
025- -D-010
6000sf
025- -D-005
6728sf
025- -D-009
2010sf
025- -C-001
Howlee Corp.
Vacant
87041sf
026- -C-002
City of Portland
18 sf Vacant
024- -C-026
Wood & Ryan
871sf Vacant
024- -C-025
Carbo Com.
Retail
20663sf
024- -C-004
Perry M&I Co.
Scrap Yard
141855F
024- -C-024
Finkelman
Scrap Yard
37206sf
025- -B-002
Fred Johnson
Vacant
115215F
024- -C-02
Wood and Ryan
Vacant
197722F
024- -C-00
Carbo Com.
Vacant
14732sf
024- -C-002
57580sf
024- -C-010
Portland Terminal Co.
Rail Corridor
155010sf
025- -B-003
Portland Terminal Co.
Rail Corridor
86383sf
034- -D-003
Marginal Way Prop.
Retail
29088sf
024- -C-001

City of Portland

Bayside Scrap Metal Yard Properties To Be Acquired

October 2003

	C-B-L	Book/Page	Current Use	Location	Owner per Assessors	Owners Address	Square Feet
(1)	25-B-2	2520/200**?	Scrap Yard w/Bld.	25 Somerset	H. Finkelman Inc. c/o	P.O. Box 48	37,206
					New England Prolerized Co	Everett, MA 02149	
(2)	24-C-24	3607/141	Scrap Yard w/Bld.	9 Somerset	E. Perry Iron & Metal Co.	115 Lancaster St.	34,185
						Portland,ME 04101	
(3)	25-D-2	13545/181	Scrap Yard w/Bld.	115 Lancaster	Alan Lerman	399 Ludlow Street	33,447
						Portland,ME 04102	
(4)	25-D-5	12604/268	Scrap Yard No Bld.	44 Kennebec	E. Perry Iron & Metal Co.	115 Lancaster St.	6,000
						Portland, ME 04101	
(5)	25-D-6	12604/268	Scrap Yard No Bld.	131 Lancaster	E. Perry Iron & Metal Co.	115 Lancaster St.	3,942
						Portland, ME 04101	
(6)	25-D-7	12604/268	Scrap Yard No Bld.	137 Lancaster	E. Perry Iron & Metal Co.	115 Lancaster St.	16,500
						Portland, ME 04101	
(7)	25-D-8	12604/268	Scrap Yard No Bld.	145 Lancaster	E. Perry Iron & Metal Co.	115 Lancaster St.	11,985
						Portland, ME 04101	
						Total	**143,265**

**Ref. To Slum Clearance & Redevelopment Authority, needs more research.

ATTACHMENT

MEMORANDUM

To: Gary Wood, Esq
From: Lee Urban
Date: January 2, 2006
Subject: Proposed Mediation

At the risk of getting too academic but, nonetheless, in an effort to help focus on a mediation with a mediator who can give an opinion on the three issues you clearly laid out in your letter of December 30 [attached], I offer the following. I feel compelled to prepare this information because of Richard's position stated in his letter [attached] that:

> "One point that Gary and I do need to discuss is that his letter suggests having a neutral lawyer, such as Chuck, make legal findings in what looks like a binding arbitration procedure. That is not the "mediation" called for in the option agreement. I won't foreclose any sensible mechanism for resolving things, but want to be clear that my clients have not as yet agreed to modify the dispute resolution process in that manner."

We are not trying to "modify the dispute resolution process." We are asking a mediator to be an "agent of reality." I've done it in mediations in the past, and they can be very helpful. They are non-binding, but they help a party confront what may be the reality of the situation.

Attached is a portion of an article on "third party interventions," which include mediation. Note that I have underlined what I think are relevant portions, and I have underlined and highlighted those portions that I think apply especially to the matter at hand. I draw your particular attention to page 363 of the article that states in part: "Understand that a good mediator often functions as an 'agent of reality,' helping both parties mange their expectations of dispute resolution, as well as clarifying the likely contingencies of no agreement." Thus, we are not asking for an arbitration, be it binding or non-binding. We are asking for a mediator to act as an "agent of reality": i.e., well, if we can't come to an agreement on those three issues, what do you, mediator, think will be the likely outcome.

I've also attached a copy of your December 30 letter to Richard, now bearing my marginal comment. Again, I think we're asking the mediator to tell us, after some period of discussion among the parties and the mediator, what might be realistic answers to those three legal questions.

I've also attached Richard's January 2 letter back to you, now bearing my marginal comment. Depending on how adamant we [the City and TPL] are at the 10:30 AM negotiation tomorrow, the dispute may be ripe for mediation that afternoon.

CC: Joe Gray, Donna Katsiaficas, Esq.

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