The next case, *SWIDA v. National City*, is an Illinois Supreme Court case that has drawn a great deal of interest around the Nation.

SWIDA
v.
NATIONAL CITY ENVIRONMENTAL, L.L.C.
SUPREME COURT OF ILLINOIS

199 Ill. 2d 225
April 4, 2002

JUSTICE GARMAN...The issue in this case is whether the Southwestern Illinois Development Authority (SWIDA) properly exercised the power of eminent domain to take property owned by National City Environmental, L.L.C. and St. Louis Auto Shredding Company (collectively NCE), and convey that property to Gateway International Motorsports Corporation (Gateway)...

...SWIDA's...stated purpose is to "promote industrial, commercial, residential, service, transportation and recreational activities and facilities, thereby reducing the evils attendant upon unemployment and enhancing the public health, safety, morals, happiness and general welfare of this State." The Act mandates that SWIDA "promote development within...Madison and St. Clair counties."...To accomplish the purposes of the Act, the legislature empowered SWIDA to...acquire property by condemnation...

In June 1996, SWIDA issued...sports facility revenue bonds [to lend] Gateway to finance the development of a [racetrack]. Gateway signed a loan agreement and a note to evince its obligation to repay the loan...The racetrack...has flourished...In 1998, Gateway increased its seating capacity and desired to increase its parking capacity as well...NCE operates a metal recycling center in an area of St. Clair County that, until recently, was National City, Illinois. NCE employs 80 to 100 persons full time and has been at its present location since 1975. NCE shreds cars and appliances and separates the reusable metals. It disposes of nearly 100,000 cars per year. Nonrecyclable by-products of the process, referred to as "fluff," are deposited in NCE's landfill, located to the east of its recycling center. When this landfill site reaches capacity, NCE plans to expand its landfill operations onto the 148.5 acre tract of land it owns to the east of the current landfill. NCE uses clay and dirt from the 148.5 acre tract to fill and cover fluff in the landfill area currently in use.

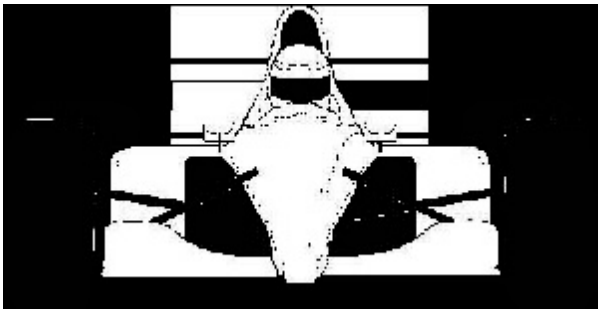
It would appear that NCE is also performing a "public purpose," would it not? Hmmmm?!?

In early 1998, Gateway attempted to discuss the purchase of NCE's land with NCE's owner [who was not interested]...Gateway asked SWIDA to exercise its quick-take eminent domain powers to take the 148.5 acres of land and transfer it to Gateway. Gateway completed a "Quick-Take Application Packet" and stated that it wanted to use the land as a parking lot for the purpose of increasing the value of Gateway's racetrack. Gateway paid SWIDA an application fee of $2,500 and the sum of $10,000 to be applied toward SWIDA's sliding scale fee of 6% to 10% of the acquisition price of property being condemned. In addition, Gateway agreed to pay SWIDA's expenses, including the acquisition price of the property, and other costs associated with the quick-take process...On February 23, 1998, the St. Clair County board adopted a resolution authorizing SWIDA to exercise its...eminent domain authority...The board noted that dramatic attendance increases could be expected at the racetrack and that it was necessary to create additional parking facilities to adequately serve patrons. The board also found that expansion of the racetrack facilities would enhance the public health, safety, morals, happiness, and general welfare of the citizens of southwestern Illinois by increasing the tax base in the area and generating additional tax revenue.

...Alan Ortbals [executive director of SWIDA] attended a meeting on March 17, 1998, at which he delivered to NCE a written offer to purchase the property for $1 million. By letter dated March 19, 1998, NCE rejected the $1 million offer but indicated its willingness to meet with SWIDA the week of March 30, 1998, following an expected appraisal of the property. On March 20, 1998, SWIDA made another written offer to NCE to purchase the property for $1 million and advised NCE that SWIDA would initiate proceedings to condemn the property if NCE did not accept the offer by 5 p.m. on March 30, 1998.

When we come to *Kelo*, remember the arrogant manner in which SWIDA acted. NCE rejects the initial offer, but indicates a willingness to talk further after an appraisal is accomplished. Before that can happen, SWIDA offers the same figure again with a short deadline for acceptance plus a threat of condemnation. It appears that SWIDA is the one acting in bad faith. We are just barely into the facts of this case and it doesn't pass the smell test.

NCE did not respond to the second offer and ultimatum until April 20, 1998, [when, by letter, it] indicated that it felt it was unnecessary to respond to the offer, as SWIDA was aware of NCE's prior rejection of the earlier offer to purchase the property for the identical sum of $1 million. However, to be clear on the matter, NCE indicated that it was again rejecting [that] offer...



[O]n March 31, 1998, SWIDA filed a complaint in...St. Clair County seeking condemnation...NCE argued that the proposed taking was for an unconstitutional private use; the proposed taking was excessive; additional parking at Gateway's racetrack was not needed; and SWIDA had failed to make a good-faith effort to negotiate an

acceptable purchase price with NCE...

The circuit court...ruled in SWIDA's favor. Relying on testimony from Mike Pritchett of the Illinois Department of Transportation (the Department), the circuit court found that the taking was for a public purpose as there were serious public safety issues involved. Pritchett had testified that the Department **was working with** Gateway **to develop a traffic plan** that would move traffic into and out of the racetrack facility, while minimizing impact on the surrounding state and interstate highways. According to traffic pattern data studied by the Department, significant traffic congestion occurred on Interstate 55-70 when major events were held at the racetrack. According to Pritchett, a safety hazard was created because drivers do not normally anticipate stopped traffic on the interstate...There was additional testimony that there was a risk pedestrians would be struck by automobile traffic as they crossed Route 203 at improper locations away from the designated crossing area and signal. Pritchett testified that construction of a parking lot on NCE's property ...would...alleviate traffic problems...

The circuit court also relied on Ortbals' testimony regarding public safety, **economic development, and elimination of blight**...Ortbals testified that it was necessary to acquire the entire 148.5 acre tract...because areas that had previously been used for patron parking...were no longer available... Rod Wolter (president of Gateway)...acknowledged that Gateway had discussed developing a parking garage facility to meet its needs but that it would be much less expensive to have SWIDA take the property in question from NCE and give it to Gateway for ground parking.

...Most...[witnesses] testified as to the many benefits that continued expansion of Gateway could ...bring to the area. **The court found that the taking was not excessive and that NCE had been unwilling to negotiate in a meaningful fashion for the sale of the property. The court found that SWIDA had bargained for the property in good faith and NCE's failure to timely reject SWIDA's final offer of sale or to present a counteroffer was dispositive of this issue**...

...NCE [appealed], arguing...that SWIDA lacked constitutional authority to take the property...The appellate court determined that SWIDA had exceeded its constitutional authority...[and] reversed the decision of the circuit court. SWIDA [appealed to this Court]. We...reversed the judgment of the appellate court [then granted a rehearing and] now affirm the decision of the appellate court.

This is rare. The Illinois Supreme Court ruled in favor of SWIDA, then granted a rehearing and almost one year later reversed itself, ultimately ruling in favor of the landowners (NCE).

[Article I, §15 of the Illinois Constitution and the 5th & 14th Amendments of the United States Constitution provide that private property shall not be taken for public use without just compensation]...[W]e determine whether this taking achieves a legitimate public use pursuant to the constitutionally exercised police power of the government (*Berman v. Parker*[1]) and, therefore,

[1]Case 5A-E-8 on this website.

whether eminent domain powers authorized by the State...were improperly exercised in the taking of private property from one private entity for the benefit and use of another private entity.

The right of a sovereign to condemn private property is limited to takings for a public use...Clearly, private persons may ultimately acquire ownership of property arising out of a taking and the subsequent transfer to private ownership does not by itself defeat the public purpose. *Hawaii Housing Authority.*[2] However,..."before the right of eminent domain may be exercised, the law... requires that the use for which the land is taken shall be public as distinguished from a private use."...The essence of this case relates not to the ultimate transfer of property to a private party. Rather, the controlling issue is whether SWIDA exceeded the boundaries of constitutional principles and its authority by transferring the property to a private party for a profit when the property is not put to a public use.

It may be impossible to clearly delineate the boundary between what constitutes a legitimate public purpose and [an inappropriate] private benefit..."We deal...with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts." *Berman.* "While, from time to time, the courts have attempted to define public use, there is much disagreement as to its meaning." Great deference should be afforded the legislature and its granting of eminent domain authority. *Berman.* However, the exercise of that power is not entirely beyond judicial scrutiny, and **it is incumbent upon the judiciary to ensure that the power of eminent domain is used in a manner contemplated by the framers of the constitutions and by the legislature that granted the specific power in question**. "Courts all agree that the determination of whether a given use is a public use is a judicial function."

The Illinois Supreme Court is not as willing to "defer" to the legislature (in this case, the St. Clair County Board) as was Justice O'Connor and others in *Hawaii*.

SWIDA contends that...a **public purpose** will be served through (1) the fostering of **economic development**, (2) the promotion of **public safety**, and (3) the prevention or elimination of **blight**. Moreover, once the determination is made that one or all of these requirements is satisfied, "possessory use by the public is not an indispensable prerequisite to the lawful exercise of the power of eminent domain."...

SWIDA contends that any distinction between the terms "public purpose" and "public use" has long since evaporated and that the proper test is simply to ask whether a "public purpose" is served by the taking.

While the difference between a public purpose and a public use may appear to be purely semantic, and the line between the two terms has blurred somewhat in recent years, a distinction still exists and is essential to this case... The term "'public purpose' is...flexible and is

[2]Case 5A-E-9 on this website.

capable of expansion to meet conditions of a complex society that were not within the contemplation of the framers of our constitution." *Adamowski v. Chicago R.R. Terminal Authority (1958).* **However, this flexibility does not equate to unfettered ability to exercise takings beyond constitutional boundaries**. "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Hawaii Housing Authority.* **As this court held in *Gaylord v. Sanitary District of Chicago,* 204 Ill 576 (1903), "the public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right."**

Clearly, **the taking of slums and blighted areas is permitted for the purposes of clearance and redevelopment, regardless of the subsequent use of the property**. *Village of Wheeling v. Exchange National Bank of Chicago (1991).* However, [here],...we are not dealing with a taking for the purposes of eliminating **slums or blight**.

Although SWIDA contended part of the public purpose was **to prevent** or eliminate blight, clearly the Illinois Supreme Court saw through such a ludicrous position. Additionally, if "prevention" of future blight were a permissible purpose, the sky would be the limit.

If this taking were allowed to stand, it may be true that spectators at Gateway would benefit greatly...[and we acknowledge]...that a public use or purpose may be satisfied in light of public safety concerns...The public is allowed to park on the property in exchange for the **payment of a fee**. **Gateway's racetrack may be open to the public, but not "by right." It is a private venture designed to result not in a public use, but in private profits. If this taking were permitted, lines to enter parking lots might be shortened and pedestrians might be able to cross from parking areas to event areas in a safer manner. [But,] we are unpersuaded that these facts alone are sufficient to satisfy the public use requirement, especially in light of evidence that Gateway could have built a parking garage structure on its existing property.**

We have also recognized that economic development is an important public purpose. *City of Canton v. Crouch (1980).* SWIDA presented extensive testimony that expanding Gateway's facilities through the taking of NCE's property would allow it to grow and prosper and contribute to positive economic growth in the region. **However, "incidentally, every lawful business does this." Moreover, nearly a century ago, *Gaylord* expressed the long-standing rule that "to constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement**."

It is perfectly permissible for the Illinois limits on the power of eminent domain to be more restrictive than the Federal Constitution as you will see in *Kelo*.

...**[T]his taking bestows a purely private benefit and lacks a showing of a supporting legislative purpose...[M]embers of the public are not the primary intended beneficiaries of this taking.**

This condemnation clearly was intended to assist Gateway in accomplishing their goals in a swift, economical, and profitable manner.

...As Justice Kuehn stated...in the appellate court, **"If property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic by-products of a private capitalist's ability to develop land cannot justify a surrender of ownership to eminent domain."**

...SWIDA's true intentions were not clothed in an independent, legitimate governmental decision to further a planned public use. **SWIDA did not conduct or commission a thorough study** of the parking situation at Gateway...

> "SWIDA did not conduct a **thorough study**." Remember this when we come to *Kelo*. Also, this sounds a bit cynical: SWIDA's true intentions were not clothed...? Does this imply that SWIDA could have camouflaged its true intentions and prevailed if its "study" would have been better "draped" in legalese?

[SWIDA] advertised that, for a fee, it would condemn land at the request of "private developers" for the "private use" of developers [and] entered into a contract with Gateway to condemn whatever land "**may be desired by Gateway**." Clearly, the foundation of this taking is rooted not in the economic and planning process with which SWIDA has been charged; [rather,] this action was undertaken solely in response to Gateway's expansion goals and its failure to accomplish [them] through purchasing NCE's land at an acceptable negotiated price...SWIDA's true intentions were to act as a default broker of land for Gateway's proposed parking plan.

...As a result of the acquisition of NCE's property, Gateway could realize an estimated increase of $13 to $14 million in projected revenue per year. While we do not deny that this expansion in revenue could potentially trickle down and bring corresponding revenue increases to the region, **revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power of the government.** Using the power of the government for purely private purposes to allow Gateway to avoid the open real estate market and expand its facilities in a more cost-efficient manner, and thus maximize corporate profits, is a misuse of the power entrusted by the public...**The power of eminent domain is to be exercised with restraint, not abandon...** SWIDA exceeded its constitutional authority in taking NCE's land by eminent domain. The judgment of the appellate court is therefore affirmed.

DISSENT: JUSTICE FREEMAN/McMORROW...**This court has previously upheld the validity of legislative enactments designed to assist economic development**, to prevent or eliminate blight...and to promote public safety...Such legislative determinations are well within the State's police powers...**Applying the holdings of *Hawaii* and *Berman*, this court should defer to the legislative determination of public use. Although the majority acknowledges that great deference is due the legislative determination, the majority does not act in accordance with**

such deference... The majority opinion is alarming both for its use of selective portions of *Hawaii* and *Berman* and for its attempt to engraft an additional principle upon the public use doctrine. The majority states: "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void. *Hawaii.* As this court held in *Gaylord,* 'the public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right.'"

The majority fails to acknowledge, however, that the Court in *Hawaii* specifically rejected a requirement that the property be put into use for the public: "The Court long ago rejected any literal requirement that condemned property be put into use for the general public...Government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause." *Hawaii Housing Authority.* **[I]n...imposing a requirement that property be put into use for the general public, the majority effectively interdicts any taking for the purpose of economic development**...**What development project can satisfy the requirement that the public be "entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right"?**...I suggest that...the majority does great harm to the public use doctrine and to the interests of this state...**This requirement [that taken property must be available to the general public as of right] is the death of social legislation in furtherance of economic development and revitalization...**

Kelo has birthed a cause. Concerned folks across the Country are seeking ways to limit the power of eminent domain. It appears that Illinois Justices Freeman & McMorrow think that is a very bad idea. What do you think?