NOTES

A PROFIT FOR THE TAKING: SALE OF CONDEMNED PROPERTY AFTER ABANDONMENT OF THE PROPOSED PUBLIC USE

I. INTRODUCTION

The power of eminent domain allows a government, or its designee, to acquire property in fee simple from private individuals against their will.[1] The Constitution limits the exercise of this power by providing that the taken property must be applied to a public use and that just compensation must be paid to the former owner.[2] Though both limitations are required for a proper condemnation, the constitutional protections seemingly disappear as soon as the condemnation proceedings conclude.[3] In other words, once the condemnor convinces the courts that the "proposed" use of the property is a legitimate public use, the "actual" use of property condemned in fee simple need not convey any public benefit.[4] This lack of post-condemnation accountability[5] creates a power ripe for abuse.[6] The likelihood of abuse is increased because state governments grant the power of eminent domain to

---

1. *See* 1 JULIUS L. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 1.11 (Rev. 3d. ed. 1995); Jonathan N. Portner, Comment, *The Continued Expansion of the Public Use Requirement in Eminent Domain*, 17 U. BALT. L. REV. 542, 542 (1988) (noting that the disturbing feature of eminent domain is that the property may be taken over the owner's objection).

2. U.S. CONST. amend. V. ("[N]or shall private property be taken for public use, without just compensation.").

3. *See* Beistline v. City of San Diego, 256 F.2d 421, 424 (9th Cir. 1958) ("judged solely by the conditions existing at the time of the taking"); Mainer v. Canal Auth., 467 So. 2d 989, 993 (Fla. 1985) (challenges to taking must be made at "condemnation proceeding and not by collateral attack").

4. *E.g.*, *Mainer*, 467 So. 2d at 992 (abandoning public use does not impair title acquired); *see* infra note 63. Also, the condemnor need not expend much effort in demonstrating the legitimacy of its proposed public use for the property. The condemnor's broad discretion concerning the proper exercise of eminent domain allow the courts to be easily convinced. *See infra* note 9.

5. *See infra* notes 87-94 and accompanying text.

6. Recognizing past abuses of eminent domain suggests that abuses of power continue to occur. *See* Don Hamilton, *Eminent Domain: Ancient and Very One-sided Power*, PORTLAND OREGONIAN, July 6, 1995, at 5 ("Just because eminent domain is well entrenched in the relationship between government and the governed doesn't mean the system hasn't seen abuses."); R. Randy Lee, *Government as Predator*, NAT'L L.J., Mar. 9, 1992, (Podium), at 13 (commenting that abuses of the eminent domain power can be reduced).

many different groups.[7] Therefore, a condemnor in the vast majority of states[8] may take property in fee simple for an "alleged" public use, while actually engaging in a form of real estate speculation,[9] and later reap a profit from the sale of the property.

Consider the following hypothetical situation.[10] A local public utility, granted the power of eminent domain by statute,[11] desires a parcel of farmland located near a gravel quarry.[12] The public utility claims that the property[13] is required for the construction of a new power plant[14] in the near

---

7. *See, e.g.*, CAL. PUB. UTIL. CODE § 622 (West 1975) (bus companies); FLA. STAT. ANN. § 235.05 (West 1989) (school boards); FLA. STAT. ANN. § 361.08 (West Supp. 1996) (coal slurry pipeline companies); GA. CODE ANN. § 46-5-63 (1992) (rural telephone cooperatives); ILL. COMP. STAT. ch. 75, para. 5/4-7 (1994) (libraries); ILL. COMP. STAT. ch. 225, para. 435/23 (1994) (ferries); IND. CODE ANN. § 32-11-3-1 (Burns 1995) (public utilities); KY. REV. STAT. ANN. § 416.350 (Baldwin 1994) (landlocked property owners); MO. REV. STAT. § 388.410 (1994) (railroad companies); MO. REV. STAT. § 351.045 (1994) (bridge building corporations).

One scholar recommends that "[t]he delegation of eminent domain to private corporations and public utilities should be eliminated" by either legislative or judicial action. ELLEN F. PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN 261 (1987).

8. Only two states have enacted statutes that limit the ability of the condemnor to sell the condemned property for a profit. *See* discussion *infra* part III.B.2.

9. Speculation is defined as, "Buying or selling with expectation of profiting by a rise or fall in price. Also, engaging in hazardous business transactions, or investing in risky securities or commodities, with the hope of an unusually large profit." BLACK'S LAW DICTIONARY 1399 (6th ed. 1990).

The courts have given discretion to the condemnor in determining the necessity of exercising eminent domain over a particular piece of property. *See* Otter Tail Power Co. v. Malme, 92 N.W.2d 514, 521 (N.D. 1958) (noting that, in the absence of a statutory provision requiring review, the condemnor generally has conclusive determination as to the necessity for taking a piece of property). By granting broad discretion to a condemnor's selection of which property should be taken by eminent domain, the condemnor is given the opportunity to "speculate" on which property will bring the highest returns.

An example of how the condemnor's discretion can lead to abuses of the eminent domain powers is found in State *ex rel.* City of Creve Coeur v. Weinstein, 329 S.W.2d 399 (Mo. Ct. App. 1959). In *Weinstein*, the city of Creve Coeur passed an ordinance condemning four pieces of property for use as a public park allegedly "*motivated* solely by reason of racial prejudice against prospective Negro residents." *Id.* at 407 (emphasis in original). However, the court refused to interfere with the condemnation proceeding based upon these allegations. *Id.* at 410. In reaching its decision, the court noted that once the proposed use is established as public, then the "judicial authority of the court is exhausted." *Id.* at 406. Thus, if a "proposed" public use of a park can cover for an "actual" use of promoting discrimination, then a condemnor seeking to "speculate" in the condemnation market should have no problem disguising his greedy ulterior motives.

10. The hypothetical is loosely based upon condemnation proceedings which occurred in southeastern Indiana during the late 1970s. Telephone Interview with Ms. Louise Farthing (Nov. 6, 1995) (former owner of the farmland in southeastern Indiana upon which the hypothetical is based). The actual situation and the hypothetical situation are different. The hypothetical is intended only to illustrate the ease in which the eminent domain power could be used "speculatively" with relatively minor changes to a given valid exercise of eminent domain powers.

11. *See* IND. CODE ANN. § 32-11-3-1 (Burns 1995) (granting power to acquire property by condemnation to any Indiana corporation organized by its articles of incorporation as a public utility).

12. In the actual condemnation proceedings upon which the hypothetical is based, only one parcel of property separates the farmland from an active gravel quarry. Farthing Interview, *supra* note 10.

13. The public utility is given broad discretion in the selection of the property deemed necessary to

future. The property owner refuses to sell the farmland to the public utility. As a result, the public utility initiates condemnation proceedings to acquire the property. Although it may have presumed the existence of extensive mineral (sand and gravel) deposits on the property,[15] the public utility bases its offer to purchase solely on the surface value[16] of the farmland. After several years of judicial proceedings,[17] the public utility takes the land for a compensation of one million dollars[18] to the property owners, a price well below the value of the mineral rights[19] in the property.

Ten years[20] pass and the public utility decides that the proposed power

---

achieve the proposed public use. Alabach v. Northern Ind. Pub. Serv. Co., 329 N.E.2d 645, 649 (Ind. Ct. App. 1975); *see also* Otter Tail Power Co. v. Malme, 92 N.W.2d 514, 521 (N.D. 1958).

14. The power plant is the legitimate public use proffered by the public utility. The power plant proposed for Ms. Farthing's land had not been built as of late 1995. Farthing Interview, *supra* note 10; *IPL Decides Not to Mine Its Mexico Bottom Land*, VEVAY REVEILLE-ENTERPRISE, Aug. 31, 1995, at 1 [hereinafter *Mexico Bottom*].

15. In the actual condemnation proceeding, the logical presumption arises from the fact that the property in question is located between two properties which are known to contain rich deposits of both sand and gravel. Also, only one parcel of land separates the condemned property from the nearby active gravel quarry. Not much imagination is required by the condemnor to speculate that the Farthing farm is also likely to be rich in sand and gravel. *See* Farthing Interview, *supra* note 10.

16. Of course, any condemnor will usually try to obtain the property for the lowest possible price. In the underlying case, because the proposed public use for the farmland would be only a surface use, the public utility offered compensation at a level typically accorded to farmland in the area. The public utility refused to acknowledge the higher alleged value, including the value of the mineral rights, of the property. Yet, the public utility sought condemnation of the entire fee of the property. *Id.*

One authority on eminent domain noted, "Where the fee simple absolute title to land has been acquired, the condemnor acquires all appurtenances thereto, buildings thereon, *minerals lying beneath the surface*, waters thereon, and easements as to which such land constitutes the dominant estate." 3 JULIUS L. SACKMAN & RICHARD H. FRIEDMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 9.03[7] (Rev. 3d. ed. 1994) (emphasis added) (footnotes omitted). Therefore, if the public utility could obtain the entire fee of the property at its value as farmland, then the "speculative" profit for the property would increase dramatically.

17. For Ms. Farthing, condemnation proceedings were initiated in 1976 and not finalized until 1981. Three main reasons caused the condemnation proceedings to last nearly five years. First, the property owners and the public utility argued about the proper determination of the requisite "just compensation." Second, the property owners unsuccessfully sought relief through the legislative process by seeking changes to the state's eminent domain laws. Finally, in the midst of the condemnation proceedings, Ms. Farthing had her farmhouse declared and registered as a historic place. As such, the public utility would be required to cut through additional red tape before removing the house from the condemned property. Farthing Interview, *supra* note 10.

18. The dollar amount of the hypothetical condemnation is fictional. However, my impression from speaking with Ms. Farthing is that the condemnation price was significantly less than the twenty million dollars that she thought the land, including the mineral rights, was worth. *Id.*

19. The mineral rights were worth an estimated minimum of twenty million dollars. The estimate was based upon the lowest royalty rate commonly paid at the time of condemnation for the quantity of sand and gravel judged to exist on the property. *Id.*

20. By comparison, the actual condemnation in southeastern Indiana was completed in 1981. Thus, at least fourteen years, depending upon the date of actual payment into the court and transfer of title, have passed without the public utility building the power plant for which the land was condemned. *Id.*; *Mexico*

plant may not be needed after all. Knowing[21] the value of the mineral rights in the condemned property, the public utility sells[22] the property, including these rights, to the neighboring gravel quarry for twenty million dollars.[23] Thus, the public utility makes a 1900% profit simply through the speculative use of its eminent domain power.

This hypothetical situation raises a series of questions. What was the actual motive of the public utility in acquiring the property: to build a power plant or to sell the property for a profit? Is the public utility actually required to put the property to a public use, and if so, within what time period?

Furthermore, if the public utility can sell the property, who should be allowed to purchase it? Should the former property owner have the first option of buying the property? If the former owner can buy the property, what price should she pay? If the former owner is unable to purchase the property, should she receive the proceeds from the sale or should the public utility

---

Bottom, *supra* note 14, at 1.

21. Even if it did not assume so beforehand, the public utility in southeastern Indiana definitely had knowledge of the mineral richness in the property by the end of the condemnation proceedings. In trying to increase the amount of "just compensation" received for the property, the property owners introduced evidence (core samples) demonstrating the value of the mineral rights in the property. Farthing Interview, *supra* note 10.

22. The public utility in southeastern Indiana has not actually sold the property, though it had entered preliminary negotiations with the neighboring gravel quarry sometime in 1995. *Mexico Bottom*, *supra* note 14, at 1. The condemnee, Ms. Farthing, had heard rumors of the negotiations and complained publicly about the injustice of such a sale. Louise D. Farthing, *The 'Public Good'?*, VEVAY REVEILLE-ENTERPRISE, July 6, 1995, Letters to the Editor, at 7 [hereinafter *Public Good*]; Farthing Interview, *supra* note 10. Consequently, the public utility promised to consider the concerns of the public regarding any future decisions as to the use or sale of the condemned property. *Mexico Bottom*, *supra* note 14, at 1.

However, as a result of the public outcry, even the local county council voiced concern over the proposition that the public utility might sell the condemned property to the gravel quarry and not utilize the property for its stated public use. *How to Boost Economic Development?*, VEVAY REVEILLE-ENTERPRISE, Nov. 16, 1995, at 14. One county resident has even asked the county to use its own powers of eminent domain to acquire the property and ensure that its use is for the benefit of the public. *Shall Switzerland County Have a Mineral Tax?*, VEVAY REVEILLE-ENTERPRISE, Oct. 19, 1995, at 5 [hereinafter *Switzerland County*].

Another possible course of action for the county is to pass an ordinance restricting excavation of sand and gravel from the condemned property. If the ordinance can be based upon valid public health and safety grounds, then it may be considered a legitimate exercise of the municipality's police powers and not an exercise of eminent domain. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 592-93 (1962) (noting the prohibitory effect of an ordinance preventing excavation of sand and gravel was insufficient to make it an unconstitutional taking). As a result, the land would more likely be applied to a public use and not sold by the public utility to the gravel quarry for a profit. However, if Indiana enacts legislation similar to the pending federal legislation, *infra* note 31, the suggested ordinance might be considered an unconstitutional exercise of eminent domain.

23. The twenty million dollar figure is based upon the minimum royalty level which could have been received for the gravel at the time of condemnation. *See Public Good*, *supra* note 22, at 7; Farthing Interview, *supra* note 10. In all likelihood, the current value of the mineral rights on the condemned property has risen over the time period since the condemnation.

receive the proceeds from the sale? In essence, what protects the private property owner from an arbitrary taking when the "alleged" use is justifiably public, but the "intended" and "actual" use is simply real estate speculation?

Courts answering similar questions have interpreted state eminent domain statutes[24] in favor of the fee simple condemnor.[25] The interests of both the courts and state legislatures in protecting the rights of private property owners generally cease[26] after the use is deemed "public" and the compensation is determined "just." As a result, the condemnor is not accountable[27] through either the courts or legislatures to apply the properly condemned property to

---

24. *See generally* ALA. CODE §§ 18-1A-1 to 18-1A-311 (1990 & Supp. 1995); ALASKA STAT. §§ 09.55.240-09.55.460 (1995); ARIZ. REV. STAT. ANN. §§ 12-1111 to 12-1162 (1994); ARK. CODE ANN. §§ 18-15-101 to 18-15-1601 (1987 & Supp. 1996); CAL. CIV. PROC. CODE §§ 1230.010-1273.050 (West 1982 & Supp. 1995); COLO. REV. STAT. ANN. §§ 38-1-101 to 38-7-107 (West 1990); CONN. GEN. STAT. ANN. §§ 48-1 to 48-27 (West 1994 & Supp. 1995); DEL. CODE ANN. tit. 10, §§ 6101-6115 (1974 & Supp. 1994); D.C. CODE ANN. §§ 16-1301 to 16-1385 (1981 & Supp. 1995); FLA. STAT. ANN. §§ 73.012-74.121 (West 1987 & Supp. 1996); GA. CODE ANN. §§ 22-1-1 to 22-4-15 (1982 & Supp. 1995); HAW. REV. STAT. §§ 101-1 to 101-72 (1985 & Supp. 1992); IDAHO CODE §§ 7-701 to 7-721 (1990 & Supp. 1995); ILL. COMP. STAT. ch. 735, 5/7-101 to 5/7-129 (1994 & Supp. 1995); IND. CODE ANN. §§ 32-11-1-1 to 32-11-6-2 (Burns 1995); IOWA CODE §§ 6A.1-6B.55 (Supp. 1995); KAN. STAT. ANN. §§ 26-101 to 26-517 (1993); KY. REV. STAT. ANN. §§ 416.010-416.990 (Baldwin 1994); LA. REV. STAT. ANN. §§ 19:1-19:201 (West 1979 & Supp. 1996); MD. CODE ANN., REAL PROP. §§ 12-101 to 12-212 (1988 & Supp. 1995); MASS. GEN. L. ch. 79, §§ 1-45, ch. 79A, §§ 1-15, ch. 80, §§ 1-17, ch. 80A §§ 1-16 (1992); MICH. COMP. LAWS ANN. §§ 213.1-213.391 (West 1986 & Supp. 1996); MINN. STAT. ANN. §§ 117.011-117.56 (West 1987 & Supp. 1996); MISS. CODE ANN. §§ 11-27-1 to 11-27-91 (1972 & Supp. 1995); MO. REV. STAT. §§ 523.010-523.100 (1994); MONT. CODE ANN. §§ 70-30-101 to 70-30-322 (1995); NEB. REV. STAT. §§ 76-701 to 76-726 (1990 & Supp. 1994); NEV. REV. STAT. §§ 37.009-37.260 (1991); N.H. REV. STAT. ANN. §§ 498-A:1 to 498-A:31 (1983 & Supp. 1995); N.J. STAT. ANN. §§ 20:1-1 to 20:4-22 (West 1969 & Supp. 1995); N.M. STAT. ANN. §§ 42A-1-1 to 42A-1-34 (Michie 1978 & Supp. 1995); N.Y. EM. DOM. PROC. LAW §§ 101-709 (McKinney 1979 & Supp. 1996); N.C. GEN. STAT. §§ 40A-1 to 40A-70 (1984 & Supp. 1995); N.D. CENT. CODE §§ 32-15-1 to 32-15-35 (1976 & Supp. 1995); OHIO REV. CODE ANN. §§ 163.01-163.62 (Baldwin 1994 & Supp. 1995); OKLA STAT. ANN. tit. 27, §§ 1-16 (West 1991 & Supp. 1996); OR. REV. STAT. §§ 35.205-35.415 (1995); 26 PA. CONS. STAT. ANN. §§ 1-101 to 1-903 (1958 & Supp. 1995); R.I. GEN. LAWS §§ 37-6-1 to 37-6-29 (1990 & Supp. 1994); S.C. CODE ANN. §§ 28-2-10 to 28-2-510 (Law. Co-op. 1991); S.D. CODIFIED LAWS ANN. §§ 21-35-1 to 21-35-30 (1987 & Supp. 1994); TENN. CODE ANN. §§ 29-16-101 to 29-17-1203 (1980 & Supp. 1995); TEX. PROP. CODE ANN. §§ 21.001-21.065 (West 1984 & Supp. 1996); UTAH CODE ANN. §§ 78-34-1 to 78-34-20 (1992 & Supp. 1995); VA. CODE ANN. §§ 25-46.1 to 25-46.36 (Michie 1993 & Supp. 1995); WASH. REV. CODE ANN. §§ 8.04.010-8.28.050 (West 1992 & Supp. 1995); W. VA. CODE §§ 54-1-1 to 54-2-20 (1994 & Supp. 1995); WIS. STAT. ANN. §§ 32.01-32.72 (West 1989 & Supp. 1995); WYO. STAT. §§ 1-26-501 to 1-26-817 (1988 & Supp. 1995).

25. *See* Higginson v. United States, 384 F.2d 504, 506 (6th Cir. 1967) (title vested years ago and "cannot now be disputed"); Beistline v. City of San Diego, 256 F.2d 421, 424 (9th Cir. 1958) (taking is not for private use even though condemnor changes mind concerning actual use of the property); Wood v. City of East Providence, 504 A.2d 441, 443 (R.I. 1986) (all rights pass to condemnor unless specifically reserved by the legislation). Non-use of the property condemned in fee simple for its condemned purpose does not cause reversion to the former owner. 3 SACKMAN & FRIEDMAN, *supra* note 16, § 9.07[3].

26. *See, e.g.*, Mainer v. Canal Auth., 467 So. 2d 989, 993 (Fla. 1985) (no collateral challenges to condemnation are permitted).

27. *See infra* notes 87-94 and accompanying text.

any public use. This lack of condemnor accountability promotes conditions that allow the fee simple condemnor to abuse its powers and to profit handsomely through the future sale of the property.

The hypothetical situation illustrates the ease in which a profit from real estate speculation can be obtained at the expense of the private property owner. Former owners are powerless in the present statutory landscape[28] to prevent this condemnor's path to profitability. Instead, the courts have allowed the new fee simple owner (condemnor) to dispose of the property like any other fee simple owner of property:[29] in whatever manner the owner deems necessary and for any reason the owner desires. In the absence of statutory language to the contrary,[30] the fact that the property was acquired in fee simple through exercise of the state's eminent domain power is irrelevant. The courts' hands are tied until the legislatures act to provide statutory protection[31] to private property owners from a condemnor's speculative use and abuse of its eminent domain powers.

Some believe that the nation is ripe for a fundamental change in the balance of power between private property owners and the government or its designees.[32] The Senate has recognized this need for change in the relationship between federal regulations, private property, and eminent

---

28. The judicial interpretation of the statutory landscape of eminent domain laws has caused the common law to develop in favor of the fee simple condemnors. *See, e.g.*, Indigo Realty Co. v. City of Charleston, 314 S.E.2d 601, 602 (S.C. 1984) (noting common-law rule that change in use does not cause title to revert to former owners). As a result, the private property owner who had his land condemned in fee simple maintains no future rights in his property. *Id.* at 602-03; *see also* Newport v. City of Los Angeles, 7 Cal. Rptr. 497, 503 (Cal. Dist. Ct. App. 1960) (former owner divested of all interest in the property regardless of the purpose for which it is used); Mainer v. Canal Auth., 467 So. 2d 989, 992 (Fla. 1985) ("former property owner retains no interest in the land").

29. The proceedings for fee simple condemnation gives the condemnor a title to the property "'good against the world.'" 3 SACKMAN & FRIEDMAN, *supra* note 16, § 9.02[2] (quoting United States v. 127.03 Acres of Land, 148 F. Supp. 904, 905 (D.P.R. 1957)); *see also* 26 AM. JUR. 2D *Eminent Domain* § 142 (1996) (noting "future intentions by a condemnor as to what will be done or not done with respect to the property condemned" does not affect the condemnor's rights to the title acquired).

30. The states of Kentucky, New Hampshire, New York, and Montana have "statutory language to the contrary" which may have an effect on the condemnor's ability to sell property acquired by eminent domain and "abandoned" without achieving any public use. *See* discussion *infra* part III.B.

31. *See supra* note 28; *infra* note 67. However, proposed federal legislation, The Omnibus Property Rights Act of 1995, would provide additional protection for private property owners from takings caused by federal regulations. *See* S. 605, 104th Cong., 1st Sess. (1995).

32. 141 CONG. REC. S4497 (daily ed. Mar. 23, 1995) (statement of Sen. Dole) (attempting to "fundamentally change and improve the relationship between the Government and its citizens"). Senator Dole also said, "It is our duty to ensure that we limit the arbitrary exercise of Government power and pursue worthwhile goals in ways that protect the rights of our citizens." *Id.* He also noted that the "reforms do more than provide that just compensation is paid in proper circumstances. The real test is to minimize the number of takings that occur in the first instance." *Id.* at S4498.

domain. The proposed Omnibus Property Rights Act of 1995[33] would adjust the balance back in favor of private property owners and limit the arbitrary exercise of government regulatory powers.[34]

Because Congress is currently acting to protect private property owners from arbitrary federal regulations, now is the time for state legislatures to take a supporting role on the stage.[35] However, the proposed federal legislation concerns only the realm of "regulatory" takings.[36] Protection from arbitrary, even speculative, physical takings is not enhanced by the proposed federal legislation. Indeed, because the vast majority of physical takings are through grants of state powers,[37] such legislative changes are better executed by the individual state legislatures. The state legislatures are in the best position to further protect private property owners from arbitrary, even speculative, uses of state government derived eminent domain powers.

This Note proposes several potential legislative approaches which could untie the courts' hands and protect private property owners from speculative physical takings. Nevertheless, the proposed legislative schemes are designed to apply to all exercises of eminent domain regardless of the motives behind the condemnation. These proposals are limited in scope to condemned property meeting the following conditions: the property is condemned in fee simple absolute;[38] the proposed public use is legitimate;[39] the condemnor does

---

33. S. 605, 104th Cong., 1st Sess. (1995). Congress expressly recognized the importance of private property ownership as a moving principle behind the legislation. *Id.* at § 101(1).

34. 141 CONG. REC. S4497 (daily ed. Mar. 23, 1995) (statement of Sen. Dole). *See also* Roger Marzulla et. al., *Taking "Takings Rights" Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 ADMIN. L.J. AM. U. 253 (1995) (discussing and debating aspects of the Omnibus Property Rights Act of 1995).

35. Over twenty state legislatures are considering bills which provide protections similar to those proposed by the Omnibus Property Rights Act of 1995. Benjamin Israel, *Takings: Bill in Committee Reflects National Trend to Elevate Property Rights*, CENTRAL COUNTIAN, Feb. 8-28, 1996, at 4, 4.

36. 141 CONG. REC. S4497 (daily ed. Mar. 23, 1995) (statement of Sen. Dole) (noting the need to halt the growth of increasingly intrusive federal regulations).

37. *See* Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 412 (1983) (noting that the power of eminent domain is generally a matter of state law).

38. In several states, lesser property interests (i.e. easements) already statutorily revert upon abandonment to the former owner. *E.g.*, IND. CODE ANN. § 32-11-1-11 (Burns 1995); IOWA CODE ANN. § 478.15 (West 1991 & Supp. 1995); MINN. STAT. ANN. § 117.225 (West 1987); MONT. CODE ANN. § 70-30-321(3) (1995).

In other states, when a condemned easement is abandoned courts uphold the right to reversion. *See, e.g.*, Pratt v. Griese, 409 P.2d 777, 780 (Kan. 1966) (abandoning an easement caused reversion to the servient owner regardless of the method by which it was obtained); Rogers v. City of Knoxville, 289 S.W.2d 868, 873 (Tenn. Ct. App. 1955) (fundamental principle that a condemned easement no longer used is considered abandoned and reverts upon nonuse to the owner of the fee).

39. If the proposed public use is not legitimate, then the power of eminent domain cannot be utilized. Consequently, if the condemnor cannot use the power of eminent domain, he cannot abuse the power of

not accomplish or significantly attempt to accomplish the proposed public use;[40] the property is not converted to another public use;[41] and the condemnor seeks to sell the property.[42] Part II focuses on the historical scope of a condemnor's eminent domain power. Part III discusses how contemporary interpretations of eminent domain power have eroded the private property owner's constitutional protections from speculative takings. It also examines several state statutes that attempt to provide some protection for private property owners from speculative condemnations. Finally, Part IV proposes several legislative options that would reinstate a degree of protection for private property owners from speculative exercises of eminent domain powers.

II. HISTORICAL SCOPE OF THE POWER OF EMINENT DOMAIN

The power of eminent domain is an inherent[43] and "necessary attribute of sovereignty"[44] which exists "in the absence of explicit constitutional

---

eminent domain.

40. *See* 3 SACKMAN & FRIEDMAN, *supra* note 16, § 9.05 (condemnor has unquestionable right to apply property to proposed public use). If the property is put to a public use (any public use), then the taking benefits the public and the condemnation power has not been abused. For the purposes of this Note, if the property is not put to a public use or no significant attempt at a public use is made, then the public use is considered "abandoned."

Another question not addressed by this Note is the definition of what must be done to "significantly attempt to accomplish" the proposed public use. However, the question is easily answered in a situation such as the hypothetical because *no attempt to accomplish* the proposed public use was made by the public utility.

41. Courts will allow property condemned for one public use to be utilized for another public use. *See, e.g.*, Galloway v. Board of Comm'rs, 271 S.E.2d 784, 785 (Ga. 1980) (condemnor may devote property to another public use); Village of S. Orange v. Alden Corp., 365 A.2d 469, 471 (N.J. 1976) (condemnor may convert use of condemned property to any other public use if the property becomes unsuitable for its intended purpose). Even though the proposed public use has not been accomplished in this situation, the public is still the ultimate beneficiary of the condemnation.

This assumes that the *initial* condemnor applies the property to the secondary public use. However, if the property is condemned for a second time by another party before it is utilized for the secondary public use, the initial condemnor receives the "just compensation." Consequently, if, in the original situation of Ms. Farthing, *see supra* note 10, the county council in southeastern Indiana condemns the property taken earlier by the public utility, *see Switzerland County*, *supra* note 22, at 5, the public utility will still profit solely because of its "speculative" eminent domain acquisition. Though this situation leads to essentially the same results, its remedy is beyond the scope of this Note.

42. The condemnor reaps the rewards of his "speculative" taking when the condemned property is sold and the proceeds of the sale are retained by the condemnor. Assuming that the value of the condemned property has risen since the time of condemnation, the sole beneficiary of the taking is the condemnor, not the public. The assumption that property values will rise over time is the nature of the real estate speculation game.

43. Robert G. Dailey, Case Note, *The Demise of the Public Use Doctrine in State Takings:* Hawaii Housing Authority v. Midkiff, 104 S. Ct. 2321 (1984), 18 CREIGHTON L. REV. 789, 791-92 (1985).

44. ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY 506 (2d. ed. 1993). *But see* PAUL, *supra*

recognition."[45] The power allows the government, or its designees, to acquire property from private owners, without their consent, for the benefit of the public.[46] Because property ownership is an ancient and basic ingredient of human culture,[47] "eminent domain is one of the most harsh proceedings known to the law."[48] As a result, the protection of private property from arbitrary governmental interference is central to the basic operation of an ideal society.[49]

The right to own private property is one of many rights encompassed within both the United States Constitution and individual state constitutions.[50] The property rights of the American people are protected by the limitations placed upon the federal government's power of eminent domain by the Fifth

---

note 7, at 260 (commenting that the government can function without the power of eminent domain).

45. Dailey, *supra* note 43, at 791-92.

46. CUNNINGHAM ET AL., *supra* note 44, at 506; 1 SACKMAN, *supra* note 1, § 1.11; Thomas Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355, 357 (1983).

47. 2 SACKMAN, *supra* note 1, § 5.01[1] (Rev. 3d. ed. 1995); *see also*, Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) (property rights are civil rights).

48. Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451, 455 (Fla. 1975). Besides its harsh effects upon private property owners, Professor Ross has noted that a state's eminent domain power is dangerous because of the difficulty a property owner has in utilizing the political process to prevent an unwarranted condemnation. *See* Ross, *supra* note 46, at 369.

49. Portner, *supra* note 1, at 552 (protecting private property from unwarranted interference is an important aspect in the concept of an ideal society).

Though the American society may not be the ideal society, the importance of private property protection has continually been recognized. In 1829, Justice Story stressed the importance of private property rights in a free society.

> That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be sacred. At least, no court of justice in the country would be justified in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being without very strong and direct expressions of their intention.

Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829) *quoted in* PAUL, *supra* note 7, at 254-55. Private property rights are still recognized as an important part of the American society today.

> The private ownership of property is essential to a free society and is an integral part of our Judeo-Christian culture and the Western tradition of liberty and limited government. Private ownership of property and the sanctity of property rights reflects [sic] the distinction in our culture between a preexisting civil society and the state that is consequently established to promote order. Private property creates the social and economic organizations that counterbalance the power of the state by providing an alternative source of power and prestige to the state itself. It is therefore a necessary condition of liberty and prosperity.

141 CONG. REC., *supra* note 34, at S4502 (statement of Sen. Hatch).

50. Portner, *supra* note 1, at 552.

Amendment.[51] Besides the requirement of public use,[52] the Fifth Amendment clearly indicates that the condemnor must pay "just compensation"[53] for the property acquired.[54] The Fourteenth Amendment extends both limitations on eminent domain imposed by the Fifth Amendment, public use and just compensation, to exercises of eminent domain by state governments, or their designees.[55]

Throughout the history of the United States, the states, not the federal government, have been the main exercisers of the power of eminent domain law.[56] As a result, the development and administration of eminent domain law, like other aspects of real property law, have been the responsibility of the states.[57] Consequently, courts interpreting state laws have played the major role in determining the scope of protections provided to property owners by the public use and just compensation requirements of eminent domain.

Besides the constitutional protections, another issue in eminent domain law plays a significant role in potential abuses of takings process: the interest in the property which may be taken.[58] The interest taken by the condemnor is limited by the state legislature through the statute authorizing the condemnation.[59] Though the interest available for condemnation is generally

---

51. Dailey, *supra* note 43, at 792 ("Fifth Amendment should be considered a limitation upon [government power] rather than a grant of this [additional government] power").

52. David R. E. Aladjem, Comment, *Public Use and Treatment as an Equal: An Essay on* Poletown Neighborhood Council v. City of Detroit *and* Hawaii Housing Authority v. Midkiff, ECOLOGY L.Q. 671, 718 (1988) (noting that the Framers included the public use requirement to protect private property owners from the abuse of the eminent domain power).

53. U.S. CONST. amend. V. ("without just compensation"). However, the "just compensation" limitation upon the exercise of eminent domain may be inadequate to compensate fully the property owner for his loss. *See* Aladjem, *supra* note 52, at 685-87. Regardless of the monetary amount paid to the former property owner, nothing can compensate for the emotional and psychological pain endured by the condemnee simply through being subjected to the condemnation process. Farthing Interview, *supra* note 10.

54. DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION 247 (1993) (compensation must be paid); *id.* at 44 (citing *Berman v. Parker*, 348 U.S. 26 (1954)).

55. CUNNINGHAM ET AL., *supra* note 44, at 506; Mansnerus, *supra* note 37, at 412; Portner, *supra* note 1, at 542.

56. *See* Mansnerus, *supra* note 37, at 414 (development of eminent domain law resided mainly in the state courts).

57. *See* Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (noting that property interests are created by the states and not the Constitution); Hughes v. Washington, 389 U.S. 290, 295 (1967) (Stewart, J., concurring) (general law of property left for the states to develop).

58. *See supra* note 38 (noting some statutes allow condemned easements to revert upon abandonment to the former owner or owner of the underlying fee).

59. *See, e.g.*, Isley v. Bogart, 338 F.2d 33, 35 (10th Cir. 1964) (condemnor secures no greater title than permitted by enabling statute); Board of Educ. v. Vic Regnier Builders, 636 P.2d 802, 806 (Kan. Ct. App. 1981) (extent of interest acquired is limited to that expressly authorized by the enabling statute); 3 SACKMAN & FRIEDMAN, *supra* note 16, § 9.03[2] ("Any inquiry into the [property] interest acquired ... must begin

limited to that which is "reasonably necessary" to achieve the proposed public use,[60] only limited interests, such as easements, have any reversionary elements. Because of the reversionary elements, many states[61] return abandoned easements to the former owners.

On the contrary, the fee simple condemnor takes the complete interest in the property.[62] Since the condemnee retains no interest in the property, the failure to apply the condemned property to the use for which it was condemned does not cause reversion to the condemnee.[63] Furthermore, the abandonment of a condemned property's public use does not affect the validity of the taking.[64] For example, the Supreme Court of South Carolina in *Indigo Realty Co. v. City of Charleston* refused to invalidate a condemnation when the city abandoned its proposed public use a mere twelve days later.[65] The *Indigo Realty* court refused "to place a cloud on the title" of condemned property by invalidating the taking and granting a right of reversion.[66] Consequently, courts in South Carolina and other states have indicated, in the absence of legislative language to the contrary, that the new fee simple owner of the condemned property has the power to dispose of the property in any manner.[67]

---

with the legislative authorization.").

Under federal law, the property interest which may be taken is determined by the legislation granting authority for the condemnation. *See* 40 U.S.C. § 258a (1994) (Declaration of Taking Act).

60. 3 SACKMAN & FRIEDMAN, *supra* note 16, § 9.03[1].

61. *See supra* note 38.

62. 3 SACKMAN & FRIEDMAN, *supra* note 16, § 9.02[2] (In the taking of a fee simple estate, "all other proprietary rights and interests are extinguished."). *Id.* § 9.03[7] (Fee simple condemnor acquires all aspects of the property interests relating to the condemned land.).

63. *See, e.g.*, Mainer v. Canal Auth., 467 So. 2d 989, 992 (Fla. 1985) (abandoning public use does not impair title acquired); Galloway v. Board of Comm'rs, 271 S.E.2d 784, 785 (Ga. 1980) (noting that failure to use land for proposed public use does not cause title to revert to the original owners); Fur-Lex Realty v. Lindsay, 367 N.Y.S.2d 388, 390 (N.Y. Sup. Ct. 1975) (abandonment or conversion to another use of condemned property does not cause reversion to the former owners); Gilbert v. Franklin County Water Dist., 520 S.W.2d 503, 505 (Tex. Civ. App. 1975) (noting if property condemned in fee simple then the land may be devoted to a different use without impairment of the estate acquired).

64. United States v. 10.47 Acres of Land, 218 F. Supp. 730, 733 (D.N.H. 1962); *see supra* note 63.

65. Indigo Realty Co. v. City of Charleston, 314 S.E.2d 601, 602-03 (S.C. 1984).

66. *Id.* at 603.

67. *See, e.g., Indigo Realty Co.*, 314 S.E.2d at 603 (decision to grant repurchase rights is for the legislature); Newport v. City of Los Angeles, 7 Cal. Rptr. 497, 503 (Cal. Dist. Ct. App. 1960) (court unable to help condemnee because of the broad discretionary powers granted to the condemning body on the actual use of the condemned property).

III. THE MODERN RELATIONSHIP BETWEEN PRIVATE PROPERTY OWNERS AND EMINENT DOMAIN

Today, the Constitution provides limited protections for private property owners from arbitrary exercises of eminent domain.[68] Recently, courts have drastically expanded the scope of the Fifth Amendment's public use requirement.[69] The expansion essentially eliminates the "public use" safeguards for private property owners. Furthermore, even the broadly defined public use need not be achieved because of the absence of any form of condemnor accountability.[70] Thus, since the courts will not create a scheme of accountability and protections for private property owners, the legislature is the only source available to reinstate checks on the potential abuse of eminent domain powers.[71]

A. Absence of Contemporary Protection for Private Property Owners

Though early interpretations of the public use requirement equated it with public ownership,[72] the modern view has expanded[73] to include private

---

68. The Fifth and Fourteenth Amendments still curtail the exercise of eminent domain powers. However, the effective scope of the Fifth Amendment's express limitations upon the exercise of eminent domain has eroded because of the contemporary interpretations of the "public use" requirement. *See* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 61 (1986) (observing that the public use limitation is a "dead letter").

69. The definition of public use has expanded from the concept of public occupation to a concept of any use that has some controlling governmental purpose. Mansnerus, *supra* note 37, at 410. Also, the due process limitation merged over time into the public use limitation. This merger thus leaves only one restrictive hurdle to be cleared before a condemnor can exercise her eminent domain powers. Dailey, *supra* note 43, at 791.

70. *See infra* notes 87-94 and accompanying text.

71. *See* 3 SACKMAN & FRIEDMAN, *supra* note 16, § 9.07[2] (noting common law applies absent a statute to the contrary). Chief Judge Smith recently recognized this problem in the context of an eminent domain case.

> There must be a better way to balance legitimate public goals with fundamental individual rights.... Judicial decisions are far less sensitive to societal problems than the law and policy made by the political branches of our great constitutional system. At best courts sketch the outlines of individual rights, they cannot hope to fill in the portrait of wise and just social and economic policy.

Bowles v. United States, 31 Cl. Ct. 37, 40 (1994).

Another scholar has noted that even though the "legislation may be wrong-headed, misguided, based on ignorance, or perhaps even mistaken," the courts will refuse to contemplate the wisdom of the legislature regarding the exercise of eminent domain. *See* Herman Schwartz, *Property Rights and the Constitution: Will the Ugly Duckling Become a Swan?*, 37 AM. U. L. REV. 9, 29 (1987) (footnote omitted).

72. Mansnerus, *supra* note 37, at 410.

73. *See* Hays v. City of Kalamazoo, 25 N.W.2d 787, 790 (1947) (noting that "'public use changes with changing conditions of society'") (quoting 37 AM. JUR. *Municipal Corporations* § 120 (1941)), *cited with approval in* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 457 (Mich. 1981).

ownership in situations where an overall public benefit can be achieved.[74] Two cases, *Hawaii Housing Authority v. Midkiff*[75] and *Poletown Neighborhood Council v. City of Detroit*,[76] exemplify the deterioration of the "public use" protection provided to private property owners. The cases represent the outward expansion of the scope of a legitimate public use.

The Supreme Court's contemporary interpretation of the public use requirement is found in *Midkiff*. The *Midkiff* decision concerned the legitimacy of condemnations authorized under Hawaii's Land Reform Act of 1967.[77] The Act's goal was to correct market failure and redistribute the ownership of land to reduce the concentration of fee simple ownership in Hawaii.[78] Thus, the Act transferred property from one private party to another private party.[79] However, the Court found that this transfer to private parties did not constitute a private use.[80] Instead, the Court supported judicial deference to the determination of legislatures that the condemnation will serve a public use.[81] Therefore, if a legislature determines that "the exercise of the eminent domain power is rationally related to a conceivable public purpose," then courts shall consider the public use requirement satisfied.[82]

A Michigan court provided the most extreme expansion of the concept of public use. In *Poletown*, the city of Detroit condemned an entire neighborhood and transferred the property to a private corporation, General Motors.[83] The city sought condemnation for General Motors to "prevent [future] conditions of unemployment and fiscal distress."[84] The court found

---

74. *See* Mansnerus, *supra* note 37, at 410 (Public use can encompass private ownership if some underlying "governmental purpose" is served.).

75. 467 U.S. 229 (1984).

76. 304 N.W.2d 455 (Mich. 1981).

77. *Midkiff*, 467 U.S. at 233, 241-42.

78. *Id.* at 232-33. In the mid-1960s, the government, state and federal, owned about 49% of the land in Hawaii. *Id.* At 232. An additional 47% of the land belonged to 72 private property owners with 40% of that land owned by only 18 land owners. *Id.* As a result, "[t]he legislature concluded that concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquillity and welfare." *Id.*

79. *Id.* at 233. The condemnations in *Midkiff* are distinguishable from the hypothetical condemnation. The Land Reform Act did *not* allow Hawaii Housing Authority to operate and condemn land for a profit. *Id.* at 234 (construing HAW. REV. STAT. §§ 516-28, 516-32 (1977)). On the contrary, the hypothetical condemnor has utilized its eminent domain powers to acquire just such a profit.

80. *Id.* at 243-44.

81. *Id.* at 244. The Court again "made clear that it will not substitute its judgment for a legislature's judgment at to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Id.* at 241 (citing United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896)).

82. *Midkiff*, 467 U.S. at 241.

83. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 457 (Mich. 1981).

84. *Id.* at 458. The *Poletown* facts are distinguishable from the hypothetical in two respects. First, the proposed public use and the actual public use are identical in *Poletown*. This is not the case in the

that the public economic benefit gained by the proposed condemnation was a legitimate public use within the limitations of the Fifth Amendment.[85] Though such an expansive interpretation of public use may be proper, its "potential risk of abuse in the use of eminent domain power is clear."[86]

The lack of condemnor accountability to actually provide the proposed public benefit increases the potential for abuse of the eminent domain power.[87] Public accountability does not exist because the condemned property is frequently taken out of the public's eye.[88] Also, as a result of minimal judicial review, legislators have little incentive to require fulfillment of the proposed public use.[89]

Courts have perpetuated the absence of any accountability standard by determining that the validity of the condemnation is "judged solely by the conditions existing at the time of the taking."[90] For example, in *Mainer v.*

---

hypothetical. Second, the entire community benefits from the improved economic conditions attained in the Detroit area; whereas, the hypothetical public utility is the sole beneficiary of the profits gleaned from the sale of the condemned property.

85. *Id.* at 459-60 (holding that the condemnation is valid on the basis of its proposed "significance to the people of Detroit").

86. *Id.* at 463 (Fitzgerald, J., dissenting). For example, following the reasoning in *Poletown*, what would prevent a state from alleging public benefits of prevention of fiscal distress and reduction of the public burden on financing government operations and then condemning property with the sole intention of selling it later for a profit?

If such an exercise of eminent domain is allowed, then the United States will have effectively instituted the concept of land banking. *See generally* ANN L. STRONG, LAND BANKING: EUROPEAN REALITY, AMERICAN PROSPECT (1979). Land banking allows for the public "acquisition of land to be held for future [public] use." *Id.* at 2. However, even though eminent domain is a necessary part of the concept, *id.* at 272, the public use need not be determined at the time of acquisition, *id.* at 2. Another central aspect of land banking is that the "public," as the government, reaps the profits from any increase in the value of the land acquired. *Id.* at 264.

The concept of land banking is particularly dangerous to private property owners because of the way the eminent domain system functions today. Since the government often delegates the authority of eminent domain to other groups, such as public utilities, a true land banking system would further enhance the ability of the hypothetical public utility to profit from its grant of eminent domain power. The enhanced abuse of the eminent domain power would result from the hypothetical public utility, for example, being able to acquire property for use in the future without a clear public purpose enunciated.

87. *See* Dailey, *supra* note 43, at 813 (noting that valid public takings may lack public accountability if the property is transferred to private parties). *But see* Ross, *supra* note 46, at 375 (proposing that accountability actually exists because the state can always condemn the land and transfer it to a party that will meet the proposed public use).

88. Portner, *supra* note 1, at 553 (noting that transfer of property from one private individual to another will likely remove and shield the property from any public scrutiny).

89. *See* Mansnerus, *supra* note 37, at 435 (recognizing that since individual private property owners are underrepresented in the legislative process, little incentive exists for the legislature to require fulfillment of the public use condition).

90. Beistline v. City of San Diego, 256 F.2d 421, 424 (9th Cir. 1958). The irrelevance of the actual use has been noted by the fact that the "mere expression of the purpose for which property is taken . . . ordinarily constitutes simply an indication of the warrant for the condemnation, and it does not, without more, effect a

Canal Authority,[91] the Supreme Court of Florida held that any challenge to the condemnation of property must be made during the condemnation proceeding and not by collateral attack.[92] Essentially, the courts' interests in the condemnation process and attention to the "public use" requirement cease with the transfer of the fee simple title to the condemnor.[93]

The combination of the expanded definition of "public use" and the lack of accountability greatly diminishes the private property owner's protection against speculative takings. The expanded public use allows a legitimate public use (a power plant in the hypothetical) to act as cover for an ulterior motive (real estate speculation leading to financial gain). Furthermore, the lack of public accountability allows the hypothetical condemnor to exercise his ulterior motive, a sale for personal profit, at the expense of the former property owner and without any fear of consequences. Only the legislatures can provide the needed standards of accountability.[94]

B. Modern State Laws Protecting Private Property Owners

Several states have enacted changes to their eminent domain laws that somewhat temper the harsh results of the common law on potentially speculative takings.[95] These legislative changes are important first steps[96] in reinstating protections for private property owners from abuses of eminent domain powers. As a result, courts in those states are given license to provide some degree of protection to former property owners.

---

dedication of the property to the use or purpose for which it was immediately taken." 26 AM. JUR. 2D *Eminent Domain* § 144 (1966).

91. 467 So.2d 989 (Fla. 1985).

92. *Id.* at 993 (Condemnation in fee simple cannot be challenged collaterally solely because the proposed use for the property is not accomplished.).

93. *See, e.g.*, Higginson v. United States, 384 F.2d 504, 506 (6th Cir. 1967) (noting that a title vesting twenty years ago "cannot now be disputed under any accepted property theory"); Village of S. Orange v. Alden Corp., 365 A.2d 469, 473 (N.J. 1976) (commenting that final judgment or award in condemnation proceeding represents the full compensation to which the condemnee is entitled).

94. *Supra* note 67.

95. The states referenced are Kentucky, New York, Montana, and New Hampshire. The statutory changes of each of these states and the overall protective effect of the changes for private property owners are discussed further in this section.

North Carolina is another state with an enacted statute that provides some protection to a former property owner. However, the North Carolina statute is not discussed in this Note because of its limited scope. The statute only applies to land taken by the North Carolina Department of Transportation and the "former owner must [continue to] own the remainder of the [original] tract of land" to have the opportunity to purchase the land back at market price. *See* N.C. GEN. STAT. § 136-19(a) (1993).

96. *See* M. Robert Goldstein & Michael J. Goldstein, *Abandoned Projects*, N.Y. L.J., Aug. 18, 1982, at 1, 2 (noting that the New York law is a good start at correcting the common law rule, but "it needs strengthening").

The promulgated statutes can be divided into two basic categories. First, the former property owner is given the right to meet any offer to purchase the condemned property after it is offered for sale by the condemnor. The second method provides the former owner the opportunity to repurchase the property at the condemnation price.

1. You Can Have the Property Back . . . If You Can Afford It: Right to Repurchase at Market Price Laws

The common law allows the fee simple condemnor of property to dispose of the property in any manner desired.[97] Two states have promulgated statutes that affect the general rights of the condemnor as fee simple property owner. These states, Montana and New York,[98] have established procedures which provide the former property owner an opportunity to repurchase the condemned property at the market price[99] after its public use has been abandoned. In the hypothetical, the public utility abandoned the proposed public use when they decided to sell the property instead of building the power plant. A speculative taking would always consist of the abandonment of the condemned public use.

In Montana,[100] the legislature has determined that a condemnor may dispose of condemned property whose public use has been abandoned through a public auction. Furthermore, the public use need not be abandoned within any set period of time.[101] Because the auction is public, the former property owner has the opportunity to be the highest bidder or to match the highest bid[102] and reacquire the property.

---

97. *See supra* note 29.

98. The relevant statutes are listed *infra* notes 100, 107.

99. Market price is reference to the current value of the property that some party is willing to pay the condemnor for the condemned property. The market value in the hypothetical is twenty million dollars.

100. The important language of the relevant Montana statute is:

> [W]henever a person who has acquired a real property interest for a public use, whether by right of eminent domain or otherwise, abandons such public use and places such interest for sale, the seller may sell the interest to the highest bidder at public auction.

MONT. CODE ANN. § 70-30-321(1) (1995).

101. No mention is made of a specific time period within which the Montana statute's public auction provision would be triggered. *Id.* Also, since the condemnor "*may* sell the interest to the highest bidder at public auction," the condemnor has the option of finding his own buyer privately and avoiding the repurchase rights of the former owner. MONT. CODE ANN. § 70-30-321(1) (1995) (emphasis added). As a result, nothing prevents the condemnor from holding the property for an indeterminate period of time without either achieving a public use or selling the property at public auction.

102. Another portion of the Montana code provides the former owner with the option to match the auction price.

> [T]he owner from whom the real property interest was originally acquired by eminent domain or

If the hypothetical had occurred in Montana, the public utility could sell the farmland at public auction.[103] Though an auction may seem to allow the former property owner to reacquire the condemned property, the Montana statutes[104] fail to truly add any protections for the private property owner from speculative takings. First, because the sale is by public auction, the former property owner has no guarantee that he will be the highest bidder. However, the former owner must be given the opportunity to purchase the property at the highest bid.[105] More importantly, the hypothetical public utility does not really care who actually buys the property because it will still receive the proceeds from the public auction. The profit is still made by the condemning public utility and the goal of "real estate speculation" is achieved.[106]

By contrast, in New York,[107] a condemnor cannot sell property taken by eminent domain, whose proposed public use is abandoned, without first offering the former property owner the right of first refusal. However, the condemnor must only offer this right of first refusal if he seeks to sell the property within ten years[108] from the date of condemnation.

Again, the hypothetical situation illustrates some of the shortcomings of the New York statute. First, the hypothetical public utility would have avoided the statute's requirements because it did not seek to sell the property within the first ten years after condemnation. The statute does not allow the former property owner to force the sale of the condemned property and thereby encourages the condemnor to simply wait beyond the statutory

---

> otherwise . . . shall be notified by the seller by certified mail and shall have a 30-day option from the date of the [public auction] to purchase the interest by offering therefor an amount of money equal to the highest bid received for the interest at the sale.

MONT. CODE ANN. § 70-30-322(1) (1995).

103. *See supra* note 101 (noting that condemnor *may* sell at a public auction).

104. MONT. CODE ANN. §§ 70-30-321, 70-30-322 (1995).

105. *Supra* note 102.

106. Since the public auction is not required to take place within a specified time after the condemnation, the condemnor could either hold the property in perpetuity without initiating a public use or sell it privately. The Montana statutes are only triggered when the condemnor seeks to sell the property at public auction. Regardless, the condemnor will profit from his speculation through whatever method the property is sold.

107. The New York statute referenced states:

> If, after an acquisition in fee pursuant to the [eminent domain] provisions of this chapter, the condemnor shall abandon the project for which the property was acquired, and the property has not been materially improved, the condemnor shall not dispose of the property or any portion thereof for private use within ten years of acquisition without first offering the former fee owner of record at the time of acquisition a right of first refusal to purchase the property at the amount of the fair market value of such property at the time of such offer.

N.Y. EM. DOM. PROC. LAW § 406(A) (McKinney Supp. 1996).

108. *Id.*

period.[109] Also, if the condemnor is willing to sell the property within the statutory time period, then the market price of the property is likely greater than the former property owner can pay. Regardless of the time of sale, the New York statute still allows the condemnor to sell the property and receive the profits. As a result, the statute does little to protect New York property owners from speculative abuses of the eminent domain power.

2. *You Can Have the Property Back . . . If You Return the Money: Right to Repurchase at Condemnation Price Laws*

Another approach that may protect private property owners from speculative takings has been promulgated by the legislatures of both New Hampshire and Kentucky.[110] These statutes differ from those of New York and Montana by affording the former property owner the opportunity to reacquire the property at the condemnation price, rather than the market price. For example, the property owner in the hypothetical situation would be able to reacquire the land at a cost of one million dollars instead of the market value of twenty million dollars. In essence, these statutes essentially allow the process of eminent domain to be erased[111] for property whose public use has been abandoned.

The New Hampshire statute[112] is very similar to that promulgated by the New York legislature. For instance, the statute is triggered only if the condemnor seeks to sell the condemned property within the ten-year period from the date of condemnation.[113] The sole difference is that, instead of the current market value of the property, the former owner can reacquire the

---

109. *See* Goldstein & Goldstein, *supra* note 96, at 2 (Forcing mechanism should be added to the New York statute so the condemnor cannot avoid its effects through delay.).

110. *See infra* notes 112, 117.

111. The condemnation is "erased" only in the sense that the condemnee once again may own the property and the purchase price is returned to the condemnor. However, regardless of the property return, the psychological and emotional effects of the condemnation proceeding are unlikely to be "erased." Farthing Interview, *supra* note 10.

112. The New Hampshire statute on abandonment of a "proposed" public use project provides:

> If a condemnor has condemned a fee and thereafter abandons the purpose for which the property has been condemned, the condemnor may dispose of it by sale or otherwise; provided, however, that if the property has not been substantially improved, it may not be disposed of within 10 years of condemnation without first being offered to the condemnee, his heirs and assigns at the same price paid to the condemnee by the condemnor. The condemnee, his heirs and assigns shall be served with notice of the offer in the manner as prescribed . . . and shall have 90 days after receipt of such notice to make the written acceptance thereof.

N.H. REV. STAT. ANN. § 498-A:12(I) (Supp. 1995); *cf.* N.Y. EM. DOM. PROC. § 406 (McKinney Supp. 1996) (repurchase at fair market price not condemnation price).

113. N.H. REV. STAT. ANN. § 498-A:12(I) (Supp. 1995).

property at the same price which the condemnor paid her.[114]

Again, the hypothetical situation illustrates the shortcomings of this statute in its ability to protect a private property owner from a speculative taking. As in New York, the New Hampshire statute would be inapplicable to the hypothetical public utility because the sale of the property was sought after the elapse of the statutorily defined period.[115] The New Hampshire statute again has no mechanism for the former property owner to proactively force,[116] within the statutory period, the return sale of the condemned property whose proposed public use has been abandoned. On the other hand, a return sale of the property prevents the condemnor from profiting from the taking because it may only recover the condemnation price. Moreover, the statute simply encourages the condemnor to be patient and await the running of the statutory period before profiting from the speculative condemnation.

The residents of Kentucky are fortunate enough to fall under the jurisdiction of the statute[117] that provides the best protection for private property owners from speculative takings. One Kentucky court has commented "[t]hat the statute allows the State to make corrections for any mistakes it has made in anticipating its needs."[118] The statute allows the former property owner to reacquire the condemned property if it has not been put to "the purpose for which it was condemned."[119] Moreover, the Kentucky statute's main advantage is that it specifically requires the condemnor to offer the property back to former owner if the public use has not been achieved within eight years from the date of condemnation.[120]

---

114. *Supra* note 112.

115. The statutorily defined period is ten years in both states. *Supra* notes 107, 112.

116. The language of the New Hampshire statute expressly states that it is applicable only if the condemnor seeks to sell the property within the first ten years. N.H. REV. STAT. ANN. § 498-A:12(I) (Supp. 1995). After the ten years have elapsed, the condemnor is not restricted by the statute. *Cf.* Goldstein & Goldstein, *supra* note 96, at 2 (noting the same deficiency with the New York statute).

117. The protection provided to Kentucky property owners is found in a statute describing the limitations on condemnation powers:

> Development shall be started on any property which has been acquired through condemnation within a period of eight (8) years from the date of the deed to the condemnor or the date on which the condemnor took possession, whichever is earlier, for the purpose for which it was condemned. The failure of the condemnor to so begin the development shall entitle the current landowner [condemnee] to repurchase the property at the price the condemnor paid to the landowner for the property.

KY. REV. STAT. ANN. § 416.670(1) (Baldwin 1994).

118. Miles v. Dawson, 830 S.W.2d 368, 370 (Ky. 1991).

119. KY. REV. STAT. ANN. § 416.670(1) (Baldwin 1994).

120. *Id.* The term of eight years appears to be a compromise generated out of the Kentucky General Assembly. The original filed version of the legislation called for a five-year time period with a potential five year extension within which the proposed public use had to be achieved or the land offered back to the

If the hypothetical property owner lived in Kentucky, after eight years the public utility would have been required to offer the property back in return for the condemnation price. This result prevents[121] the public utility from speculating with its power of eminent domain. However, one major deficiency with the statute still exists: the private property owner is still deprived of his property for the eight-year period. The Supreme Court in *First English Evangelical Lutheran Church v. County of Los Angeles*[122] found that a similar temporary deprivation of property without just compensation is contrary to the Fifth Amendment.

In *First English*, the Court resolved the issue of whether abandonment of a land-use regulation depriving a landowner of all use of his property constituted a "temporary" regulatory taking requiring the payment of compensation.[123] After reviewing cases concerning the government's temporary use of private property during World War II, the Court recognized that a temporary taking denying all use of one's property is no different from a permanent taking.[124] As a result, the Court held that "where the government's activities have already worked a taking of all use of [the] property, no subsequent action by the government can relieve it of the duty to provide compensation" during the time the property's use is denied.[125]

By analogy, the hypothetical property owner in Kentucky should be compensated for loss of use of her property during the eight years the condemnor controls the property.[126] As such, the right to repurchase the land at the condemnation price is a "constitutionally insufficient remedy" without some additional payment for the time of temporary deprivation.[127] Therefore,

---

condemnee. *See* KY. LEGISLATIVE RESEARCH COMM'N, INFORMATIONAL BULLETIN NO. 110, ISSUES CONFRONTING THE 1976 GENERAL ASSEMBLY 77 (Gary W. Luhr ed. 1975).

121. Real estate speculation by the condemnor is prevented because no profit made from the sale of the land. Either the public use must be significantly achieved within eight years or the land must be offered back to the former owner at the same price at which it was condemned.

122. 482 U.S. 304 (1987).

123. *Id.* at 317-18 (emphasis added).

124. *Id.* at 318 (construing United States v. Dow, 357 U.S. 17 (1958)(collecting cases)).

125. *Id.* at 321.

126. A similar analogy has been made between temporary regulatory takings and the abandonment of condemnation proceedings. *See* Christopher J. Dietzen & Thomas H. Weaver, *Temporary Takings: Another Victory for Landowners*, 9 HAMLINE J. PUB. L. & POL'Y 49, 63-64 (1988). Since title to the condemned property under Minnesota law passes to the condemnor upon payment into the court of a specified portion of the estimated award, the property owner loses "constructive possession" of the property from the time title passes until the condemnation proceedings are abandoned. *Id.* at 63-64 & nn.89-92. If this analogy is justifiable, what prohibits its expansion to the end of the statutory period in which the condemned property must be returned by some method back to the condemnee?

127. *See* First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304, 322 (1987) (holding that "invalidation of the ordinance without payment of fair value for the use of the property during

compensation should also be paid to the condemnee for the temporary deprivation of property rights arising from a physical taking of property.

IV. LEGISLATIVE PROPOSALS PROTECTING AGAINST "SPECULATIVE" TAKINGS

The contemporary interest in enhancing protections for private property owners is exemplified by the Congressional efforts in the Omnibus Property Rights Act of 1995.[128] State legislatures are in the best position[129] to further protect private property owners from arbitrary, even speculative, uses of state government derived eminent domain powers. Until the state legislatures act, the courts will continue to follow the common-law approach[130] and refuse to protect private property owners from abuses of the powers of eminent domain. This Note proposes several potential legislative approaches which could untie the courts' hands and protect private property owners from speculative physical takings.

All of the legislative proposals assume that a statutory time period[131] is set in which the proposed public use must be significantly developed. If no significant development[132] of the property occurs within the statutory time period, then the condemnor may not avoid by waiting, but instead, must comply[133] with the dictates of the proposed "abandonment" legislation.

[the period of time when all use was denied] would be a constitutionally insufficient remedy").

128. *See supra* notes 31-36 and accompanying text.

129. *See supra* notes 37, 67, 71.

130. *See supra* notes 25-26, 38, 63, 67.

131. In Kentucky, for example, the statutory time period in which the proposed public use must significantly develop is eight years. *See supra* note 117. On the other hand, even though they lack the strict triggering mechanisms as proposed, both New York and New Hampshire indicate a statutory time period of ten years. *See supra* notes 107, 112. A third statutory time period of seven years is suggested in California. CAL. CIV. PROC. CODE § 1240.220 (West 1982). However, the time period is only *suggestive* because no actions arise because of its tolling; instead, the condemnor is only required to show a "reasonable probability" of accomplishing the proposed public use within that time period. *Id.* § 1240.220(a).

132. The determination of what constitutes a "significant development" or the proper statutory period, *see supra* note 131, are beyond the scope of this Note. The determination of what constitutes a "significant development" is critical to the enhanced private property protection advanced by these legislative proposals. If the "significant development" criterion is easily met, then no real protection is gained because the condemnor could proceed to the point of minimum necessary development and avoid the proposed statutes. On the other hand, the tougher the "significant development" test, the more protection provided by these legislative proposals.

The duration of the proper statutory period is also central to these legislative proposals. If the time period is too long, then the condemnor may find it easy to "forget" to comply with the statute. On the other hand, if the time period is too short, then the condemnor may not have an adequate opportunity to accomplish the property's proposed public use.

133. *See* KY. REV. STAT. ANN. § 416.670 (Baldwin 1994); *supra* notes 117-20 and accompanying text.

A. Penalizing the Lack of Actual Public Use: Simple Reversion

The first proposal is to treat a condemnation in fee simple similar to the condemnation of an easement: allow reversion of the land upon abandonment of the proposed public use.[134] In such a statutory scheme the condemnee would be able to keep both the property and the condemnation price paid. Though some may find it difficult to allow the former owner to keep both the money and the land,[135] other concerns justify such monetary retention. First, the retention of the condemnation compensation is analogous to the temporary regulatory taking compensation deemed appropriate by the Supreme Court in *First English*.[136] Though the condemnation price may over-compensate the condemnee, any over-compensation may be regarded as a penalty for affecting an ultimately invalid taking.[137]

If this proposed legislation was in effect in the state of the hypothetical public utility, then the property owner would have kept the land and the one million dollar condemnation price. Although it is highly unlikely that the temporary taking value of the property is one hundred thousand dollars per year, the money functions as a combination of compensatory and punitive damages.

This proposal provides the greatest degree of protection to private property owners from arbitrary takings and the abuse of eminent domain powers. The "penalty" aspect of the proposal should discourage condemnors from taking property except when the proposed public use is absolutely necessary and needed in the near future. Also, any increase in the market value of the property would be realized by the condemnee, not the condemnor. As a result, such a scheme should eliminate[138] any chance of speculative condemnation and profiting from the (ab)use of eminent domain powers.

---

134. *See* City of Dallas v. Malloy, 214 S.W.2d 154, 156 (Tex. Civ. App. 1948) (noting in dicta that the same principle should apply in both easement and fee simple condemnation cases). *But see* Galloway v. Board of Comm'rs, 271 S.E.2d 784, 785 (Ga. 1980) (noting that failure to use lands condemned in fee simple for the proposed public use does not cause title to revert to the previous owners).

135. Pfarr v. Union Elec. Co., 389 S.W.2d 819, 823 (Mo. 1965) (commenting that former owner cannot keep both the land and the money).

136. *See supra* notes 122-27 and accompanying text.

137. Even though validity of a taking is typically determined at the time of condemnation, *supra* notes 25-26, if no public use is ever achieved for the condemned property, is the ultimate taking truly constitutional?

138. This "elimination" is greatly dependent upon the definition of the "significant development" criterion. The more difficult to achieve "significant development" in the absence of an actual public use, the more likely this "elimination" is possible. *See supra* note 132.

However, this proposal is not without limitations. First, the strict penalty aspect may dissuade[139] the pursuance of condemnation proceedings that are legitimately for the public's benefit. Also, the penalty may be too harsh in circumstances where the abandonment of the proposed public use is beyond the control of the condemnor.[140] Finally, the notion of reversion for a fee simple absolute transfer is contrary to the "absoluteness" of the property transfer described by general property law.[141]

B. Condemnee Right to Repurchase at a "Fair" Price

The second proposal is merely an modification and enhancement of the legislative scheme found in Kentucky.[142] The Kentucky statute allows the former owner the right to repurchase the property at the condemnation price. As discussed above, this price fails to account for the condemnee's deprivation of his property for the statutory time period. Again, the analogy to the temporary regulatory takings compensation[143] is appropriate to properly determine the repurchase price. Consequently, the repurchase price should be the condemnation price minus the value of the temporary deprivation.[144]

If the hypothetical had occurred under this modification of Kentucky's statute, the property owner could have repurchased the condemned property for some figure less than one million dollars. The cost to the public utility in this case is the "rental" value of the property for the statutory time period. No "penalty" is paid for the ultimately invalid exercise of the eminent domain powers.

This proposed method is the easiest to conform to existing legislation.[145] The proposal allows protection of the private property owner without unduly burdening[146] the condemnor for an unnecessary condemnation. The private

---

139. For example, in Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981), the city of Detroit may never have sought to stretch the definition of "public use" if such a strict penalty was possible in the event that General Motors never met the proposed public use with the property.

140. *See* 3 SACKMAN & FRIEDMAN, *supra* note 16, § 9.07[6] (noting that external conditions sometimes necessitate the abandonment of the proposed public use).

141. *See generally* CUNNINGHAM ET AL., *supra* note 44, at 29-35.

142. *Supra* note 117.

143. *See supra* notes 122-27 and accompanying text.

144. One question generated by this proposal is whether or not the value of the property taxes paid by the condemnor during the statutory period should be used as an offset in determining the value of the temporary deprivation.

145. This proposal modifies only the repurchase price of the currently enacted Kentucky statute. *See supra* note 117.

146. Unlike the first proposal, no "penalty" is assessed under this proposal for the abandonment of the proposed public use.

property owner is also compensated for the temporary loss of her property in the event that the public use is abandoned. The only drawback to such a statutory scheme is that it may increase the burden upon the judicial system by causing an increase in litigation to determine the value of the "temporary" taking.

C. Changing Time of Fee Simple Title Transfer

Another possible change to the eminent domain laws is to modify the time in which the fee simple title to the condemned property actually transfers and vests in the condemnor. Under current laws, fee simple title vests in the condemnor upon payment into the court of the determined "just compensation."[147] Under common law, after this payment is made, the former property owner retains no further property interest in the condemned property.[148] If, on the other hand, the vesting of title is delayed until the proposed public use is achieved, then the condemnee retains his property interest in the land and common law would allow "reversion"[149] when the public use is abandoned.

To effectuate a condemnation under the delayed transfer of title scheme, the condemnor would pay a percentage of the condemnation price initially and the remainder into an escrow account.[150] If the public use is achieved within the statutory period then the escrow account is released to the condemnee and title transfers to the condemnor. However, if the public use is abandoned, the condemnor retains the funds in the escrow account, and the condemnee keeps both the initial payment and fee simple title to the property. The retention of the initial payment functions as compensation for the

---

147. *See, e.g.*, CAL. CIV. PROC. CODE § 1268.030 (West 1982) (title vests upon payment, final judgment, and recordation); FLA. STAT. ANN. § 74.061 (West 1987) (title vests upon payment into the court); 735 ILL. COMP. STAT. 5/7-105(a) (West 1994) (title vests upon preliminary payment into the court); IND. CODE ANN. § 32-11-2-6 (Burns 1985) (title vests upon payment into the court); MO. REV. STAT. § 523.040 (1994) (interest passes upon payment into the court); MONT. CODE ANN. § 70-30-309 (1995) (title vests upon payment and filing of court order); N.H. REV. STAT. ANN. § 498-A:5 (1983) (title passes with the filing of the required security and a declaration of taking); N.Y. EM. DOM. PROC. LAW § 402 (McKinney Supp. 1996) (condemnor vested upon filing of order and acquisition map); OHIO REV. CODE ANN. § 163.15 (Baldwin 1994) (title transfers after payment of award to court).

148. *See, e.g.*, Mainer v. Canal Auth., 467 So. 2d 989, 992 (Fla. 1985) ("former property owner retains no interest in the land" condemned in fee simple).

149. "Reversion" only in the sense that the condemnee retains fee simple title in the property until the proposed public use is achieved. If the public use has been abandoned by the condemnor, then the condemnee has retained fee simple ownership of the property.

150. The state legislature would also have to determine how to split the condemnation price between the initial payment and the escrow account.

temporary deprivation of the property.[151]

Under this proposal, the hypothetical public utility would have never obtained the title to the farmland. As a result, the public utility could not be in a position to legally sell[152] the land to the gravel quarry. Though the one million dollar condemnation price would have been split and paid to two separate accounts (property owner and escrow), the property owner would have maintained his initial share of the condemnation price. Also, because title never passed to the hypothetical utility, the property owner is in a position to sell the property to the gravel quarry and receive the proceeds.

The delayed vesting of title proposal accomplishes the needed protection of private property owners from speculative takings. However, many difficult questions must also be answered before such a scheme can be effectively promulgated. First, who should maintain tort liability for any accidents on the property? Also, which party is required to pay the taxes on the property, the title holder or the condemnor preventing the property owner from using the property? Finally, is there a duty of the condemnor to maintain the value of the property during the statutory time period?

D. Go Ahead and Sell It, Just Give Sale Proceeds to Condemnee

The final proposal is perhaps the simplest to conceive but may be the most difficult to police. If the condemnor sells the "abandoned" property for a profit, then the former property owner receives any proceeds over and above the condemnation price from the sale.[153]

In the hypothetical, the property owner would have received an additional nineteen million dollars from the subsequent sale of the condemned property to the gravel quarry. The public utility recoups its condemnation price expenditure, but does not profit from the condemnation.[154]

Though this proposal seems the simplest and conceptually solves the problem, it may be the most difficult to apply and enforce. The difficulty in enforcing this scheme comes when the condemnor does not seek to sell, or

---

151. This proposal provides a closer analogy to the temporary regulatory takings, because in neither situation does the title transfer to the condemnor. *See* note 126 and accompanying text.

152. Until the proposed public use is significantly developed, the condemnor does not acquire title to the condemned property. Since the condemnor does not possess a valid title to the land, any sale of the land prior to that significant development would be a tortuous act against the holder of the title, the condemnee.

153. The same question concerning the payment of property taxes as an offset to the sale proceeds also exists with this proposal. *See supra* note 144.

154. If property taxes are not allowed as an offset, then their payment by the condemnor functions as a sort of "penalty" for failing to achieve the proposed public use for the condemned property.

have a buyer, at the expiration of the statutory period. Also, the statutory scheme could be avoided by the condemnor simply selling two pieces of property in the same transaction: the condemned piece at the condemnation price and the second piece at an inflated price that encompasses the market value of both properties. As a result, the condemnor wishing to speculate through his eminent domain powers may still do so as long as he also purchases additional properties with which to manipulate the system.

V. CONCLUSION

The current status and interpretation of eminent domain laws allow and promote real estate speculation by condemnors because of the lack of accountability in ensuring the property's actual use is public. State courts have refused to protect property owners from speculative exercises of eminent domain when the condemnor takes in fee simple. Instead, courts have inferred that state legislatures have the duty to initiate such protections for private property owners.[155] Though a few states have promulgated statutes providing some degree of protection from speculative takings, none have gone far enough to truly provide the needed safeguards. Until legislative changes are made in eminent domain laws, such as those proposed in this Note, the power of eminent domain is easily available for abuse by condemnors wishing to speculate and profit in the real estate market.

Kevin L. Cooney

155. *See supra* notes 67, 71.