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*spot*light

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Riding the Eminent Domain Rail

Triangle Transit Authority Is N.C.'s Case Study in Eminent Domain Abuse

SUMMARY: The Triangle Transit Authority (TTA) has been seizing private property for a rail system even though the necessary federal funding has never been secured. In late 2005, as it became clear that the rail was likely a dead project, the TTA still condemned land even though it meant forcing people out of their homes and businesses. TTA's eminent domain abuse, however, may reach a new level. Through a possible public/private partnership, TTA may start using the already seized private property, and acquire additional private property, for economic development reasons. Unfortunately, current N.C. law may allow for these *Kelo*-type takings.

The Triangle Transit Authority (TTA) is considering a public/private partnership with Cherokee Investment Partners, a commercial developer, to develop property that was intended to house rail stations for its proposed $810-million, 28-mile commuter rail line between Raleigh and Durham. TTA's goal is to increase population densities in the vicinity of the proposed stations in order to make a rail system more appealing to the federal government, and therefore, make federal funding more likely. This approach may seem innocuous, but it should be a concern for all North Carolinians given the TTA's history of eminent domain abuse.

Eminent domain is the government's power to seize private property for a public use with "just compensation" being paid to the property owner. The TTA certainly acquired much of the property it would like to develop through eminent domain or the threat of eminent domain. Now the TTA may use the property for housing, offices, stores, and other development — everything except the reason the property was taken in the first place. Even worse, the TTA may use its partnership with Cherokee as an excuse to acquire more land for economic development. The TTA, with its private partner, may become one of the largest real estate speculators in the Triangle.

This *Spotlight* first will explain the TTA's past eminent domain abuse. Second, it will explain how, under current law, the TTA might try to seize additional private property for economic development purposes under the guise of helping a rail system that may never be built.

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Background

In the early 1990s, the Triangle Transit Authority (TTA) received a grant from the Federal Transit Authority (FTA) to study the regional transit alternatives for the Triangle region. This study culminated in the 1995 adoption of a Regional Transit Plan, of which the centerpiece would be a commuter rail system linking Raleigh, Cary, Research Triangle Park, and Durham. The proposed $810-million, 28-mile rail project was to be partially financed through state and local taxes while the federal government would fund the vast majority of the project (60 percent). The TTA, however, has repeatedly failed to meet the FTA guidelines required to receive federal funding. In late 2005, the FTA informed[1] the TTA that, for all practical purposes, it was not going to receive federal funding. In August 2006, the TTA withdrew its application for federal funding.[2]

Nevertheless, the TTA is not giving up on its dream of a commuter rail system.[3] Even its decision to stop seeking federal funding is not serving as an obstacle.[4] Instead, through a possible public/private partnership,[5] the TTA would work with a commercial developer, Cherokee Investment Partners, to develop the property taken for rail stations and instead use it for commercial and residential development. The hope is that high-density development around the proposed stations would make rail transit more likely to obtain future federal funding. According to TTA lawyer Wib Gulley, "the authority might acquire additional property if the rail project moves forward."[6] It appears that finalizing the partnership with Cherokee would be enough to move forward and to acquire additional land.[7]

TTA's Eminent Domain Power

The North Carolina eminent domain statute[8] and the state regional public transportation authority (RPTA) statute[9] provide TTA with eminent domain powers. The TTA can seize private property for a "public transportation system."

From the RPTA statute:

> "Public transportation system" means, **without limitation**, a combination of real and personal property, structures, improvements, buildings, equipment, vehicle parking or other facilities, railroads and railroad rights-of-way whether held in fee simple by quitclaim or easement, and rights-of-way, or any combination thereof, used or **useful** for the purposes of public transportation. "Public transportation system" however, does not include streets, roads, or highways except those for ingress and egress to vehicle parking.[10] *(Emphasis added.)*

TTA's History of Eminent Domain Abuse

When the TTA (or any governmental entity) approaches a private property owner, it does not need to condemn property using eminent domain to use its eminent domain power. It does not even have to use the threat of eminent domain. The mere knowledge that the power exists is enough to "convince" people to sell their property. The only question usually is not if the government can seize property but whether the government's offer for the property is "just compensation." Few individuals can afford to go through the expense of challenging the government's offer. For those that do sue the government, attorney fees and the stress of litigation often exceed any benefits.

Surprisingly though, there actually is a clear record of the TTA not only using the threat of eminent domain, but also actually condemning property for the rail system. The TTA owns 11 parcels of land in Durham along its proposed rail line. Out of those 11, the TTA has condemned five parcels.[11] This is just in Durham County where only four out of the proposed 16 stations are located.

TTA Should Not Be Involved in Real Estate Speculation

TTA should be able to seize property for transportation systems that clearly have the "green light." A rail system is a legitimate public use. However, the TTA should not be able to seize private property because it might be able to use the property sometime in the distant future — government should not be in the business of speculation.

Out of the $810 million needed for the rail system, the TTA needed 60 percent of the funding to come from the

federal government.[12] When the TTA started seizing private property for the rail system in the mid-1990s, it had not secured federal funding. This funding "obstacle" did not stop the TTA. It decided to become a real estate speculator and seize property since there was a possibility of a public use.

In late 2005, the speculation only got worse. The TTA learned that the FTA gave its project a low rating and therefore excluded the project from the Presidents FY 2007 budget.[13] The project also lost the support of both U.S. Senators Elizabeth Dole and Richard Burr.[14] For all practical purposes, the project was not going to receive federal funding, yet the TTA still did not stop taking private property, including Bob Morrison's.

Morrison's experience with the TTA started in early 2005. Morrison used to own an auto repair garage in Durham. The TTA decided to initiate condemnation proceedings for his property in February 2005.[15] Mr. Morrison was one of the few individuals that decided to challenge TTA's offer — TTA offered $216,000 for property appraised at $370,000 by Mr. Morrison's bank.[16] The TTA kept pursuing his property even after the federal funding looked dead in late 2005. When it continued this ongoing battle to seize his property in late 2005, the TTA moved from the realm of taking property based on the possibility of a public use to taking property simply because it could. Pipe dreams and aspirations of *unelected* and therefore largely unaccountable governmental bodies, such as the TTA, should never constitute a "public use."

In August 2006, the TTA decided to stop seeking federal funding because it could not meet the federal funding guidelines.[17] For now, the TTA is not going to initiate any new condemnation proceedings. Amazingly, they still are going forward with acquisitions already under way.[18] Mr. Morrison, as quoted in a recent article said it best "So they … got me out of that place [my garage] for what reason?"[19] The answer seems to be that they do not need a reason, as long as the TTA dreams of a rail system.

TTA Should Not Have Quick-Take Power

In North Carolina, the term "quick take" refers to a government entity's power to take immediate possession and title of private property upon the filing of a deposit with the court of the estimated amount for just compensation.[20] This power is designed to address situations when time is critical for the government. The TTA's actions are a prime example as to why the government never should have this power.

When the TTA condemned Mr. Morrison's garage in February 2005, they used their quick-take authority. They took immediate title of the property. To make their eminent domain abuse even worse, the TTA demanded that Mr. Morrison vacate his property by January 1, 2006, and until he did so, he was to be charged rent.[21]

The TTA had not secured federal funds for the rail system when it condemned Mr. Morrison's property. Time was the last thing that mattered for TTA in this transaction. TTA's actions were more than eminent domain abuse — the TTA had a complete disregard for Mr. Morrison and his rights.

What Should TTA Do with its Rail Properties?

If the TTA moves forward with the public-private partnership, all of the property likely would be made available solely to Cherokee Investment Partners.[22] Since the TTA took property without having the necessary federal funding, it is now trying to figure out what to do with land it never should have taken. The following recommendations apply to all private property acquired by TTA for the rail system, and if necessary the law should be changed to accommodate these reasonable solutions:

1) The eminent domain victims should have the right to buy back their property at the price paid by the government. An amount of money necessary to make each owner "whole" would be subtracted from the buy-back price. This would include costs for legal fees, interest, emotional harm, and relocation costs. An independent body would determine the costs.

2) For any remaining property, TTA should be required to sell the land using a transparent bidding process for each parcel of land.

Future TTA Takings: This Time It Could Be for Economic Development

In *Kelo v. City of New London*,[23] the United States Supreme Court held that economic development takings were constitutional. Since then, North Carolinians rightfully have been very concerned about the government seizing their private property and transferring it to private developers for economic development — they are concerned that if a better economic use for their property can be found, the property will be seized.

The North Carolina legislature recently enacted eminent domain legislation.[24] Contrary to some accounts, this legislation simply eliminated a few ways[25] the government is expressly *allowed* to take property for economic development. However, it did not expressly *prohibit* economic development takings.

The proposed TTA public/private partnership again shows how current law does not protect against the government seizing property for economic development. It is likely that the TTA will acquire additional land and transfer it to its partner for economic development.[26] To what extent, if any, Cherokee would have to pay for TTA's acquired property is unclear. There is every reason to expect, given its history, that TTA will use eminent domain or the threat of eminent domain to acquire this property.

In fact, TTA has the incentive to seize land for Cherokee because it will mean more profits for the TTA. Most troubling, however, is Cherokee has stated they will try and acquire additional property.[27] It is very possible that even though Cherokee will not have eminent domain power per se, it will be able to use the partnership and the threat of the TTA's eminent domain power to acquire property. This will allow one private entity to take the property of other private citizens through the force of government. While other developers have to negotiate prices for property in a free marketplace, Cherokee will be able to secure artificially low prices because property owners will have no choice but to sell their properties.

Of course, TTA likely would argue that since the economic development (by creating density near the station sites) could help secure future federal funding necessary for a possible rail system, the taking of the property is for the rail system (a legitimate public use or benefit) and not for economic development reasons. However, this is a clear case of the TTA taking the property solely for economic development. The only definite benefit is economic development while securing funding for a rail system is a speculative secondary benefit that is highly unlikely. To put it another way, regardless of whether there is a rail system, the TTA will take the property and transfer it to Cherokee for economic development reasons.

Is TTA's Real Estate Speculation with a Private Developer Legal?

A "public transportation system," as defined in the regional public transportation authority statute, can include any combination of property "without limitation" and the property only has to be "useful" for the purposes of public transportation. Note that "useful" specifically does not mean "used" for public transportation reasons. In other words, the property that the TTA seizes likely can be used for non-transportation reasons, such as malls, hotels, residences, office buildings, etc. — as long as it is "useful" for public transportation.

The words "without limitation" certainly seem to mean that the TTA has an unlimited ability to take as much property as it wants that is "useful" for public transportation purposes. Could the TTA take 10 blocks of property and transfer it to a private developer to develop a shopping mall and luxury condos because it would help a rail system? How about taking 40 blocks for a subdivision if it could be shown that it may help increase the number of passengers? The answers to these hypothetical questions are unclear.

The key problem with the "public transportation system" definition in the statute is that it probably would allow economic development takings if it can be shown that the property helps existing public transportation systems or sys-

tems that certainly will exist. The definition though probably would not allow economic development takings simply because the property might help a rail system that may exist in the distant future (government real estate speculation) — property is not "useful" to public transportation when the rail system likely will never exist. This definition needs to be amended — the possibility of economic development takings for any rail system should never be allowed. Economic development takings certainly should not be buried in provisions that are supposed to be for legitimate public uses. The TTA should not be allowed to create the higher density development need for federal funding simply by condemning the lower density development that residents have shown a preference for and coercively transforming it.

Conclusion

The TTA let their delusion for the rail system become the basis for trampling on the rights of Triangle residents. Eminent domain rarely should be used and as government officials repeatedly tell us, it is used as a last resort. Of course, it usually is the first resort. However, the TTA took eminent domain abuse to a new level. They simply seized property, without a realistic reason, and asked questions later. The abuse probably will only get worse if there is a public/private partnership. The rail system now is nothing more than a symbol for everything that is wrong with eminent domain.

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Notes

1. See the Triangle Transit Authority (TTA) web site page entitled "Current Status" at www.ridetta.org/Regional_Rail/Current_Status/2-06ClaflinComments.html.
2. "Triangle Regional Rail System to Take New Direction: TTA Removes Planned Rail System from Federal New Starts Process," Triangle Transit Authority Press Release (August 18, 2006) at www.ridetta.org/Regional_Rail/Overview/8-06RRPUpdate.html.
3. David Ranii and Bruce Siceloff, "Rail is stalled, but developer soldiers on," *The News & Observer* (Raleigh), August 30, 2006, www.newsobserver.com/104/story/480514.html.
4. *Op. cit.*, note 2.
5. *Op. cit.*, note 3; there also is a draft agreement that this author has on file.
6. *Op. cit.*, note 3
7. *Ibid.*
8. N.C. Gen. Stat. § 40A et seq., www.ncga.state.nc.us/gascripts/Statutes/StatutesTOC.pl?Chapter=0040A.
9. N.C. Gen. Stat. § 160A-600 *et seq.*, www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_160A/Article_26.html.
10. N.C. Gen. Stat. § 160A-601, www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-601.html.
11. Jim Wise, "Will shops be lost in transit?" *The Durham News*, August 19, 2006, www.thedurhamnews.com/front/story/2993955p-9420366c.html.
12. See the TTA web site page entitled "Frequently Asked Questions" at www.ridetta.org/Regional_Rail/FAQ/faq.html.
13. *Op. cit.*, note 1.
14. J. Andrew Curliss and Bruce Siceoff, "TTA not giving up on rail," *The News & Observer*, December 16, 2005, www.newsobserver.com/858/story/378605.html.
15. *Op. cit.*, note 11; see also Rick Martinez, "A garage gets railroaded," *The News & Observer*, January 18, 2006, www.newsobserver.com/1108/story/389492.
16. Andrea Weigl, "NC law on taking land scrutinized," *The News & Observer*, January 5, 2006, www.newsobserver.com/145/v-print/story/385041.html.
17. *Op. cit.*, note 2.
18. Benjamin Niolet, "TTA, garage owner settle strife over site," *The News & Observer*, August 22, 2006, www.newsobserver.com/215/story/477615.html.
19. *Ibid.*
20. N.C. Gen. Stat. § 40A-42, www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_40A/GS_40A-42.html.
21. Rick Martinez, "A garage gets railroaded," *The News & Observer*, January 18, 2006, www.newsobserver.com/1108/story/389492.
22. *Op. cit.*, note 5.
23. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) at laws.findlaw.com/us/000/04-108.html.
24. S.L. 2006-224 (HB 1965) at www.ncga.state.nc.us/Sessions/2005/Bills/House/HTML/H1965v6.html.
25. The new legislation repealed some local acts that permitted economic development takings and it repealed a buried provision that allowed for the use of eminent domain to complete revenue bond projects that were designed to promote economic development. The law did make some critical changes to the state's urban redevelopment law.
26. *Op. cit.*, note 5.
27. *Ibid.*