

EMINENT DOMAIN ABUSE IN MINNESOTA



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Departing from Minnesota's "fundamental law," courts have stretched the concept of "public use" to the point that it effectively requires "great deference" to legislative action that directly and primarily promotes private interests.

Property owners in Minnesota and throughout the country have increasingly reacted against municipal and state planners using the powers of eminent domain to transfer their property to private developers for private profit. Far from resolving the question of eminent domain abuse, the 5-4 decision in *Kelo v. City of New London*¹ merely shunts the problem into a different analytical framework and bounces it into a new forum. In view of the majority's opinion that a "skeptical eye" must be kept on private-to-private transfers that lack an "integrated development plan,"² courts are now tasked with developing legal principles for detecting which "private transfers" entail "impermissible favoritism of private parties" that "is so acute that a presumption (rebuttable or otherwise) of invalidity is

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warranted under the Public Use Clause" of the U.S. Constitution.³ While this new task percolates through the legal system, the baton has also been passed to Minnesota's state courts, and others, to consider higher standards under their respective state constitutions.⁴

Outside of Minnesota, state courts have addressed the abuse of takings powers by heightening scrutiny of the exercise of eminent domain under their respective state constitutions.⁵ But, following *Kelo* and the split decision affirmations of the cases involving the Walser Auto Dealership and the City of Richfield,⁶ the question remains: what direction should Minnesota take under Article I, §13 of the Minnesota Constitution?⁷ Based on the history, language and structure of the Minnesota Constitution, this article will argue that the Minnesota Constitution strictly limits the power of eminent

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domain when it is used to redistribute private property between private parties. It is now time to clarify what went unanswered when the Minnesota Supreme Court heard the *Walser* cases.

A VERY BRIEF HISTORY

The Northwest Ordinance of 1787, which governed the eastern portion of the Minnesota territory, rejected the notion that eminent domain was an unlimited “despotic power.”⁸ Instead, eminent domain was originally understood as an exceptional power, exercised when circumstances of public exigency made it “necessary” to take private property or services to ensure the “common preservation.”⁹ This restrictive understanding of eminent domain was later reinforced and extended to the western portion of the Minnesota territory through Section 14 of the Act of June 4, 1812, which emphasized: “If the public exigencies make it necessary for the common preservation to take the property of any person, or to demand his particular services, full compensation shall be made for the same.”¹⁰ Eventually, the robust protection afforded private property and other civil liberties under the Northwest Ordinance came to govern the entire Minnesota territory through Section 12 of the Organic Act of 1849.¹¹

At the time of the Constitutional Convention of 1857, private property in the Minnesota territory was no more beholden to the power of eminent domain than to any common law rule of necessity. Nevertheless, less than ten years later, the Minnesota Supreme Court reaffirmed the “public exigency” justification for eminent domain while dissonantly announcing that the power was an inherent entitlement of sovereignty, which was “not conferred by the constitution” and limited only as expressly stated in the Minnesota Constitution.¹² Between the lines of the very same case, the notion of eminent domain as the “prerogative of the Crown” returned from exile to wrestle with the Northwest Ordinance’s “public exigency” justification for the taking of private property for public use.

Under the banner of the “legislative prerogative,” the original public exigency justification for eminent domain was eventually vanquished. By 1891, rather than asking whether a taking was “necessary” to address a “public exigency,” Minnesota courts adopted a policy of deference to the “legislative judgment” as to whether the exercise of eminent domain was “expedient” to achieving a “public purpose.”¹³ With takings no longer restricted to circumstances of public exigency, the legal understanding of what constituted a “public use” was primed for expansion.

The Minnesota Supreme Court first announced that the concept of “public use” was “flexible” in 1896.¹⁴ At that time, however, the term was not flexible in the sense of having no fixed meaning whatsoever; rather, it was seen as flexible only as to the *kinds* of property that could be used as “public facilities for travel or for transmission of intelligence or commodities.” Even in this flexible sense, what constituted a “public use” under the Minnesota Constitution was still limited by the public’s “right to resort to the property for the use for which it is acquired independently of the mere will or caprice of the person or corporation in which the title of the property would vest upon condemnation.”¹⁵

For many years, the “flexible” sense of “public use” remained consistent with the usage of the delegates to

the 1857 Constitutional Convention, who spoke of publicly accessible highways, canals and railroads being created through condemnation¹⁶ and who rejected a constitutional provision that would have permitted lumber companies to declare non-navigable private rivers “rights of way” for lumbering purposes as unfairly preferring one private business over another.¹⁷ Property taken through eminent domain simply could not be transferred or leased for exclusive private use under the Minnesota Constitution, regardless of the indirect public benefit of doing so.¹⁸ In *Schubert v. Town of Rockford*,¹⁹ for example, the Minnesota Supreme Court held that private property could not be condemned for use as a private drainage ditch. In reaching this holding, the Court reasoned that a private drainage ditch “affects the public only indirectly, as the public may share in the profit of the particular individual” and that “[t]he Legislature cannot by its mere fiat make a private use a public use.” Significantly, this decision led to the proposal of a constitutional amendment in 1915 to permit condemnation of private property to create private drainage ditches,²⁰ which was ultimately rejected by the electorate. This attempt to amend the Minnesota Constitution highlights the fact that, as late as 1915, it was clear that “public use” did not encompass private uses with indirect public benefits.

“Public use” did not become so “flexible” as to encompass private-to-private takings until 1920. This new degree of flexibility was made possible by the new rule of construction that, when the Minnesota Constitution “employs terms which change in definition as conditions change, it refers to them in the sense in which they are meant when the protection of the Constitution is sought.”²¹ Based on this new rule and the growing acceptance of zoning laws as a valid exercise of the police power, the Minnesota Supreme Court in *State ex rel. Twin City Bldg. & Inv. Co. v. Houghton* deemed the use of condemnation to create a restricted residential district a “public use,” even though the condemned property would ultimately be transferred to private parties. A taking resulting in private ownership of the taken property was thus justified by indirect public benefits attributed to private land uses, rather than by the public’s right to access and control the taken property. Implicitly, the Court in *Houghton* declared that the meaning of “public use” had somehow expanded to encompass the very kind of private-to-private taking that the electorate had already rejected with respect to private drainage ditches a mere five years earlier.

Houghton’s dramatic expansion of the asserted meaning of “public use” remained largely surreptitious for another 30 years. However, by 1951, the Minnesota Supreme Court explicitly abandoned any “public use” test that was premised on the “use of a proposed structure, facility or service by everybody and anybody,”²² and replaced it entirely with a “public purpose” test that simply asked whether the proposed taking aimed at a public purpose. Within a decade, “public use” then stretched wide enough to subsume private-to-private takings to eliminate blight through the private development of low and middle-income housing.²³ During the late ‘70s, the Court held the expenditure of public money to “lure the private sector” into a “redevelopment plan” passed the public purpose test where it was anticipated to increase the tax base and encourage economic development;²⁴ and, by 1986, the anticipation of an increased tax base and employment

justified the outright condemnation of one private business to replace it with another private business.²⁵

CUTTING THE ROOTS

As discussed above, eminent domain was first transmuted from a rule of necessity founded on public exigency into a rule of expediency founded upon the legislative prerogative. Then, after nearly a century of legal wrangling, the requisite “public use” morphed into a private use that secondarily benefits the public. In short, the Minnesota takings clause has been contorted to the point where it now means something nearly the opposite of what it originally meant. Rather than continue along this path, Minnesota courts should step back from the precipice and seek guidance from the “fundamental law” of Minnesota.

At least one scholar has observed that the Northwest Ordinance governs the Minnesota Constitution because it has not been abrogated by the “common consent” of the state and federal government.²⁶ Significantly, the Northwest Ordinance expressly contemplates that the stated “fundamental principles of civil and religious liberty” shall be fixed and established “as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory.” (emphasis added) Moreover, the “rights and privileges” and “unenumerated rights” clauses of the Minnesota Constitution²⁷ were plainly intended to secure liberties recognized at the time of ratification:

[t]he entire social and political structure of America rests upon the cornerstone that all men have certain rights which are inherent and inalienable [t]he Constitution of Minnesota specifically recognizes the right to “life, liberty or property,” but does not attempt to enumerate all “the rights or privileges secured to any citizen thereof.” It, however significantly provides: “The enumeration of rights in this constitution shall not be construed to deny or impair others retained by and inherent in the people.” (citations omitted).²⁸

Given such express language, the civil liberties protected by the Northwest Ordinance, like those of the Magna Carta, should be seen as principles of “fundamental law” secured and not superseded by the Minnesota Constitution. Not surprisingly, recent decisions of the Minnesota Supreme Court reflect a nascent recognition of the fundamentality of the Northwest Ordinance in their constitutional analyses.²⁹

The limited nature of the takings power under the Northwest Ordinance sets the appropriate stage for cutting the roots of eminent domain abuse. Injected through the “rights and privileges” and “unenumerated rights” clauses, this “fundamental law” of civil liberty would limit the exercise of eminent domain to circumstances where “public exigency” renders it “necessary” for the “common preservation.” Courts would thereby become constitutionally obligated to do more than ask whether a proposed taking would be “expedient” to a “public purpose;” they would need to ask whether a “public exigency” rendered the proposed taking “necessary” for the “common preservation.” Viewed from this perspective, only truly extraordinary circumstances could possibly sustain the asserted “public necessity” of bulldozing a modest middle-class neigh-

borhood to make way for an upscale condominium development, even with appropriate deference to the coordinate legislative branch of government.

The “public exigency” conception of eminent domain under the Northwest Ordinance should stand as a bulwark against the abuse of eminent domain. Nevertheless, the century of hardened jurisprudence that undergirds eminent domain abuse is unlikely to fall from a single analytical blow. Therefore, attention must also be directed to the prime manifestation of what has become the “despotic power” despite the Northwest Ordinance: the seemingly unmoored “flexibility” of the concept of “public use.”

PUBLIC USE & PRIVATE INTERESTS

The original meaning of “public use” under the Minnesota Constitution required public ownership, control and/or sustained access. This original understanding was confirmed as late as 1915, when the Legislature failed in its attempt to amend the Minnesota Constitution to permit condemnation of private property for the creation of private drainage ditches. Nevertheless, advocates of private-to-private takings contend that *who* gets to keep taken property is just as constitutionally insignificant as *what* kind of property can be taken, provided that a public purpose is served in some fashion. In making this assertion, such advocates prefer the interpretive rule that when the Constitution “employs terms which change in definition as conditions change, it refers to them in the sense in which they are meant when the protection of the Constitution is sought.”³⁰ As a practical matter, therefore, returning to a more restrictive concept of “public use” requires more than a historical review of the meaning of “public use” and the foundations of civil liberty; it requires the identification of a shared jurisprudential framework that sets meaningful constraints on the interpretation of “public use,” regardless of whether one is a constitutional originalist or evolutionist. Fortunately, such a framework exists insofar as it is generally accepted that the structure of the Minnesota Constitution limits the construction of particular constitutional provisions.³¹

The Minnesota Constitution is, in fact, structured to prevent public action from being dominated by private economic interests. The prime example of this structural restriction is Article X, section 1 of the Minnesota Constitution — addressing the power of taxation. Courts have construed this provision as requiring that all governmental expenditures be predominantly for a public purpose, stating:

- (1) The state or its municipal subdivisions or agencies may expend public money only for a public purpose.
- (2) A “public purpose” is such activity as will serve as a benefit to the community as a body and which, at the same time, is directly related to the functions of government.
- (3) A legislative declaration of public purpose is not always controlling. In the final analysis, the courts must make the determination.
- (4) The mere fact that some private interests may derive an incidental benefit from the activity does not deprive the activity of its public nature if its primary purpose is public. On the other hand, if the primary object is to promote some private end,

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the expenditure is illegal, although it may incidentally also serve some public purpose.³²

As such, Article X, section 1 of the Minnesota Constitution can be a direct structural limitation on the power of eminent domain: if the alleged public purpose served by a taking is not sufficiently predominant for public funds to be spent constitutionally under Article X, section 1, a constitutional taking involving public funds simply cannot occur.

Even in situations where Article X, section 1 does not function as a direct limitation on private-to-private takings, it is undeniably aimed at preventing public action from primarily serving private interests. In this regard, it is mirrored by the limitation on the use of the credit of the state “in aid of any individual, association or corporation”³³ and the prohibition on “special legislation.”³⁴ Indeed, the Minnesota Supreme Court has noted that these various provisions are “closely interrelated” and designed to ensure that the public purpose spending restriction “is safeguarded against indirect erosion.”³⁵ When these provisions are viewed together with the takings clause of Article I, section 13, it is clear that the Minnesota Constitution is deliberately structured to prevent public action from primarily serving private interests. To fit within this constraint, the concept of “public use” under the takings clause cannot be so “flexible” that it permits the primary object of a taking to be the promotion of a private interest.

Of course, the primary benefit of property ownership is control over the associated bundle of rights. In a private-to-private taking, a private party is literally the primary beneficiary of the transfer because the private party captures the most important rights in the bundle — control over the use and profits of the property. By contrast, any benefit to the public, such as an increase in tax revenues or economic growth, is purely an incidental “epiphenomenon.” For this reason, it borders on doublespeak to declare that the primary object of a private-to-private transfer is *not* the promotion of a private interest. Such a declaration boils down to the rather curious claim that the promotion of private interests is incidental to the promotion of public purposes that are themselves being promoted incidentally by the direct promotion of private interests. As a matter of basic common sense, such assertions are appropriately viewed with a “skeptical eye,” especially when one considers that more direct means of addressing “public exigencies” exist than private-to-private takings. Indeed, the cognitive dissonance required to accept this notion increases substantially when one considers that property taxes on commercial and industrial properties in Minnesota range between 1.5 percent to 2.0 percent of the fair market value, whereas the required return on private capital is approximately 10 percent.³⁶ Leaving aside speculation about public benefits derived from secondary economic and property valuation growth, the monetary benefits from a private-to-private taking are intrinsically skewed in favor of the private party to whom the condemned property is transferred.

In the final analysis, a concept of “public use” that is so “flexible” that it effectively requires “great deference” to legislative action that directly and primarily promotes private interests is completely alien to the framework of the Minnesota Constitution.³⁷ The point of this observation is not that a “flexible” conception of “public use”

should be retooled in a Rube Goldberg fashion to accommodate some sort of public purpose analysis. Rather, the point is that requiring taken property to actually be used by the public in the sense of public ownership, control and/or sustained access is simply what naturally “fits” within the structural constraints of the Minnesota Constitution and the limitations imposed on eminent domain by the “fundamental law” of the Northwest Ordinance. This understanding also respects the basic fact that the words “public use” were chosen by the framers of the Minnesota Constitution rather than “public purpose,” which is a textual distinction that was reaffirmed as substantive upon the ratification of the reformed Minnesota Constitution on November 5, 1974, the whole purpose of which was “to improve its clarity by removing obsolete and inconsequential provisions, by improving its organization and by correcting grammar and style of language, but without making consequential changes in legal effect.”³⁸

CONCLUSION

The notion that eminent domain may be exercised by state actors to effect private-to-private takings in expedient service of freewheeling legislative prerogatives stands in contradiction of the history, language, structure and amendment processes of the Minnesota Constitution. Notwithstanding the current state of the law, the Minnesota electorate has never repudiated the Northwest Ordinance’s robust protection of private property rights, nor its corresponding conception of eminent domain as a power limited to circumstances of public exigency. This “fundamental law” of civil liberty remains incorporated into the Minnesota Constitution by way of the “rights and privileges” and “unenumerated rights” clauses of Article I, sections 2 and 16. Moreover, despite the opportunity to do so in 1857, 1915, and again in 1974, the electorate has never equated “public use” with “public purpose” or “private use.” If constitutional history, language, structure, and amendment processes are to have any meaning, and if the past and present will of the people is to be respected, constitutional originalists and evolutionists alike should embrace the original meaning of “public use,” along with careful judicial scrutiny of public necessity. If this is done, the public good will return to its proper place as the primary object of the takings power, which is the only way to stem further eminent domain abuse in the state of Minnesota. □

NOTES

1 545 U.S. ____, Case No. 04-108 (06/23/05).

2 Id. at 16-17, n.17 (majority opinion)

3 Id. at 4 (Kennedy, J., concurring).

4 Id. at 19 (stating “[w]e emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power”) (majority opinion).

5 *Wilmington Parking Auth. v. Land with Improvements*, 521 A.2d 227 (Del. 1986); *Southwestern Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.W.2d 1 (Ill. 2002); *County of Wayne v. Hathcock*, 684 N.W.2d 785 (Mich. 2004); *Merrill v. City of Manchester*, 499 A.2d 216 (N.H. 1985); *Condemnation of 110 Washington Street*, 767 A.2d 1154 (Penn. 2001); *Manufactured Housing Communities of Wash.*

v. State of Wash., 13 P.3d 183 (Wash. 2000).

6 Walser Auto Sales, Inc. v. City of Richfield, 644 N.W.2d 425 (Minn. 2002); Housing and Redevelopment Authority ex rel. City of Richfield v. Walser Auto Sales, Inc., 641 N.W.2d 885 (Minn. 2002); Walser Auto Sales, Inc. v. City of Richfield, 635 N.W.2d 391 (Minn. App. 2001); City of Richfield v. Walser Auto Sales, Inc., 630 N.W.2d 662 (Minn. App. 2001).

7 Minn. Const. art. I, §13 (stating “[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured”).

8 Quoting Vanhorne’s Lessee v. Dorrance, 2 Dall. 304, 310-13 (1795).

9 Northwest Ordinance of 1787, art. II.

10 Act of June 4, 1812, Sess. I, ch. 95, p. 747 (1812) (emphasis added).

11 William Anderson & Albert J. Lobb, A History of the Constitution of Minnesota 11 (1921).

12 Winona & St. P. R. Co. v. Waldron, 11 Minn. 515, 517 (1866).

13 Fairchild v. City of St. Paul, 49 N.W. 325, 326 (Minn. 1891).

14 Stewart v. Great Northern Ry. Co., 68 N.W. 208, 209 (Minn. 1896).

15 Minnesota Canal & Power Co. v. Koochiching Co., 107 N.W. 405, 407 (Minn. 1907); see also Minneapolis Gen. Elec. Co. v. City of Minneapolis, 194 F. 215, 223 (D. Minn. 1911).

16 Francis H. Smith, The Debates and Proceedings of the Minnesota Constitutional Convention Including the Organic Act of the Territory, 370-72 (1857).

17 Id. at 566-70.

18 Sanborn v. Van Dwyne, 96 N.W. 41, 43 (Minn. 1903).

19 114 N.W. 244, 245-46 (Minn. 1907).

20 1915 Minn. Sess. Laws, ch. 384.

21 State ex rel. Twin City Bldg. & Inv. Co. v. Houghton, 176 N.W. 159, 161 (Minn. 1920).

22 Thomas v. HRA of Duluth, 48 N.W.2d 175, 185 (Minn. 1951) (quoting Matter of New York City Housing Authority v. Muller, 1 N.E.2d 153 (1936)). Minnesota courts, in fact, have never employed this kind of “public use” test. Instead, the test for public use until 1920 focused on the question of whether members of the public had equal access to the taken property on equal terms, free from the mere will and caprice of a private party.

23 Housing & Redevelopment Auth. of St. Paul v. Greenman, 96 N.W.2d 673, 679 (Minn. 1959); see also Minneapolis v. Wurtele, 291 N.W.2d 386 (Minn. 1980); Minneapolis v. Minneapolis Metro. Co., 104 N.W.2d 864, 874 (Minn. 1960).

24 R.E. Short Co. v. City of Minneapolis, 269 N.W.2d 331, 339 (Minn. 1978).



25 City of Duluth v. State, 390 N.W.2d 757, 762 (Minn. 1986). (“Great weight must be given to the determination of the condemning authority, and the scope of review is narrowly limited. ... Historically, the court has used the words “public use” interchangeably with the words “public purpose,” thus implying that even though a public entity, using its eminent domain powers, turns over parcels to a private entity for use by that private entity, the condemnation will, nevertheless, be constitutional if a public purpose is furthered by such a transfer of land”); see also City of Richfield v. Walser Auto Sales, Inc., 630 N.W.2d 662 (Minn. App. 2001).

26 Mary Jane Morrison, The Minnesota State Constitution 3-4 (2002). It should also be noted that the U.S. Supreme Court has held repeatedly that the governmental and territorial forms imposed by the Northwest Ordinance were impliedly superseded by the ratification of subsequent state constitutions and the entry of such states into the Union Chapin v. Fye, 179 U.S. 127 (1900); Van Brocklin v. Tennessee, 117 U.S. 151 (1886).

27 Minn. Const. art. I, §§2 and 16.

28 Thiede v. Town of Scandia Valley, 14 N.W.2d 200, 225-26 (Minn. 1944).

29 State v. Hershberger, 462 N.W.2d 393, 399 n.3 (Minn., 1990); Ideal Life Church of Lake Elmo v. Washington County, 304 N.W.2d 308, 313 (Minn. 1981).

30 Quoting Houghton, 176 N.W. at 161.

31 Skeen v. State, 505 N.W.2d 299, 314 (Minn. 1993).

32 Port Authority of City of St. Paul v. Fisher, 132 N.W.2d 183, 197 (Minn. 1964); see also Walser Auto Sales, Inc. v. City of Richfield, 635 N.W.2d 391, 400 (Minn. App. 2002); Burns v. Essling, 194 N.W. 404, 405 (Minn. 1923).

33 Minn. Const. art. XI, §2.

34 Minn. Const. art XII, §1.

35 City of Pipestone v. Madsen, 178 N.W.2d 594, 598-99 (Minn. 1970).

36 This insight belongs to Lee McGrath, executive director of Institute for Justice — Minnesota, who no doubt drew upon his former professional life in corporate finance.

37 See generally Visina v. Freeman, 89 N.W.2d 635, 647 (1958).

38 Minn. Stat. Const. Prec. §1.



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