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### Challenging eminent domain Hurst homeowners buck precedent

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HURST - In California, Oakland condemned its NFL team as a business in a desperate attempt to keep the Raiders in town.

In Michigan, Detroit condemned thousands of houses, churches and other properties to make way for a General Motors plant.

In Minnesota, St. Paul condemned a large site to make way for a Sears department store.

In each case, courts upheld the city's right to use eminent domain for private development. Across the country, governmental entities have been given ever-broadening latitude in determining when they can take ownership of private property for economic development.

Now, 10 Hurst homeowners are contending that the city had no right to condemn their properties to make way for the expansion of North East Mall. Judge Fred Davis in 17th District Court will hear arguments today in the homeowners' lawsuit.

But legal experts say that whenever cities use economic development as a rationale for condemnation, they are likely to prevail.

"Cities win 90 percent of those cases that are challenged in court," said Marc Needles, a Philadelphia attorney who commonly litigates eminent domain cases. "Occasionally a court rules in favor of the property owner, but most often it's settled if enough money can be thrown around." Still, the homeowners remain hopeful that their case will limit a city's ability to rely on eminent domain.

"I've had no doubt from the beginning that we're going to prevail," said Phyllis Duval, one of the plaintiffs. "The city's action was only for profit - nothing else." Hurst officials have argued that they had a right to condemn houses in the Richland Park East neighborhood to make way for the \$220 million expansion of the mall and a planned shopping center. Of the 127 houses on the buyout site, 117 homeowners agreed to sell to the city at better than market prices.

Emphasizing the economic benefits of the mall expansion, Hurst officials said the city expects to gain about \$8 million in new sales tax annually and about 2,000 new jobs.

John Boyle, a city attorney, said Hurst used a statute amended by the state Legislature in 1987 that allows for eminent domain in the name of economic development and public improvement. The city condemned eight of the 10 houses in question for a road and two other houses for a public parking lot, he said.

Arlington and Fort Worth have used the amended statute for the condemnation of property for development ranging from The Ballpark in Arlington to Texas Motor Speedway. The new version has not been tested in Texas appellate court.

"It all boils down to the court's interpretation of state statutes," Boyle said.

Before the statute was amended, the Texas Supreme Court and lower courts concluded

in at least 40 cases that a city could not use eminent domain for private development, said Glenn **Sodd**, an attorney representing the homeowners.

In one of the most significant cases, the Texas Supreme Court ruled in 1972 against Arlington's condemnation of property set aside for Bell Helicopter to use for an airport. In 1962, the justices ruled against a Brooks County condemnation of a roadway, also taking aim at legislation supporting the action.

"In Texas, the courts are willing to look at what the Legislature does," **Sodd** said. "At the same time, they don't hesitate to question their legitimacy." Richard A. Epstein, a law professor who specializes in eminent domain at the University of Chicago, said several courts across the country have ruled that the issue should be left to the state legislatures.

"Judges themselves have washed their hands of this issue," Epstein said. "The true battle is over what dollar amount will be paid." In the Hurst case, however, **Sodd** contends that the condemnation sets a dangerous precedent because the city used its powers to broker a deal for Simon DeBartolo Group, which is considered the largest developer of retail real estate in North America.

Hurst could pay up to \$80 million in incremental sales tax revenue to the owners of North East Mall over 20 years, according to figures obtained from depositions filed in court.

"We're not saying that Simon is evil for trying to expand their mall," **Sodd** said. "All we're saying is that Simon is not entitled to go out and use the city's power of eminent domain to expand their mall." Simon officials say they negotiated in good faith for almost two years with homeowners, offering them up to 160 percent of the appraised value of their properties.

"Eminent domain is clearly an action of very, very last resort," said Billie Scott, a Simon spokeswoman. "We genuinely feel that through the city's actions and the ultimate expansion of the mall that the vast majority of Hurst residents will benefit." Susan Connor, a professor at John Marshall Law School in Chicago, said the trend of using eminent domain for economic development began about 25 years ago, when courts began allowing the condemnation of inner-city slums.

Taking the lead from urban areas, suburban towns started using eminent domain to remain competitive, she said.

The emergence of economic development corporations allowed cities to use eminent domain more frequently, said John E. Petersen, president of Government Finance Group, a financial advisory firm in Arlington, Va.

"It is not uncommon to use eminent domain for redevelopment," Petersen said. "As long as eminent domain is used as a competitive tool between municipalities, it will remain a permanent fixture." Three pivotal court rulings paved the way for the broader interpretation of eminent domain, said Thomas Merrill, a professor of law at Northwestern University.

-In 1981, the Michigan Supreme Court approved Detroit's plan to condemn 465 acres for construction of a General Motors automobile assembly plant. The city condemned the neighborhood after General Motors had announced its intention to relocate operations if Detroit did not provide a new plant site. The court ruled that the public benefits of retaining 6,000 jobs and preserving tax revenue justified the city's action.

-In 1982, the California Supreme Court refused to address the question of whether Oakland could condemn the Raiders when the National Football League team tried to move to Los Angeles, leaving open the possibility that a city could condemn a business to keep it from leaving town, Merrill said. The team eventually moved to Los Angeles, but is

now back in Oakland.

-In 1984, the U.S. Supreme Court issued its first ruling regarding eminent domain, affirming the lower court rulings that the issue should generally be left to the state legislatures.

Courts have also backed cities' use of eminent domain for the expansion of department stores, Merrill said. In a "pre-emptive" case in 1959, the Minnesota Supreme Court ruled in favor of St. Paul condemning a site to make way for a Sears, Roebuck and Co. department store.

In 1963, the Pennsylvania Supreme Court ruled in favor of Philadelphia condemning property to make way for a parking lot of a department store.

Although the courts have been supportive of cities in most cases,

they might start setting limits if cities begin to condemn property of blatant personal value, legal experts say.

"If a city tried to condemn Aunt Mary's silver set, I think the courts might object," Merrill said. "But, any time that cities use economic development as a rationale, the homeowners are going to be in the isolated minority." The public may not be as reticent as the courts.

"The politics of the issue are alive and well," said Richard Collins, a professor of law who teaches eminent domain issues at the University of Colorado. "Obviously, homeowners might choose to express their dissatisfaction with a vote." The controversy over eminent domain will remain contentious in areas such as Northeast Tarrant County, where cities need to ensure economic development, legal experts say.

"Public benefit is in the eye of the beholder," attorney Needles said. "That really is the main problem in the debate over eminent domain."

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