APPENDIX

APPENDIX A

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
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SPRINGFIELD, ILLINOIS 62701-1721
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FIRST DISTRICT OFFICE
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Chicago, IL 60601-3103
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September 30, 2020

In re: The City of Chicago, etc., respondent,
v. Fred J. Eychaner, petitioner.
Leave to appeal, Appellate Court,
First District. 126079

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 11/04/2020.

Anne M. Burke, C.J., took no part.

Neville, J., took no part.

Very truly yours,

/s/ Carolyn Taft Grosboll

Clerk of the Supreme Court

APPENDIX B

2020 IL App (1st) 191053
No. 1-19-1053
Opinion filed May 11, 2020

First Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

No. 05 L 5792

THE CITY OF CHICAGO, a Municipal Corporation,

Plaintiff-Appellee,

v.

FRED J. EYCHANER and UNKNOWN OWNERS,

Defendants

(FRED J. EYCHANER, *Defendant-Appellant*).

Appeal from the Circuit Court of Cook County.

Honorable Rita M. Novak and
James M. McGing, Judges, presiding.

JUSTICE HYMAN delivered the judgment of the court, with opinion.

Presiding Justice Griffin and Justice Pierce concurred in the judgment and opinion.

OPINION

Fred Eychaner again challenges the City of Chicago's use of eminent domain to take his property. When the case was last before us, we upheld the taking, finding that the City could use eminent domain to take the property, which lies in a conservation area, to prevent future blight and to promote economic redevelopment. *City of Chicago v. Eychaner*, 2015 IL App (1st) 131833. We remanded, however, for a new trial on just compensation. After a jury awarded Eychaner $7.1 million in just compensation, he filed a posttrial motion renewing his argument on the taking's constitutionality. Eychaner conceded the binding effect of our decision but sought "to preserve" the constitutional claim for possible review by the supreme court. He also moved to reconsider the denial of his original traverse based on purported changed circumstances, asserting the City adopted a new plan for the area so the taking no longer served a permissible public use.

The trial court denied the motion based on this court having remanded for the limited purpose of a new trial on just compensation. As to Eychaner's invocation of changed circumstances, the court noted that all the evidence of purported changed circumstances was available before the second trial, so Eychaner could have filed a new traverse or alerted the court to his claim of changed circumstances. The court also determined that the City's new plan adhered to the previous plan's goals of redeveloping a conservation area to promote economic revitalization and, thus, the taking continued to serve a constitutionally permissible public use.

Eychaner appeals, arguing the City may not use eminent domain to take property in a conservation

area in the name of economic redevelopment. He also contends the trial court erred in denying his motion to reconsider based on the city's new redevelopment plan. We affirm. The law-of-the-case doctrine precluded the trial court, and now precludes us, from reconsidering the denial of Eychaner's traverse. As to the reconsideration, we agree with the trial court that the new plan adheres to the earlier plan so that the taking still serves a constitutionally permissible public use, and the trial court did not abuse its discretion in denying the motion.

Background

We laid out the facts in detail in *Eychaner*, 2015 IL App (1st) 131833, and will summarize only the relevant facts.

Fred Eychaner owned vacant land at the southwest corner of Grand Avenue and North Jefferson Street in Chicago. At the end of 1999, the City proposed creating a planned manufacturing district (PMD) there, aimed at protecting industrial jobs; preventing residential encroachment on existing manufacturing facilities; and encouraging manufacturers to invest, modernize, and expand their facilities. Residential uses are not permitted within PMDs. See Chicago Municipal Code §§ 17-6-0403-C, 17-6-0403-F (amended Sept. 10, 2014).

Blommer Chocolate Company's (Blommer) factory stood two blocks south of Eychaner's property. Blommer initially opposed its factory's inclusion in the PMD, raising concerns that residents of a nearby planned residential development would find the smell, noise, and traffic generated by the factory "intolerable." Blommer proposed two solutions: extending the PMD further south to provide a buffer between Blommer and the new residential development or not

including Blommer in the PMD to allow it to sell its property more easily if conflicts with the residents forced it to relocate. Blommer also discussed with the City the possibility of acquiring property to the north of its factory, which did not include Eychaner's property, for a truck staging area.

The City wanted to keep the Blommer factory, and the City's plan commission spent months discussing alternative plans with Blommer to make sure that happened. Eventually, Blommer dropped its opposition in exchange for the City's willingness to help Blommer expand its industrial campus by acquiring nearby property to "create a buffer" between its operations and the proposed residential development. The plan commission recommended that the city council adopt the PMD. It did a few months later.

The City intended to fund the project though the River West Tax Increment Finance Redevelopment Plan (River West TIF). The City retained a private firm that commissioned studies and produced a 68-page report about the River West TIF. The report concluded:

> [T]ax-increment financing would induce private investment and arrest blighting factors in the area. Because the area had not been subject to growth and reinvestment, the study reasoned that property owners would not invest in their properties without tax-increment financing. The study anticipated benefits, including: (i) stronger economic vitality; (ii) increased construction and long-term employment opportunities; (iii) replacement of inappropriate uses, blight, and vacant properties with viable, high-quality developments; (iv) the elimination of physical

> impediments, such as roads in poor condition; (v) the construction of public improvements to attract private investment; (vi) job-training services to make the area more attractive to investors and employers; and (vii) opportunities for minority- and women-owned businesses to share in the redevelopment."

Although Eychaner's property was not deemed blighted, the study stated that it met the requirements of a "conservation area" under the Tax Increment Allocation Redevelopment Act (65 ILCS 5/11-74.4-1 *et seq.* (West 2006)) and, as a conservation area, "may become a blighted area" because of (i) deterioration, (ii) code violations, (iii) excessive vacancies, (iv) lack of community planning, and (v) lagging property values (*id.* § 11-74.4-3(b)). The City's community development commission recommended, and the city council adopted, the plan for the River West TIF.

A few months later, Blommer submitted a redevelopment proposal for its expanded campus. Blommer proposed acquiring 4.2 acres of land surrounding its factory, including Eychaner's land. Initially, Blommer offered to buy Eychaner's land, but he refused to sell. Then the City notified Eychaner of its possible taking of his property with the intent of conveying it to Blommer as part of its plan to expand its campus. After a public hearing, the city council passed an ordinance authorizing the taking. The ordinance considered the taking necessary to achieve the objectives of the River West TIF.

Condemnation Proceedings

In August 2005, the City filed a complaint to condemn Eychaner's property through eminent domain. Eventually, the case proceeded to a jury trial

on just compensation. The jury returned a verdict of $2.5 million. Eychaner appealed, challenging the denial of his traverse and the compensation award. To support his argument that the taking was unconstitutional, Eychaner relied primarily on *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 199 Ill. 2d 225 (2002) (*SWIDA*). There, the Illinois Supreme Court invalidated the taking of private property for an adjacent racetrack's parking lot that had a "purely private benefit and lack[ed] a showing of a supporting legislative purpose." *Id.* at 240. The *SWIDA* court held that the taking had "minimal public benefit" and that the "true beneficiaries *** are private businesses." *Id.* at 239-40.

Our opinion noted that the facts in *SWIDA*—significantly, a lack of a parking study or economic plan—showed it to be a sweetheart deal and that SWIDA did not intend to benefit the public. *Eychaner*, 2015 IL App (1st) 131833, ¶ 55. We acknowledged that "[r]ecognizing the difference between a valid public use and a sham can be challenging. But a telling feature of sound public use in the context of economic redevelopment is the existence of a well-developed, publicly vetted, and thoughtful economic development plan." *Id.* ¶ 71. That kind of plan was present in *Kelo v. City of New London*, 545 U.S. 469 (2005) and *People ex rel. Gutknecht v. City of Chicago*, 3 Ill. 2d 539 (1954), but "absent in *SWIDA*." *Eychaner*, 2015 IL App (1st) 131833, ¶ 71 ("SWIDA did not conduct or commission a thorough study of the parking situation at [the racetrack]. Nor did it formulate any economic plan requiring additional parking at the racetrack." (Internal quotation marks omitted.)). *Id.* ¶ 71.

On the contrary, the plans showed the City considering, in good faith, the taking of Eychaner's land as part of a "carefully formulated" economic development plan that "unquestionably serves a public purpose of preventing blight, promoting economic revitalization, and protecting existing industry." *Id.* ¶63. We concluded, "the use of eminent domain to expand Blommer's campus passes constitutional muster because it aligns with the goals of the City's economic development plan to retain existing industry, prevent conflicts between residential and industrial use, and promote investment and revitalization in a conservation area." *Id.* ¶78. We also found the trial court erred in excluding certain evidence and remanded for a new trial on just compensation. *Id.* ¶105.

The North Branch Framework

While on remand, the Chicago Plan Commission undertook a comprehensive review of 26 "industrial corridors" in the City to "address the modern realities of the city's industrial marketplace and its evolving role within the global economy." The commission selected a 760-acre area along the Chicago River, the North Branch, as the first industrial corridor for comprehensive review. This area includes Eychaner's property and the Bloomer factory. The review process, dubbed the "North Branch Framework," sought "to modernize existing land use regulations in the corridor to more effectively promote economic growth and job creation through the expansion of existing businesses and the attraction of new businesses, corporate headquarters and companies that drive Chicago's knowledge-based economy." It proposed allowing mixed-use development to "maximize[e] the North Branch as an economic engine and vital job center."

The North Branch Framework proposed dividing the corridor into three distinct zones. Eychaner's property and the Blommer factory lie in the "South Sub-Area," containing a mix of industrial and office uses and abutting the downtown (D) zoning district and high-density, mixed-use properties. It proposed new land use regulations for the South Sub-Area that would provide for "higher density office; retail and select residential uses," while maintaining "[a]t least 50 percent of the corridor's land *** for employment-oriented development." To help implement its goals and principles, the framework recommended replacing the existing zoning for the South Sub-Area from PMD to "Downtown Service" (DS). DS zoning does not permit residential uses. "[E]xisting legal industrial uses would be permitted to continue without impact," and future zoning amendments in the South Sub-area would be "limited to Downtown Mixed-Use (DX)." DX includes multistory high-rise residential structures, which in recent years have become more prevalent in the area.

To address the possibility that some companies would decide to expand or relocate, the North Branch Framework proposed "allocating funding to provide the appropriate infrastructure and related amenities to accommodate ongoing shifts as needed." It recognized the importance of retaining industrial uses within the City's overall industrial corridor system and that "[l]and within the corridors that transitions to nonmanufacturing uses is a loss to the overall system and should entail compensation on behalf of the City's industrial base." A special fee to support the corridor system citywide "will be recommended for development projects that diminish the amount of corridor land that is used or designated for industry and related employment."

Industrial Corridor System Fund Ordinance

After the plan commission issued its North Branch Framework, the City Council approved an ordinance creating an industrial corridor system fund. The ordinance, titled the "Industrial Corridor System Fund Ordinance," established " '[c]onversion areas' *** within the industrial corridor system identified for potential zoning and/or other land use changes or modifications" and " '[r]eceiving corridors," "in which the primary sources of jobs are in industrial use categories." When property within a "conversion area" is rezoned, the City collects a "conversion fee." Industrial users that relocate from conversion areas to replacement sites in receiving corridors are exempted from paying the conversion fee to the City.

The ordinance's purpose was "to mitigate the loss of industrial land and facilities in conversion areas by generating funds for investment in receiving corridors in order to preserve and enhance the city's industrial base, support new and expanding industrial uses, and ensure a stable future for manufacturing and industrial employment in Chicago." The ordinance created a "North Branch Industrial Corridor Conversion Area," which included the Blommer factory and Eychaner property, and repealed the PMD zoning and replaced it with DS zoning.

The Sale of Blommer

Before the second just compensation trial, Fuji Oil Holdings, Inc. (Fuji), announced it had acquired all outstanding shares of Blommer for $750 million. Fuji said it intended to "[e]xpand business in North America, the largest market in the chocolate industry," and "maintain the management structure of [Blommer] with the current management team."

Second Just Compensation Trial

At the second just compensation trial, the City and Eychaner presented expert witnesses who agreed that the highest and best use of the property would be a multistory high rise residential structure with ancillary commercial use. The property would have to be rezoned because DS zoning does not permit residential uses and the owner would have to pay a conversion fee, which would be used to assist other industrial properties in the area. The expert witnesses agreed approval of the zoning change was reasonably probable.

The jury returned an award to Eychaner of $7.1 million. Eychaner filed a posttrial motion, which did not challenge the fair compensation award but renewed his argument that the City's exercise of eminent domain in a conservation area in the name of redevelopment was unconstitutional. Eychaner conceded that the trial court was bound by this court's decision but stated that he was "rais[ing] the issue again in order to preserve it for further judicial review in higher courts." Eychaner also sought reconsideration of the denial of his original traverse under section 2-1202(b) of the Code of Civil Procedure (735 ILCS 5/2-1202(b) (West 2018)), based on changed circumstances. He asserted the taking no longer served a permissible public use since the City had changed its plans for the area surrounding Eychaner's property. Specifically, Eychaner argued, "without the River West TIF Plan, there is no valid conservation plan—or any plan—on which the Blommer redevelopment project and the taking of defendant's property is based. It's a naked transfer of private property through the power of eminent domain to benefit a private party—now Fuji Oil Holdings, Inc. It is a taking for private,

not public use, and is thus barred in Illinois." Eychaner wanted the trial court to vacate the judgment entered on the jury verdict and either reverse the ruling on the traverse or reconsider and reverse that ruling based on changed circumstances and dismiss with prejudice.

The trial court denied the motion on the basis of our having remanded for the limited purpose of a new trial on just compensation. As to changed circumstances based on the new plan, the trial court found that, since all the evidence of purported changed circumstances was available before the second trial, Eychaner could have filed a new traverse or alerted the court to his claim of changed circumstances. The court also held that the City's North Branch Framework adhered to the River West TIF's goals of redeveloping a conservation area to promote the economic revitalization of that conservation area and, thus, the taking continued to serve a constitutionally permissible public use.

Analysis

Eychaner raises two arguments. First, he asserts the City has no right to take his property and that our ruling allowing the taking to prevent future blight was wrong and in conflict with supreme court precedent in *SWIDA*. Eychaner asks that we reverse that judgment and dismiss the eminent domain proceeding with prejudice. Alternatively, Eychaner contends the trial court erred in denying his motion to reconsider its denial of his traverse in light of the City's new North Branch Framework and asks that we reverse that denial and remand so the trial court can reconsider in light of changed circumstances.

Law-of-the-Case Doctrine

As to Eychaner's argument that we reverse our original decision allowing the taking, the parties agree that the law-of-the-case doctrine applies; Eychaner asserts he raises the issue to preserve it for review in the Illinois Supreme Court.

The law-of-the-case doctrine provides that issues presented and disposed of in an earlier appeal are binding and will control in the circuit court on remand, as well as the appellate court in a later appeal, unless the facts presented differ so much as to require a different interpretation. *Bilut v. Northwestern University*, 296 Ill. App. 3d 42, 47 (1998). Absent substantially different facts, a party will not be allowed to reargue issues already decided by the appellate court. A dissatisfied party may file a petition for rehearing or petition for leave to appeal to the supreme court. *Id.* (citing *Sanders v. Shephard*, 258 Ill. App. 3d 626, 633 (1994)).

We addressed the constitutionality of the taking in Eychaner's initial appeal and upheld it. *Eychaner*, 2015 IL App (1st) 131833, ¶ 78. The law-of-the-case doctrine binds us to that decision, so we affirm. Because we apply the law-of-the-case doctrine, we do not address Eychaner's arguments that our 2015 decision should be reversed.

Denial of Posttrial Motion

Eychaner next contends the trial court erred in refusing to reconsider its 2006 denial of the traverse because the North Branch Framework has superseded the River West TIF, which this court relied on to affirm the taking. Specifically, Eychaner argues inconsistency exists between the North Branch Framework and the River West TIF and that the City no longer

intends on preserving industrial uses in the area. Eychaner adds that the City wants to move industrial uses out of the area and replace them with multi-family residences. Eychaner contends that, under the North Branch Framework, the City will relocate Blommer rather than expand its campus, which constitutes a taking for private, not public, use. He considers this new evidence so conclusive that it would probably change the result on reconsideration of the denial of the traverse. Eychaner claims the trial court abused its discretion in ruling on the reconsideration.

We will not reverse a decision to grant or deny a motion for reconsideration absent an abuse of discretion. *Landeros v. Equity Property & Development*, 321 Ill. App. 3d 57, 65 (2001). A motion to reconsider brings to the court's attention (i) newly discovered evidence unavailable at the time of the hearing, (ii) changes in the law, or (iii) errors in the court's application of the existing law. *O'Connor v. County of Cook*, 337 Ill. App. 3d 902, 911 (2003). Illinois courts do not favor posttrial motions based on newly discovered evidence and subjects them to close scrutiny. *Robbins v. Avara*, 28 Ill. App. 3d 292, 295 (1975).

A motion for a new trial based on newly discovered evidence requires establishing the new evidence be (i) so conclusive it probably changes the judgment should a new trial be granted, (ii) discovered after the trial, (iii) undiscoverable "before trial with the exercise of due diligence," (iv) material to the issue, and (v) not "merely cumulative to the evidence at trial." *Lannert v. Ramirez*, 214 Ill. App. 3d 1102, 1104 (1991).

Timeliness of Motion for Reconsideration

We agree with the trial court that Eychaner did not meet the elements required to grant a motion for

reconsideration based on newly discovered evidence. Eychaner met the fourth requirement, as to materiality. But Eychaner failed to meet the other four requirements.

First, Eychaner failed to establish that the new evidence was discovered after trial. He knew of the "changed circumstances"—the North Branch Framework—before the second just compensation trial and had ample opportunity to bring the evidence to the court's attention. The City first publicly announced its North Branch Framework recommendations on June 6, 2016, and adopted the implementing ordinance in July 2017. Fuji publicly announced its acquisition of Blommer on November 19, 2018. As the trial court noted, some of the changes brought about by the North Branch Framework, including zoning changes that would permit mixed-use residential developments, had been presented at the just compensation jury trial. The circumstances plainly had changed; both parties were aware of it, as was the trial court. If Eychaner had filed his motion to reconsider beforehand and had prevailed, the parties and the court would have been spared the cost and time of conducting what would have been an irrelevant four-day jury trial on just compensation. Instead, Eychaner waited until after the trial to ask the court to again consider the constitutionality of the taking based on evidence available well beforehand.

Eychaner contends the trial court should have looked at whether the new evidence could have been discovered before the 2006 condemnation hearing rather than the second just compensation jury trial. Eychaner cites no cases to support this contention. He simply asserts that the jury only had jurisdiction over the just compensation issue and could not have

decided whether the taking was constitutional under the City's new North Branch Framework. That argument fails. The trial judge, not the jury, possesses the authority to decide the constitutionality of the taking. See *City of Naperville v. Old Second National Bank of Aurora*, 327 Ill. App. 3d 734, 739 (2002) (issues raised on traverse and motion to dismiss are preliminary questions determined by trial court without jury). But nothing restrained Eychaner from bringing a motion to reconsider or for a new traverse based on the purportedly material change of circumstances, so the trial judge could have addressed it before the jury trial on just compensation. Eychaner had opportunity between July 2017, when the City adopted an implementing ordinance for the North Branch Framework, and December 2018, when the just compensation trial began, to argue that the taking was no longer constitutional. He remained silent to his detriment.

We also reject the contention that by remanding for a jury trial on just compensation our mandate prevented the trial court from reconsidering its denial of the traverse and motion to dismiss in light of newly discovered evidence. As the trial court noted, the law-of-the-case doctrine precludes Eychaner from rearguing issues this court decided. *Bilut*, 296 Ill. App. 3d at 47. But the doctrine applies to issues of fact or matters concerning claims decided by the appellate court, not issues of fact or matters concerning claims not decided by the appellate court. *Zokoych v. Spalding*, 84 Ill. App. 3d 661, 667 (1980). When we remanded in 2015, the city's North Branch Framework did not exist, and we could not address whether it affected the constitutionality of the taking, a question of fact. Nothing in our remand indicated that the trial court had to blindly follow our mandate and hold a new jury trial on just compensation, undeterred by material

new facts that came to light after we ruled. See *Bilut*, 296 Ill. App. 3d at 47 (despite law-of-the-case doctrine, dissatisfied party may file petition for rehearing based on new facts). Thus, Eychaner failed to timely file his motion to reconsider or show that new evidence was discovered after trial.

Nor can Eychaner contend the evidence was undiscoverable before the just compensation trial with the exercise of due diligence. The evidence of changed circumstances, as we have said, was known to Eychaner before trial and partly presented to the jury. Thus, he failed to satisfy the third and fifth *Lannert* requirements.

Changed Circumstances Did Not Warrant Reversal

Even if Eychaner could meet the other *Lannert* requirements, he failed to demonstrate the new evidence would change the outcome. Eychaner notes that our decision affirming the trial court's denial of his traverse relied primarily on the City's River West TIF, which showed (i) the City had a "carefully formulated" economic development plan and (ii) the taking "unquestionably serves a public purpose of preventing blight, promoting economic revitalization, and protecting existing industry." *Eychaner*, 2015 IL App (1st) 131833 ¶ 63. Eychaner asserts that the City's decision to adopt the new North Branch Framework supersedes the River West TIF; in other words, the taking is no longer supported by the City's current economic development plan, and so it is nothing more than a naked transfer from Eychaner to Blommer in the name of economic development.

The North Branch Framework, however, is not the sole expression of the City's plan, and it does not supersede the River West TIF, which remains in

effect. The River West TIF was enacted by an ordinance that remains in effect, by its own terms, until 2024. Eychaner relies on what he deems "express language in the North Branch Framework stating that all prior plans are superseded." But he either purposely or erroneously misstates the language; it has nothing to do with the River West TIF. The North Branch Framework states, "At least seven plans and studies have been completed since 2010 that provide recommendations which are relevant to the North Branch Industrial Corridor and its surrounding areas." It then identifies those specific seven plans. *None* involve the River West TIF plan.

Moreover, the North Branch Framework and the River West TIF plan together carry out the purpose of promoting the economic revitalization of a conservation area. As the North Branch Framework states, its primary goal is to "maintain the north branch industrial corridor as an important economic engine and vital job center within the city of Chicago." It does so by "moderniz[ing] existing land use regulations in the corridor to more effectively promote economic growth and job creation through the expansion of existing businesses and the attraction of new businesses, corporate headquarters and companies that drive Chicago's knowledge-based economy," a goal consistent with that of the River West TIF to promote economic revitalization and protect existing industry.

Further, the area around Eychaner's property continues to qualify under the TIF Act as a conservation area that runs the risk of blighting without intervention by the City. And, as we held, the City "may use the power of eminent domain to prevent future blight in a conservation area such as the River West TIF." *Id.* ¶ 69. The City's decision to change the zoning to allow

broader economic redevelopment beyond strict industrial uses does not render the plans unconstitutional. As we held, "[t]he goals of the River West TIF—to reduce blighting factors, prevent blight, foster the City's industrial base, prevent conflicts between residential and industrial uses, and retain existing industry—all constitute valid public uses." *Id.* ¶ 75. The City's current plan to redevelop the conservation area around Eychaner's property seeks to "preserve the industrial character of the corridor while also attracting innovation and technology-oriented businesses," a valid public use.

Eychaner relies on *Village of Skokie v. Gianoulis*, 260 Ill. App. 3d 287 (1994), to argue that the taking was an abuse of the City's eminent domain power. In *Gianoulis*, the appellate court invalidated a taking by the Village of Skokie because the defendant's properties had not been included in the Village's original planning study or in the ordinance that originally authorized the use of eminent domain as part of a redevelopment plan. *Id.* at 296. Later, when a developer contacted the Village about an unsuccessful attempt at privately purchasing the property, the Village passed an ordinance retroactively redefining the redevelopment project area to include the defendants' properties. *Id.* This court held that the Village lacked authority to take the properties and abused its power because the properties had not been part of the redevelopment project area identified in the ordinance authorizing the use of eminent domain and "[the Village] cannot merely pass an ordinance and state therein that the lots are now included in the study and the plan." *Id.* at 297.

Eychaner contends that, as in *Gianoulis*, the City's decision to adopt the North Branch Framework

constituted a change in policy, approach, and planning: from conserving existing industrial uses to relocating and replacing them with residential and commercial uses. We disagree. Unlike the defendants in *Gianoulis*, Eychaner's property has always been within the conservation area identified by the River West TIF; the City has always planned for the area's economic redevelopment area. As the trial court stated in distinguishing *Gianoulis*, "[h]ere there was a broad redevelopment plan implemented prior to the initial taking, and there was a broad redevelopment plan implemented at the time of the second trial. Changed circumstances in the manner of new developments in the subject area, which warranted the City conduct a new comprehensive study to determine what zoning best would promote its intention of economic revitalization of the conservation area bolsters its public purpose, rather than show an abuse of power." See *id.*

Also, Eychaner presented no evidence of changes to the plan. Instead, he asserts the City's current plan no longer supports the taking. Not so. Residential uses remain prohibited under the current zoning, though the zoning went from PMD to DS. And Eychaner cites no evidence that Blommer or Fuji intends to use the property for a residential purpose or a use inconsistent with the redevelopment agreement or the River West TIF goals. Indeed, Eychaner acknowledges that both the plans for the property to become part of Blommer factory and the Blommer redevelopment agreement remain unchanged.

Further, the City's decision to create a fund to pay industrial businesses to relocate out of the area supports the goal of the River West TIF by reducing conflicts between residential and industrial uses.

Acquiring Eychaner's property has been to allow Blommer to expand into a self-enclosed campus, thereby reducing conflicts with neighboring uses, continuing operations, and maintaining its workforce within the City—all part of the City's larger plan to redevelop and ensure the economic vitality of the area.

The City's plans under the River West TIF, the redevelopment agreement, and the North Branch Framework continue to "carry out the same purpose of promoting 'the economic revitalization of a conservation area." Thus, the trial court did not abuse its discretion in denying the motion to reconsider.

Affirmed.

No. 1-19-1053

Cite as:	City of Chicago v. Eychaner, 2020 IL App (1st) 191053
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 05-L-5792; the Hon. Rita M. Novak and the Hon. James M. McGing, Judges, presiding.
Attorneys for Appellant:	Thomas F. Geselbracht and Elizabeth L. Butler, of DLA Piper LLP (US), of Chicago, for appellant.
Attorneys for Appellee:	Mark A. Flessner, Corporation Counsel, of Chicago (Benna Ruth Solomon, Myriam Zreczny Kasper, and Justin A. Houppert, Assistant Corporation Counsel, of counsel), for appellee.

APPENDIX C

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS COUNTY DEPARTMENT
LAW DIVISION

PROJECT: RIVER WEST TIF
Case No. 05 L 050792
Calendar: 2
Parcel BC-1

CITY OF CHICAGO, a municipal corporation,

Plaintiff,

vs.

FRED J. EYCHANER and UNKNOWN OWNERS,

Defendants.

FINAL JUDGMENT ORDER

THIS MATTER COMING ON TO BE HEARD upon the complaint for condemnation, as amended, of Plaintiff, THE CITY OF CHICAGO, a municipal corporation, for the ascertainment of the just compensation to be made for the taking by Plaintiff for the uses and purposes stated and set forth in its complaint, as amended, of the fee simple title to the real property identified in said complaint, as amended, as Parcel BC-1 and legally described in said complaint and the attached Exhibit A, and the Plaintiff, appearing by its attorneys, Lisa Misher, Deputy Corporation Counsel, Lenny D. Asaro of Dinsmore & Shohl LLP, Special Assistant Corporation Counsel, and Charlotte Huffman of Neal & Leroy, LLC, Special Assistant Corporation

Counsel; Defendant Fred J. Eychaner, appearing by his attorneys, Thomas Geselbracht and Elizabeth Butler of DLA Piper;

And it appearing to the Court that all parties defendant herein have been served with process in the matter and form as provided for by statute or have duly entered their appearances;

And the Court having jurisdiction of all the parties to this suit and the subject matter thereof, and all parties interested being before the Court, and the Court being fully advised in the premises and having ordered that a separate trial be had as to the real property described in the complaint, as amended, as Parcel BC-1, it was ordered that a jury be selected, examined and sworn to ascertain and report the just compensation to be made to the owner or owners of and party or parties interested in the property sought to be taken by these proceedings, according to the facts in the case as they have been made to appear from the evidence, and the jury, having heard the evidence adduced herein, the arguments of counsel, and instructions from the Court, brought in their verdict on December 18, 2018, in the amount of SEVEN MILLION ONE HUNDRED THOUSAND DOLLARS AND 00/100 ($7,100,000.00).

Whereupon the parties move for judgment on said verdict and all persons interested being before the Court, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED AND ADJUDGED that the sum of money awarded by the jury in and by their verdict to the owner or owners of and party or parties interested in said real property described in the complaint filed herein, as amended, is just com-

pensation for the taking of the fee simple title to said real property described as Parcel BC-1, and judgment is herein entered accordingly.

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff, within one hundred eleven (111) days from the date of entry of this order, shall deposit with the Treasurer of Cook County, Illinois, for the benefit of the owner or owners of and party or parties interested in Parcel BC-1 the sum of SEVEN MILLION ONE HUNDRED THOUSAND DOLLARS AND 00/100 ($7,100,000.00) plus statutory interest on said sum from December 18, 2018, until the date of deposit of said sum with the Treasurer of Cook County, Illinois, as full compensation for the taking of the fee simple title to said real property identified as Parcel BC-1.

IT IS FURTHER ORDERED AND ADJUDGED that upon said deposit to the Treasurer of Cook County, Illinois, Plaintiff may enter in and upon Parcel BC-1 and use the same for its uses and purposes.

DATE: December 26, 2018

ENTERED: [STAMP]
Judge James M. McGing
DEC 26 2018
Circuit Court – 1926

/s/ James M. McGing
JUDGE

The foregoing Final Judgment Order is agreed to in form, without either party waiving its post-judgment rights under 735 ILCS 5/2-1202 and/or Illinois Supreme Court Rule 303.

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APPENDIX D

IN THE APPELLATE COURT
OF ILLINOIS FIRST DISTRICT

2015 IL App (1st) 131833
No. 1-13-1833
Opinion filed January 21, 2015

Third Division

THE CITY OF CHICAGO, a Municipal Corporation,

Plaintiff-Appellee,

v.

FRED J. EYCHANER,

Defendant-Appellant

(Unknown Others, *Defendants*).

Appeal from the Circuit Court of Cook County.
No. 05 L 050792
The Honorable Rita M. Novak &
Margaret A. Brennan, Judges, presiding.

JUSTICE HYMAN delivered the judgment of the court, with opinion.

Presiding Justice Pucinski and Justice Lavin concurred in the judgment and opinion.

OPINION

The plaintiff City of Chicago (City) exercised its power of eminent domain to take defendant Fred Eychaner's property and transfer it to the Blommer Chocolate Company. Eychaner filed a traverse and motion to dismiss, challenging the taking as unconstitutional, which the trial court denied. After a trial on just compensation, a jury valued Eychaner's land at $2.5 million.

Eychaner appeals, arguing: (i) the City may not use eminent domain to take property in a conservation area in the name of economic redevelopment; (ii) the trial court should have granted Eychaner's motion *in limine* to bar reference to the property's planned manufacturing district (PMD) zoning; (iii) the trial court erred in excluding evidence of how and why the City included Eychaner's land in the PMD because it was relevant to the issue of whether there was a reasonable probability of rezoning; (iv) the City should not have been allowed to add new appraisers that Eychaner had originally retained; (v) the trial court should have allowed appraiser Michael MaRous to testify regarding his opinion that there was a reasonable probability of rezoning; (vi) the trial court should have stricken MaRous's testimony for violating the court's *in limine* order when he identified Eychaner as his original employer; and (vii) the jury's $2.5 million verdict was the result of a mistaken belief that there was no reasonable probablility of rezoning.

We affirm in part and reverse in part, holding: (i) under long-standing precedent, the City may use eminent domain to take property in a conservation area to prevent future blight; (ii) the trial court erred in refusing to exclude reference to the land's PMD zoning, and having so held, (iii) we decline to address

the relevancy of how and why the PMD zoning came about; (iv) Eychaner was not prejudiced when the City chose to call witnesses he had formerly retained but had chosen not to call at trial; (v) the trial court erred in limiting MaRous's testimony; and (vi) because of the trial court's curative instruction, no prejudice arose from MaRous's identifying Eychaner as his original employer. Accordingly, we reverse and remand for a new trial on just compensation.

BACKGROUND

Eychaner's Property and Rezoning to PMD

Eychaner owned vacant land at the southwest corner of West Grand Avenue and North Jefferson Street (labeled "Eychaner's Land," *infra* figure 1). Two blocks south of Eychaner's land stood the Blommer Chocolate Company's Chicago factory at the corner of North DesPlaines Street and West Kinzie Street (labeled "Blommer's Factory", *infra* figure 1).

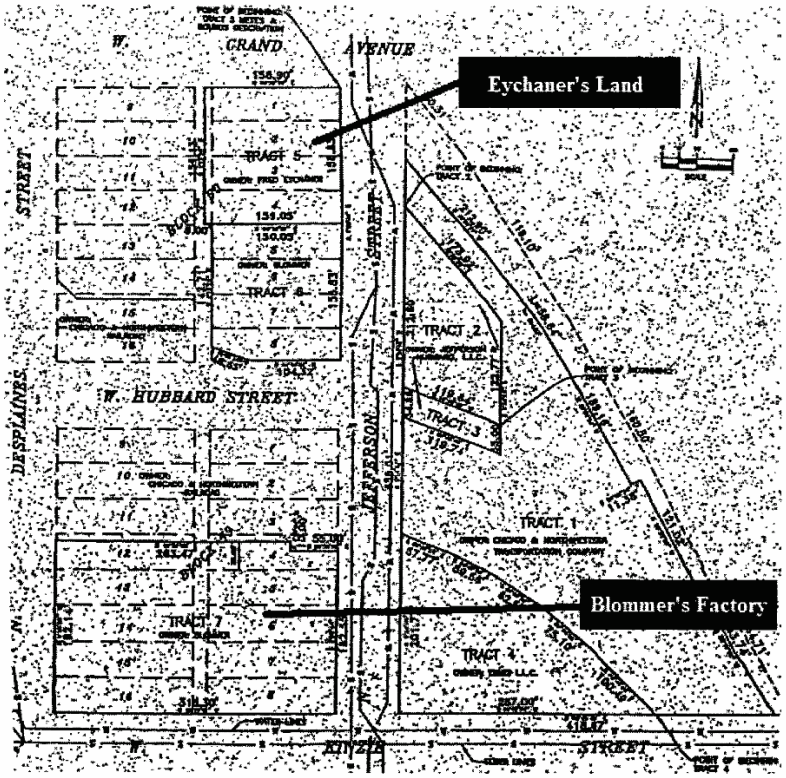

Figure 1.

At the end of 1999, the City proposed the creation of a PMD in the Chicago-Halsted corridor (shaded area in the map, *infra* figure 2, "Eychaner" and "Blommer" labels added), aimed at protecting the 2,800 industrial jobs located in the area, preventing residential encroachment on the existing manufacturing facilities, and encouraging manufacturers to invest in their facilities.

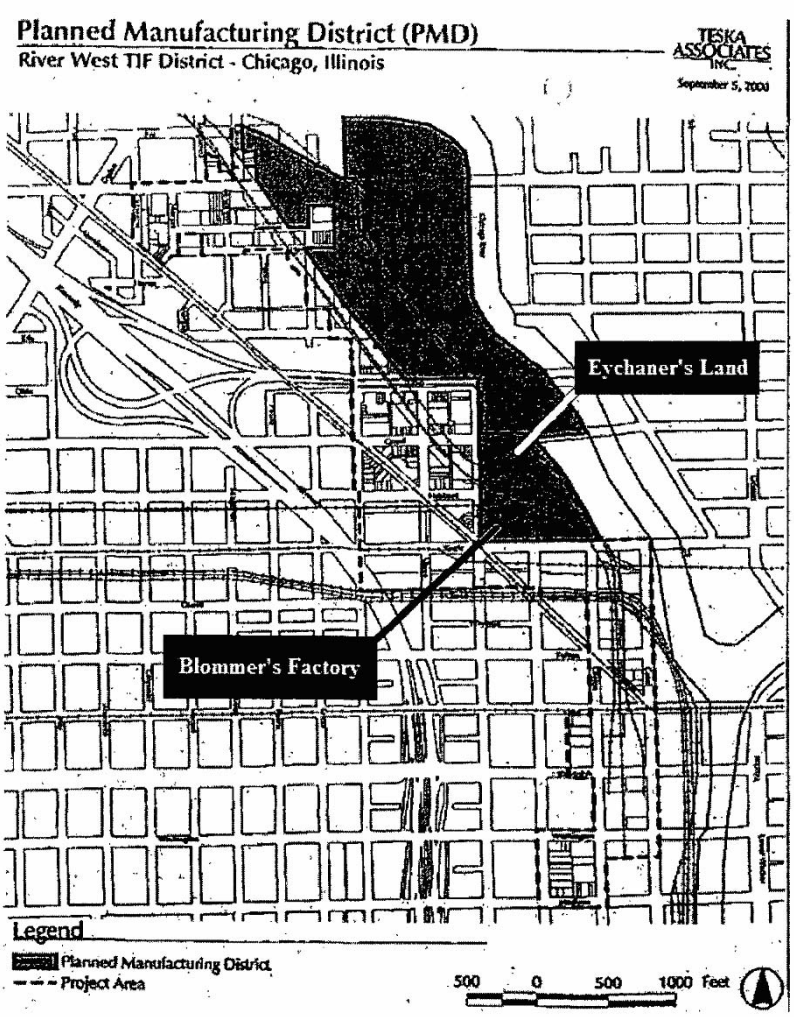

Figure 2.

The City's municipal code lists five goals behind the creation of PMDs, to: (i) "foster the city's industrial base"; (ii) "maintain the city's diversified economy for the general welfare of its citizens"; (iii) "strengthen existing manufacturing areas that are suitable in size, location and character and which the City Council deems may benefit from designation as a PMD"; (iv)

"encourage industrial investment, modernization, and expansion by providing for stable and predictable industrial environments"; and (v) "help plan and direct programs and initiatives to promote growth and development of the city's industrial employment base." Chicago Municipal Code § 17-6-0401-A (amended Sept. 10, 2014). Residential uses are not permitted within PMDs. See Chicago Municipal Code §§ 17-6-0403-C, 17-6-0403-F (amended Sept. 10, 2014).

The proposed area for the PMD contained nine industrial firms, including the Blommer Chocolate Company's factory, which was located at the southern most part of the PMD. In January 2000, the City held a public meeting regarding the PMD. At the meeting, the area's Alderman noted that there had been increasing conflicts between the residential tenants and the area's existing industry, including complaints about heavy truck traffic at all hours of the day. At the meeting, the City also mentioned that, later in the year, it would conduct an eligibility study for the creation of a tax-incremental financing (TIF) district under the Tax Increment Allocation Redevelopment Act. 65 ILCS 5/11-74.41 *et seq*. (West 2004). At the meeting, the City described Eychaner's land as one of the "two largest sites [in the proposed PMD] that aren't being used as the present time," and a potential development site.

Blommer also attended the January 2000 meeting and raised concerns about a proposed residential development by CMC Heartland on the other side Kinzie Street, just south of Blommer's factory and just outside the proposed boundaries of the PMD. Blommer noted that there was no buffer zone between itself and the proposed residential development, creating a potential for conflict.

In February 2000, Blommer wrote a letter to the City, objecting to its inclusion in the PMD. Blommer's letter noted that "the purpose of the PMD was to protect manufacturing businesses from residential development," but the inclusion of Bloomer did not fulfill that purpose. Blommer did not show any interest in Eychaner's land in the letter.

Blommer primarily objected to its inclusion in the PMD because "the vacant land directly South of Blommer [was] scheduled for massive residential development by CMC. Unless the boundary of the PMD was extended to include the CMC property (South of Kinzie and North of the railroad track), there would be no buffer between the heavy industrial use of Blommer's property and the residential development being proposed by CMC." Blommer took the position that "rather than fight the CMC development, it would be more productive to work together with CMC to find ways to make Blommer's operation more compatible to neighboring residential usage." Citing three sources of conflict—smell, noise, and traffic—Blommer noted that it had already made plans to minimize complaints about the smell of cocoa bean roasting and plant noise. As to traffic, Blommer, working with the CMC, wanted to acquire the vacant land and parking lot to the east of its factory to use as a staging area for trucks, and alleviate truck congestion on DesPlaines and Kinzie Streets. Blommer also proposed vacating the sections of Hubbard and Jefferson Streets adjacent to its plant.

But even with its plan to reduce the smell, noise, and traffic associated with its operation, Blommer raised the specter that residents would still find its manufacturing operations "intolerable." If that were the case, the best solution for Blommer would be to relocate, and if forced to move, Blommer noted, "it is

hard to imagine another manufacturing concern would be interested in buying our property only to inherit our neighborhood problems." Blommer concluded that, if it were forced to sell, "not being included in the PMD would provide us with some flexibility in finding another use for the property."

The City's plan commission held another meeting on the PMD in March 2000. There, a representative from the City's department of planning and development noted that the PMD would send a message to developers that this area was to remain primarily industrial and commercial, and that the PMD would prevent residential development on vacant parcels within its boundaries. At that meeting, Blommer opposed its inclusion in the PMD, repeating the reasons stated in its February 2000 letter. Blommer proposed two solutions: expand the PMD to extend south of Kinzie Street, preventing the residential development, or exclude Blommer from the PMD so that it could sell its land if conflicts arose with the future residents. Members of the Plan Commission expressed a desire to keep Blommer in Chicago. In light of Blommer's and others' objections, the Plan Commission deferred voting to approve the PMD.

In late March 2000, Blommer met with the City regarding its concerns about its inclusion in the PMD. To minimize the impact of nearby residential development, Blommer asked the City to assist it in increasing the size of its industrial campus to create more places for off-street truck staging. Blommer proposed acquiring the land to the north and east of its current factory, and then walling off the expanded campus. This expansion would mitigate neighbors' complaints about noise and trucks. Drawings of Blommer's proposed expansion did not include

Eychaner's land (outlined below, *infra* figure 3, "Eychaner" label added). At the meeting, the City noted that it was conducting an eligibility study for a tax increment financing district, and that Blommer could use the financing to acquire land for its expansion and improve the infrastructure.

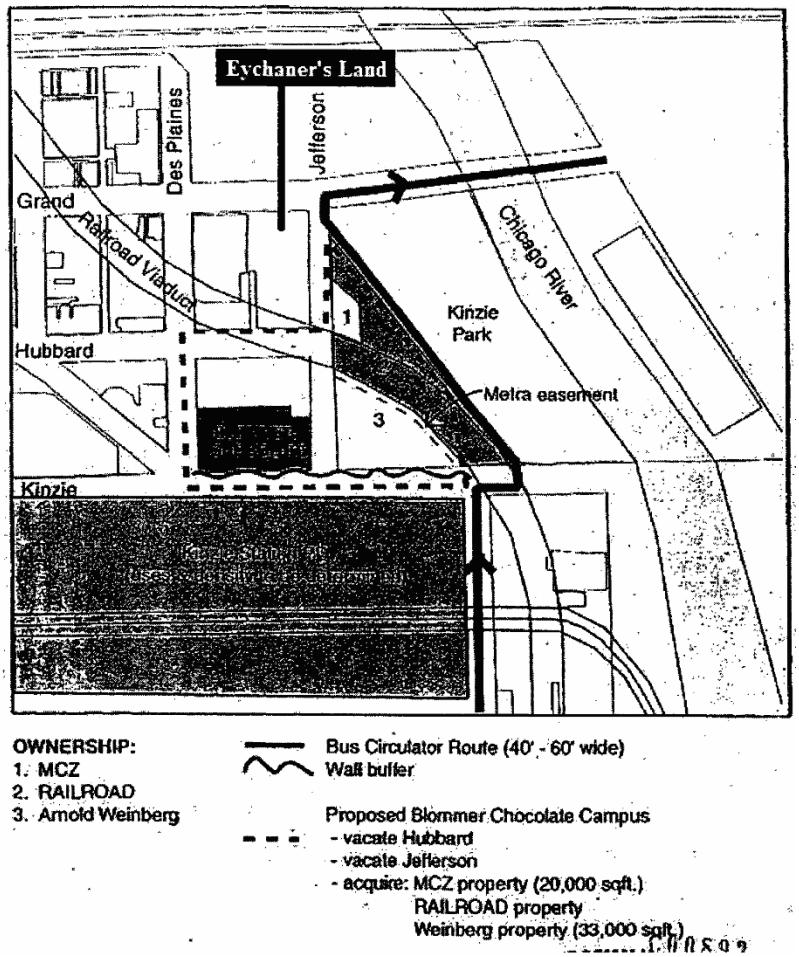

Figure 3.

In, April 2000, the commissioner of the City's Plan Commission wrote a letter to Blommer expressing

"[w]e are committed to keeping quality manufacturing firms, such as [Blommer] in the City. To that end, we are very interested in helping your create a larger 'industrial campus' as a means to internalize your loading operations, limit traffic impacts on adjacent streets, and provide room to expand." The commissioner wrote that the Plan Commission would: (i) work on the possibility of closing parts of Hubbard Street and Jefferson Street; (ii) pursue the creation of a tax-increment finance district to finance public infrastructure improvements and "any potential acquisitions," which now included Eychaner's land; and (iii) defer approval of residential development south of Blommer's plant "to explore design, use and density issues." The PMD, the commissioner noted, would "ensure that properties to the north and east of [Blommer's] factory are not developed for residential use," and also made clear that Blommer's "public support for this action [was] crucial in getting this measure through the legislative process."

In May 2000, Blommer commissioned an architect to draw up a site plan for its expanded campus. That plan included Eychaner's land *(infra* figure 4, "Eychaner" and "Blommer" labels added). In June 2000, Blommer wrote another letter to the commissioner of the City's Plan Commission, summarizing its position on the PMD and CMC's proposed residential development south of Kinzie Street. Blommer laid out the plan for its expanded industrial campus, outlining a nine-step process for the expansion, including: (i) the City, Blommer, and CMC would execute a redevelopment agreement; (ii) the City would acquire three parcels of land, one of which Eychaner owned, that the City would then transfer to Blommer for $1; and (iii) the City would put in place a tax-increment finance district to help fund the expansion. Blommer also

noted that "[a] binding Redevelopment Agreement would have to be approved by the City and fully executed before Blommer could fully support the PMD and the rezoning of the CMC development" for residential use.

Blommer's position did not sit well with the City. In a July 2000 memorandum to the mayor, the City wrote that "Blommers seems to be negotiating as if they have us over [a] barrel." The memorandum recommended proceeding with the creation of the PMD while continuing to negotiate with Blommer, also noting, "Blommer's will go public with its concerns. The only other option is to change the boundaries to exclude them. That will create a slippery slope for all the others who want out of the PMD."

In August 2000, the Plan Commission held another meeting. At the meeting, in an effort to minimize conflicts between its future residents and Blommer, CMC Heartland proposed a 1-acre, 25-foot setback for its residential development on Kinzie Street. Blommer withdrew its opposition to its inclusion in the PMD based on the City's willingness to help expand Blommer's industrial campus and "create a buffer" between its operations and CMC's proposed residential development. In expanding the industrial campus, Blommer could move its truck staging off of DesPlains and Kinzie, alleviating complaints about traffic and noise. The Plan Commission recommended the city council approve the PMD.

In September 2000, the City Council passed an ordinance adopting the PMD. The City made five findings. First, it is City policy to "foster the growth of the City's manufacturing and commercial base to maintain a diversified economy." Second, the City "is committed to the retention of exiting manufacturing

and commercial firms and the development of modern facilities." Third, the area designated as the PMD is "directly adjacent to the North Branch industrial' Corridor and shares many of the corridor's industrial characteristics. Fourth, the proposed PMD has "an active manufacturing and commercial base, expansion opportunities, excellent locational advantages and sufficient infrastructure. Fifth, "[c]ontinued manufacturing and commercial investment, modernization and expansion depends on a stable and predictable land-use environment." The ordinance then lists the purpose of the PMD as intending "to accommodate manufacturing, commercial and entertainment uses with an emphasis on office, night-time entertainment, high tech service and sales, arts-oriented retail and the retention/expansion of existing manufacturing and distribution facilities."

That same month, the City's community development commission accepted for review the proposed plan for the River West Tax Increment Financing Redevelopment Project Area (River West TIF). The proposed plan encompassed land on the west side of the Chicago River (outlined in picture, *infra* figure 5, "Eychaner" and "Blommer" labels added), and included both Blommer's factory and Eychaner's land. It also included part, but not all, of the PMD (both areas mapped, *supra* figure 2).

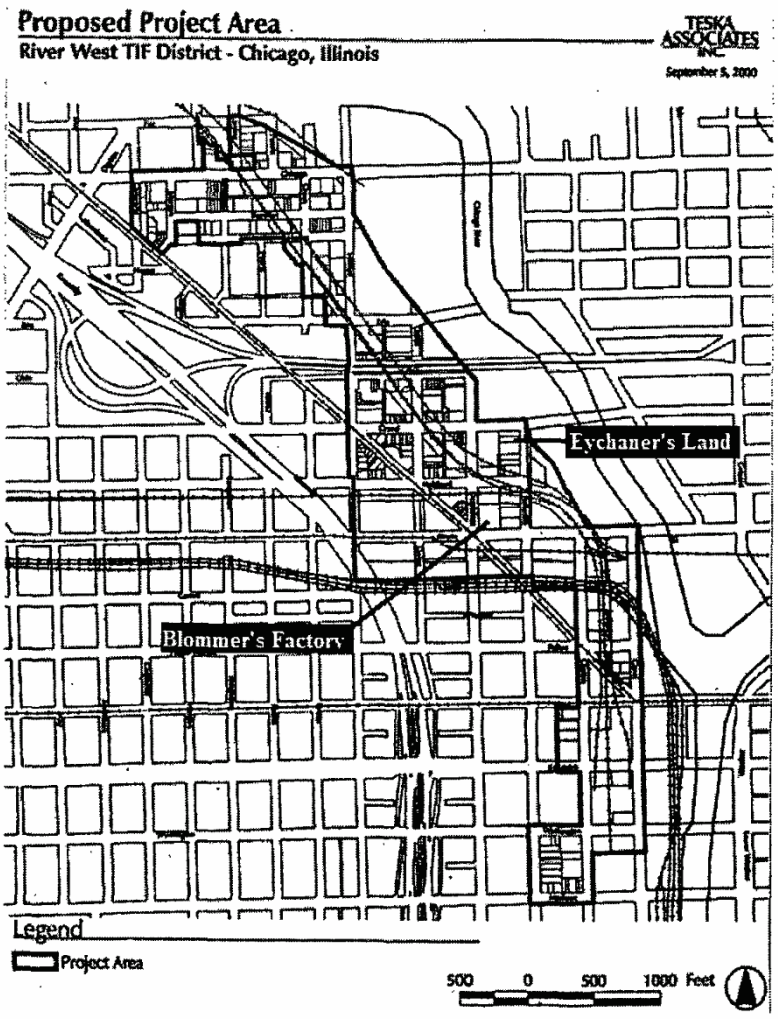

Figure 5.

As a part of the plan for the proposed River West TIF, the City retained a private firm that conducted an eligibility study and drafted a 68-page report. The proposed plan sought "to respon[d] to a number of problems and needs within the [River West TIF] Project Area, and *** to maintain and revitalize the

Project Area as a viable support area for" the Loop. The study noted that the areas around Chicago's Loop

> "are currently enjoying a residential renaissance as thousands of new and returning residents discover the convenience and vibrancy of living downtown. To satisfy the demand for new housing units, developers have begun rehabilitating old industrial buildings and constructing new residential buildings around the Project Area. The inherent incompatibility between new residents and existing industry and commercial businesses can force these industries and commercial businesses out of the area. The rise in land values and property taxes, the incentive to sell to high-bidding residential developers, and the increase in complaints from neighboring residential developments, all work to push industrial and commercial users out.
>
> The City of Chicago has recognized, however, that it is critical to the overall land-use balance, and to the employment and tax base of the City, to protect and enhance the remaining industrial areas already in proximity to the Loop."

In support of these policies, the report notes that the City created the Chicago-Halsted PMD, and that the River West TIF is one of the City's tools that "is intended to provide the financial mechanism necessary to implement the goals and objective of the PMD.

Regarding the PMD, the River West TIF study described the need for buffer zones between industrial and residential uses to "limit off-site impacts such as noise and vibration" and "to prevent conflicts between

incompatible uses." It also noted that "demand for new or additional facilities by existing industry is expected to become important in the future."

The proposed area for the River West TIF consisted of 124 acres with 103 buildings and 105 vacant or parking lot parcels. The usage within the River West TIF included: 15.1% industrial, 7.8% commercial, 1.4% mixed-use residential, and 0.7% multi-family residential. The remaining uses fell into the categories of institutional, parking, vacant, railroad, and other right-of-way.

The study found that tax-increment financing would induce private investment and arrest blighting factors in the area. Because the area had not been subject to growth and reinvestment, the study reasoned that property owners would not invest in their properties without tax-increment financing. The study anticipated benefits, including: (i) stronger economic vitality; (ii) increased construction and long-term employment opportunities; (iii) replacement of inappropriate uses, blight, and vacant properties with viable, high-quality developments; (iv) the elimination of physical impediments, such as roads in poor condition; (v) the construction of public improvements to attract private investment; (vi) job-training services to make the area more attractive to investors and employers; and (vii) opportunities for minority- and women-owned businesses to share in the redevelopment.

The study also documented the conditions of the buildings within the area. According to the study, 88% of the buildings were 35 years old or older, and the area met the statutory definitions for the following blighting factors: deterioration, code violations, excessive vacancies, lack of community planning, and

lagging property values. The proposed plan concluded that it met the requirements of a "conservation area" under the Tax Increment Allocation Redevelopment Act (65 ILCS 5/11-74.4-1 *et seq.* (West 2004)).

Moreover, the study set forth several goals and objectives for the River West TIF, including: (i) "reduction or elimination of those conditions which qualify the Project Area as a conservation area"; (ii) "provision of sound economic development in the Project Area, particularly by strengthening the viability, function, and cohesiveness of industrial and commercial development"; (iii) employment of local residents; (iv) the creation of strong public-private partnerships; (v) improved utilities, roadways, transit facilities, and infrastructure; (vi) improved quality of life in the City; (vii) fostering an environment to benefit the health, safety, and general welfare of City residents, and that will enhance property values and stimulate private investment; and (viii) the preservation of historic buildings.

The study lists 15 strategies to induce redevelopment: (i) encouraging "maintenance and expansion of sound and viable industrial and commercial uses in appropriate locations;" (ii) permitting "residential development only where such development imposes the minimum adverse impact upon the existing industrial and commercial base"; (iii) rehabilitating and modernizating existing industrial and commercial structures for continued use; (iv) assembling parcels into shapes appropriate for modern development; (v) upgrading infrastructure; (vi) create buffers between incompatible uses; (vii) recruiting new enterprises to fill vacant structures; (viii) studying existing and future traffic conditions; (ix) improving parking; (x) enhancing visual character with building rehabilita-

tion and right-of-way improvements; (xi) undertaking environmental rehabilitation; (xii) preventing any adverse environmental impact to the Chicago River; (xiii) promoting energy efficient development; (xiv) establishing job-readiness and job-training programs and having area employers commit to interviewing those trainees; and (xv) providing opportunities for women- and minority-owned businesses.

The River West TIF plan cited one parcel of land for acquisition by the City under the Act, but this was not Eychaner's land. The total estimated redevelopment costs for the River West TIF were $150 million. The estimated date of completion of the redevelopment project was "no later than December 31, 2023."

In January 2001, the Community Development Commission recommended the City Council adopt the plan for the River West TIF. The City Council passed an ordinance that adopted the River West TIF plan soon thereafter, finding that, as a conservation area, the area "may become a blighted area."

In May 2001, Blommer submitted a redevelopment proposal to the City regarding its expanded campus. Blommer proposed acquiring 4.2 acres of land surrounding it factory, which included Eychaner's land. Its proposal noted that Blommer's expanded campus would create and retain jobs at its plant, increase tax revenue for the City, ensure that Blommer stayed in Chicago, and create a "buffer zone" between Blommer's factory and residential development.

In February 2002, Blommer offered to purchase Eychaner's land for $824,980. Eychaner refused to sell. In April 2002, the City notified Eychaner that it was considering taking his property. The City's Community Development Commission held a public

meeting regarding the proposed taking in May 2002. Eychaner's counsel attended the meeting and objected to the City's actions. The commission nevertheless recommended acquiring Eychaner's and others' property via eminent domain. In June 2002, the City Council passed an ordinance authorizing the taking of Eychaner's land, finding the taking necessary to achieve the objectives of the River West TIF plan, noting "[t]he Plan and the use of tax increment financing provide a mechanism to support new growth through leveraging private investment, and helping to finance land acquisition, demolition, remediation, site preparation and infrastructure for new development in the Area."

In February 2006, the City Council passed an ordinance appointing Blommer as the project developer for the acquired properties and authorizing a redevelopment agreement between Blommer and the City.

Condemnation Proceedings

In August 2005, the City filed a complaint to condemn Eychaner's property through eminent domain. In January 2006, Eychaner filed a traverse and motion to dismiss, arguing that the City's exercise of eminent domain was *prima facie* unconstitutional and that the trial court should dismiss the complaint.

The trial court denied Eychaner's traverse in August 2006. On Eychaner's motion, the trial judge certified that order for interlocutory appeal on the question of whether the City could use its eminent domain powers to take property that is neither blighted nor a slum and give to a private party in the name of economic redevelopment. This court denied Eychaner's petition for leave to appeal, and remanded

the case, which proceeded to a jury trial on just compensation.

Before trial, Eychaner moved *in limine* to bar reference to the land's PMD zoning. Eychaner argued that under the "project influence rule," the valuation should not take into account the PMD zoning. The trial judge denied that motion. The City filed a motion *in limine* to bar evidence that it intends to transfer the land to Blommer, which the trial court granted.

Eychaner disclosed four expert witnesses under Illinois Supreme Court Rule 213(f)(3) (eff. Jan. 1, 2007): Joseph Thouvenell, Michael MaRous, Allen Kracower, and Dale Kleszynski. But in his witness list before trial, Eychaner decided not to call two of his experts: MaRous and Thouvenell. The City then supplemented its Rule 213(f) disclosures to add MaRous and Thouvenell as its own witnesses. Eychaner moved to strike those disclosures as untimely, which the trial court denied. The City then moved *in limine* to bar Eychaner from cross-examining his abandoned witnesses on opinions the City did not elicit on direct examination, which the trial court granted. It also granted Eychaner's motion *in limine* to bar evidence that he previously retained MaRous and Thouvenell.

At trial, during the City's case-in-chief, it called three real estate appraisal expert witnesses. First, Kathy Dart opined rezoning was not a reasonable probability. She based this conclusion on Chicago's 13 PMDs, not one of which has a residential use in it. No one has rezoned any land in a PMD for residential use. They are strictly industrial and commercial areas. She also noted that residential use would not meet the objectives of a PMD. Dart stated that the highest and best use of the land was for light industrial and commercial uses, consistent with the PMD zoning.

Dart appraised the property at $1.53 million. Another appraiser, James Gibbons, testified similarly: that it was not reasonably probable to assume that land in a PMD could be rezoned for residential use. He appraised Eychaner's land at $1.4 million.

The City then called MaRous, who did not testify whether there was a reasonable probability of rezoning, but valued the land at $2.55 million assuming the land's PMD zoning, which he described on cross examination as an "extraordinary assumption." MaRous also testified as follows on redirect examination:

> "Q. [City's attorney:] And then he [opposing counsel] also mentioned that you do work for corporations, correct?
>
> A. Yes.
>
> Q. And a corporation did not hire you to appraise the subject property in this case, did they?
>
> A. It may have been one of Mr. Eychaner's corporations. I don't recall.
>
> Q. Well—
>
> MR. GESELBRACHT [Eychaner's attorney]: Objection, you Honor.
>
> THE COURT: Sustained. Move to strike[?]
>
> MR. GESELBRACHT: Move to strike.
>
> THE WITNESS: Okay.
>
> THE COURT: That answer will be stricken."

Eychaner requested a sidebar and moved to strike all of MaRous' testimony for violating the trial court's *in limine* order. Alternatively, Eychaner argued that the

trial court should permit him to re-cross-examine MaRous on his opinions not covered on the City's direct examination. As a second alternative, Eychaner requested a curative instruction. The court denied Eychaner's motions, but did instruct the jurors "not to concern themselves with who may have requested Mr. MaRous to perform an appraisal of the subject property."

In Eychaner's case-in-chief, he called Allen Kracower as a land planning expert. Kracower testified that the highest and best use for the land was as a "multiple family residential" use. As to the reasonable probably of rezoning, Kracower opined that "it was reasonably probable * * * to have the property rezoned" to allow "a multiple family higher-rise type structure." He based this opinion on the rezoning of 13 acres of nearby land outside of the PMD that was originally zoned for industrial use and was rezoned in 1972 and 2002 for residential use: Kinzie Park and Kinzie Station. These rezonings, Kracower stated, showed that the industrial zoning designation was flexible. He also noted that the surrounding area is becoming increasingly residential to the east and south even though industrial firms once dominated it. In Kracower's opinion, dense urban areas are not suited for manufacturing, since such use requires an abundance of land and unclogged trucking routes. Regarding PMDs generally, Kracower opined that the PMD was an out-of-date classification since it has not stopped manufacturing from leaving the City. He also said there were no residential uses in PMDs simply because no one had asked for such a rezoning.

Eychaner then called Dale Kleszynski as an expert real estate appraiser. Kleszynski opined that there was a reasonable probability of rezoning and that the

highest and best use of the land was as a residential high rise. He noted many properties in the area, especially on the east side of the Chicago River, had transitioned from industrial to residential. Kleszynski valued the land at $5.1 million. On cross-examination, however, Kleszynski revealed that, for valuation purposes, he did not compare Eychaner's land to land in other PMDs. He also could not cite a single instance of a residential use in any PMD.

Eychaner also called Nora Curry, a financial planning analyst with the City's department of housing and economic development. Curry testified about the nature and purpose of PMDs to create a stable areas of industry.

In its rebuttal case, the City called Thouvenell, who valued the land at $3.6 million and stated that its highest and best use was as multifamily residential use. He testified to a reasonable probability of rezoning for multifamily residential use. He admitted that in the City's 13 PMDs, there were no residential uses, and he relied on other nearby properties that have been rezoned from industrial to residential classifications.

The City then called Lawrence Okrent, an expert land planner, who testified that there was no reasonable probability of rezoning Eychaner's property. He looked at zoning trends in the area dating back to the 1920s. He opined that the creation of this PMD was consistent with land use trends in the area. Okrent disagreed with Kracower regarding the meaningfulness of nearby residential development. He distinguished Eychaner's property from others because it was in the middle of the PMD, making it an unlikely candidate for residential rezoning. For the City Council to adopt residential zoning for Eychaner's

land, he testified, would be careless, and the highest and best use of the land was for light industrial and commercial uses, consistent with the PMD zoning.

The jury returned a verdict of $2.5 million. Eychaner appeals.

ANALYSIS

Eychaner raises seven issues on appeal regarding both the traverse and the trial on just compensation. We find no constitutional error, but reverse for a new trial on just compensation.

Eminent Domain in a Conservation Area

Eychaner argues that the City may not exercise the power of eminent domain in a conservation area in the name of economic redevelopment. We disagree. We review the constitutionality of a taking *de novo. Southwestern Illinois Development Authority v. AlMuhajirum,* 318 Ill. App. 3d 1005, 1008 (2001).

Condemnation, or eminent domain, is the process by which the government takes private property for public purposes subject to payment of just compensation. *Village of Bellwood v. American' National Bank & Trust Co. of Chicago,* 2011 IL App (1st) 093115, ¶ 18. The Illinois Constitution and the United State Constitution prohibit the taking of private property for a public purpose without payment. Ill. Const. 1970, art. I, § 15; U.S. Const., amend. V. While the power and right of eminent domain are indeed vast, they are heavily regulated by legislation. *Department of Public Works & Buildings v. Kirkendall,* 415 Ill. 214, 218 (1953).

The government's exercise of eminent domain must be for some public purpose. *City of Chicago v. Barnes,* 30 Ill. 2d 255, 257 (1964). Nevertheless "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." *Southwestern Illinois Development Authority v. National City Environmental, LLC,* 199 Ill. 2d 225, 235 (2002) *(SWIDA).* Moreover, "possessory use by the public is not an indispensable prerequisite to the lawful exercise of the power of eminent domain." *People ex rel. Gutknecht v. City of Chicago,* 3 Ill. 2d 539, 545 (1954).

Eychaner argues the City's taking is unconstitutional, lacking a public purpose under *SWIDA,* 199 Ill. 2d 225 (2002). Eychaner mischaracterizes *SWIDA,* arguing that the City cannot use eminent domain to transfer property from one party to another unless the property is blighted. But *SWIDA* focuses on the motive behind the taking, and does not support Eychaner's position.

In *SWIDA,* the Southwestern Illinois Development Authority (SWIDA) sought to exercise its eminent domain powers to take 148.5 acres of land belonging to a recycling company and transfer it to a racetrack for use as a parking lot. *Id.* at 228-29. SWIDA cited less traffic, better public safety, economic benefits, and the reduction of blight as the public purposes of the taking, but conducted no study and had no economic plan to support these findings. *Id.* at 232- 33. The trial court approved the taking as constitutional, but the supreme court reversed. *Id.* at 227. *SWIDA* permits a government to take property in the name of economic redevelopment as long as members of the public are the primary intended beneficiaries of the taking rather than private businesses. *Id.* at 240.

The supreme court established no "bright-line test" or set of factors to distinguish public versus private

beneficiaries. *Id.* Rather, the court noted that the facts—significantly, a lack of a parking study or economic plan—showed this was a sweetheart deal, and that SWIDA did not intend to benefit the public at all:

> "While the activities here were undertaken in the guise of carrying out its legislated mission, 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. Nor did it formulate any *economic plan* requiring additional parking at the racetrack. SWIDA advertised that, for a fee, it would condemn land at the request of 'private developers' for the 'private use' of developers. In addition, SWIDA entered into a contract with [the racetrack] to condemn whatever land 'may be desired * * * by [the racetrack].' 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 those goals through purchasing [the recycling center's] land at an acceptable negotiated price. It appears SWIDA's true intentions were to act as a default broker of land for Gateway's proposed parking plan." (Emphases added.) *Id.* at 240-41.

This court commented in *dicta* on *SWIDA* in *City of Chicago v. Midland Smelting Co.,* 385 Ill. App. 3d 945 (2008). We noted that *SWIDA* did not stand for the

proposition that takings in the name of economic redevelopment required a right of public access to the taken property. *Id.* at 971. Rather, "'possessory use by the public is not an indispensable prerequisite to the lawful exercise of the power of eminent domain.' " *Id.* at 973 (quoting *People ex rel. Gutknecht v. City of Chicago,* 3 Ill. 2d 539, 544-45 (1954)). Instead, the *SWIDA* court "focused on the motives behind the taking and whether the taking was in fact intended to benefit the public or, rather, to benefit purely private interests." *Id.* at 971-72.

SWIDA does not stand for the proposition, as Eychaner urges, that a taking in a conservation area is unconstitutional. In *People ex rel. Gutknecht v. City of Chicago,* 3 Ill. 2d 539 (1954), and *Kelo v. City of New London, Connecticut,* 545 U.S. 469 (2005), the Illinois Supreme Court and United States Supreme Court held these takings constitutional.

In *Gutknecht,* the Illinois Supreme Court dealt with the constitutionality of a taking in a conservation area under the Urban Community Conservation Act (Ill. Rev. Stat. 1953, ch. 67 1/2, 91.8, *et seq.). Gutknecht,* 3 Ill. 2d at 541. That statute defined "conservation areas," like the statute here, as those areas "likely to become slum and blighted areas if their deterioration is not arrested." *Id.* at 542. The statute called for the creation of "municipal community conservation boards" to designate areas as conservation areas, and, after investigations and hearings, to adopt conservations plans to prevent the areas from becoming blighted. *Id.* If the board adopted a conservation plan, it could take land through eminent domain when appropriate to the plan's implementation. *Id.* at 543.

The plaintiff in *Gutknecht* challenged the validity of these takings. It argued that because the statute

allowed properties acquired through eminent domain to be transferred to private developers in accordance with a conservation plan, the taking had no public purpose. *Id.* at 544. Eychaner makes the same argument. Our supreme court roundly rejected that position, holding "[w]hen such areas have been reclaimed and the redevelopment achieved, the public purpose has been fully accomplished." (Internal quotation marks omitted.) *Id.* at 545.

Nor was it fatal that the *Gutknecht* takings were done to prevent blight rather than eliminate it (another of Eychaner's arguments). Rejecting this position, the court said it knew of no constitutional principle requiring a government to deal with blight only after "it has reached its maximum development." *Id.* The court also rejected the argument that the use of eminent domain to prevent slums would mean every piece of property potentially could be condemned. *Id.* "Legitimate use of governmental power is not prohibited because of the possibility that the power may be abused." *Id.*

Similarly, the United State Supreme Court in *Kelo v. City of New London, Connecticut,* 545 U.S. 469 (2005), found no issue with this kind of taking. There, a state-sanctioned nonprofit created a development plan to revitalize an economically distressed portion of the city. *Id.* at 472-74. Part of that plan included the acquisition of 115 privately owned properties for use as a conference center hotel among other commercial and recreational uses. *Id.* at 474. Many of the individual properties were not blighted, but were condemned only because they were located in the planned development area. *Id.* at 475.

Addressing the same arguments, the court rejected the condemnees' position on the constitution's public

use mandate, holding the fifth amendment's public use requirement did not require the public actually be able to use the taken land. *Id.* at 479. Rather, "it embraced the broader and more natural interpretation of public use as 'public purpose.'" *Id.* at 480. That interpretation granted great deference to state legislatures to determine "what public needs justify the use of the takings power." *Id.* at 483. Thus, the court reasoned that the plan the city set forth—to revitalize a distressed area—satisfied the public use requirement:

> "The City has *carefully formulated an economic development plan* that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. *** To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. *Given the comprehensive character of the plan,* the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us *** to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the *entire* plan. *Because that plan unquestionably serves a public purpose,* the takings challenged here satisfy the public use requirement of the Fifth Amendment." (Emphases added.) *Id.* at 483-84.

Guided by *SWIDA, Gutknecht,* and *Kelo,* we turn to the City's taking, and hold that it unquestionably serves a public purpose of preventing blight, promoting economic revitalization, and protecting existing

industry. As the City noted at oral argument, the public purpose of the PMD and River West TIF was "to make this whole area work for everyone."

We begin with the authority under which the City exercised the taking. See *Lake Louise Improvement Ass'n v. Multimedia Cablevision of Oak Lawn, Inc.,* 157 Ill. App. 3d 713, 716 (1987) ("the question of whether a particular taking authorized by a legislative enactment should not be construed constitutionally without a complete inquiry into the substance of the legislation and its ultimate purpose").

The City took Eychaner's property under the Tax Increment Allocation Redevelopment Act (Act) (65 ILCS 5/11-74.4-1 *et seq.* (West 2004)), which allows municipalities to use eminent domain within a "redevelopment project area * * * to achieve the objectives of the redevelopment plan and project." 65 ILCS 5/11-74.4-4(c) (West 2004). A "redevelopment plan" is a program "to reduce or eliminate" conditions that cause the area to be labeled as a "blighted area," a "conservation area," or an "industrial park conservation area." (Internal quotation marks omitted.) 65 ILCS 5/11-74.4-3(n) (West 2004). In addition to eminent domain, a municipality may acquire and dispose of property in any number of ways to further a redevelopment plan. See 65 ILCS 5/11-74.4-4(c) (West 2004) ("A municipality may *** acquire by purchase, donation, lease or eminent domain; own, convey, lease, mortgage or dispose of land and other property, real or personal, or rights or interests therein, and grant or acquire licenses, easements and options with respect thereto, all in the manner and at such price the municipality determines is reasonably necessary to achieve the objectives of the redevelopment plan and project.").

Under the Act, an improved area is considered "blighted" where "buildings or improvements are detrimental to the public safety, health, or welfare because of a combination of *5 or more"* blighting factors distributed throughout the area, including: dilapidated, obsolescent, or deteriorated buildings; code violations; illegal uses; excessive vacancies; lack of ventilation, light, or sanitary facilities; inadequate utilities; excessive or deleterious land use; the need for environmental remediation; lack of community planning; and declining land values. (Emphasis added.) See 65 ILCS 5/11-74.4-3(a)(1)(A)-(M) (West 2004).

Similarly, an improved area is considered a "conservation area" where "50% or more of the structures" are 35 years old or older, and the "area is not yet a blighted area but because of a combination of *3 or more* of the above blighting factors, the "area may become a blighted area." (Emphasis added.) See 65 ILCS 5/11-74.4-3(b)(1)-(13) (West 2004). (The blighting factors for a "blighted area" and a "conservation area" are, for the most part, identical. The differences between the factors are either insubstantial or irrelevant. Compare 65 ILCS 5/11-74.4-3(a)(1)(G) (West 2004) and 65 ILCS 5/11-74.4-3(b)(7) (West 2004); compare 65 ILCS 5/11-74.4- 3(a)(1)(M) (West 2004) and 65 ILCS 5/11-74.4-3(b)(13) (West 2004).)

The Act's definition of a "conservation area" is similar to the term's definition in the Urban Community Conservation Act, the statute at issue in *Gutknecht,* 3 Ill. 2d at 541. In the Act's legislative findings, the General Assembly noted that "conservation areas are rapidly deteriorating and declining and may soon become blighted areas if their decline is not checked." 65 ILCS 5/11-74.4-2(a) (West 2004). The legislature further found that the presence of blighting

factors in a conservation area endangers the area's "stable economic and physical development." *Id.* "[T]o remove and alleviate adverse conditions it is necessary to encourage private investment and restore and enhance the tax base of the taxing districts in such areas by the development or redevelopment of project areas." 65 ILCS 5/11-74.4-2(b) (West 2004). Redevelopment projects that eliminate blighting factors from conservation areas are, as the legislature found, "essential to the public interest." *Id.*

Eychaner does not contest the designation of the River West TIF as a conservation area. That is, he does not contest that the area is under the threat of becoming blighted. Under *Gutknecht,* the government may use the power of eminent domain to prevent future blight in a conservation area such as the River West TIF. *Gutknecht,* 3 Ill. 2d at 545. Eychaner incorrectly argues that *SWIDA's* holding foreclosed takings unless to eliminate already existing blight. Not so.

When determining the limits of the government's right to take private property, we will defer to the General Assembly's exercise of those powers. *Id.* at 543; *SWIDA,* 199 Ill. 2d at 236 ("Great deference should be afforded the legislature and its granting of eminent domain authority."). Under *SWIDA,* that deference evaporates when the public purpose behind the taking is a pretext, when a municipality uses eminent domain as a weapon to forcibly transfer property from one private owner to another. See *SWIDA,* 199 Ill. 2d at 240 ("While [SWIDA's] activities here were undertaken in the guise of carrying out its legislated mission, SWIDA's true intentions were not clothed in an independent, legitimate governmental decision to further a planned public use."); *Kelo v. City*

of New London, Connecticut, 545 U.S. 469, 478 (2005) (noting government would not be allowed "to take property under the mere pretext of a public purpose, when its actual purpose was to bestow private benefit."); *cf. Franco v. National Capital Revitalization Corp.,* 930 A.2d 160, 169 (D.C. 2007) (finding "pretext" to be valid affirmative defense to condemnation for economic redevelopment).

Recognizing the difference between a valid public use and a sham can be challenging. But a telling feature of sound public use in the context of economic redevelopment is the existence of a well-developed, publicly vetted, and thoughtful economic development plan. Such a plan was present in *Kelo,545* U.S. at 483-84, and *Gutknecht,* 3 Ill. 2d at 542-43, but absent in *SWIDA,* 199 Ill. 2d at 240 ("SWIDA did not conduct or commission a thorough study of the parking situation at [the racetrack]. Nor did it formulate any economic plan requiring additional parking at the racetrack."). A taking will likely pass constitutional muster where done in furtherance of a sound economic development plan, rather than the plan retroactively justifying the taking. *Cf. Romeo v. Cranston Redevelopment Agency,* 254 A.2d 426, 433 (R.I. 1969) ("governing bodies must either plan for the development or redevelopment of urban areas or permit them to become more congested, deteriorated, obsolescent, unhealthy, stagnant, inefficient and costly" (internal quotation marks omitted)).

The City had a plan when it created the PMD to promote industrial investment and prevent residential encroachment on existing factories. The City wanted to foster its industrial and commercial base while maintaining a diversified economy. In creating a large contiguous PMD, the City created an area where industrial and commercial users could rely on a

stable and predictable zoning scheme. That stability would encourage investment, modernization, and expansion of existing industrial facilities while minimizing future conflicts between industrial and residential property owners. Investment would promote job growth and increase tax revenues. The City logically found that, given the increasingly residential nature of the area surrounding the Loop, existing manufacturing firms had little incentive to invest in their facilities—let alone stay in their current locations—especially knowing that rising land values and taxes would soon make their current locations unfeasible if nearby residents complained about factory operations.

The City also created the River West TIF to further similar goals through the exercise of eminent domain and to act as a "financial mechanism" to implement the PMD. Before approving the River West TIF, the City thoroughly studied the proposed area and created strategies for its revitalization. One of the goals for the River West TIF, given the "inherent incompatibility between new residents and existing industry," was to minimize the conflict between residential and industrial uses. This included "protect[ing] and enhanc[ing] the remaining industrial areas already in proximity to the Loop," and creating buffer zones between industrial and residential uses. Anticipated benefits of the River West TIF included more economic and employment opportunities, increased tax revenue, and the prevention of blight. Moreover, in the ordinance authorizing the taking of Eychaner's land, the City found the eminent domain action in line with the goals of the River West TIF.

The findings associated with the PMD, the River West TIF, and the ordinance authorizing the taking of

Eychaner's land do not indicate a sweetheart deal to help Blommer avoid paying full price for Eychaner's land on the real estate market, as was the case in *SWIDA,* 199 Ill. 2d at 239-40. On the contrary, these plans show the City, in good faith, considering the public use of taking Eychaner's land, and finding it in conformance with the goals of the Act, the PMD, and River West TIF to check future blight, to minimize the conflict between residential and industrial uses, and promote the economic revitalization of a conservation area. See 65 ILCS 5/11-74.4-3(n) (West 2004); *Northeast Parent & Child Society, Inc. v. City of Schenectady Industrial Development Agency,* 114 A.D.2d 741, 742 (N.Y. App. Div. 1985) (finding valid public use in taking of school for industrial use to retain local industry); *General Building Contractors, LLC. v. Board of Shawnee County Commissioners of Shawnee County,* 66 P.3d 873, 883 (Kan. 2003) (holding development of industrial park valid public purpose of encouraging economic development).

Eychaner cites no evidence that the River West TIF and PMD were set up as a sham to take his property. He does not attack the findings of the study underlying the River West TIF, which noted the presence of four blighting factors, and the need for economic revitalization and reinvestment. See *Malec v. City of Belleville,* 407 Ill. App. 3d 610, 632 (2011) ("When a municipality approves the findings of blight in an ordinance, a presumption exists that the municipality's findings of blight were valid."). The goals of the River West TIF—to reduce blighting factors, prevent blight, foster the City's industrial base, prevent conflicts between residential and industrial uses, and retain existing industry—all constitute valid public uses. The taking of Eychaner's land to expand Blommer's industrial

campus land furthers each of these goals, and is thus a sound use of eminent domain.

Eychaner next argues that his property shows no signs of blight and therefore cannot be taken. Our supreme court long ago rejected this argument. See *City of Chicago v. Barnes,* 30 Ill. 2d 255, 257 (1964) ("the fact that there may be some sound buildings in the slum and blighted area is no defense to the proceedings. Property may be taken which, standing by itself, is unoffending, for the test is based on the condition of the area as a whole."); *Village of Wheeling v. Exchange National Bank of Chicago,* 213 Ill. App. 3d 325, 332 (1991) (same). The argument suffers from tunnel vision. The question of whether a taking prevents or eliminates blight focuses on the area in question—here, the River West TIF—not Eychaner's individual property.

Eychaner casts aspersions on the deal between the City and Blommer to expand Blommer's campus. Throughout his briefs, he implies that that deal was the impetus behind both the PMD and River West TIF. This is incorrect. Rather, the City conceived of the PMD and River West TIF as part of an economic revitalization plan. Blommer's objection to its inclusion in the PMD created a roadblock to the City's plan, which the City removed when it agreed to aid and fund the expansion of Blommer's campus. While numerous land owners objected to their inclusion in the PMD, the City only acted on Blommer's objection. Naturally, the City did not want the PMD to cause hardship to existing industry like Blommer—a result contrary to the stated purposes of the PMD and River West TIF. Accordingly, Eychaner's characterization is untrue.

Thus, the use of eminent domain to expand Blommer's campus passes constitutional muster because it aligns

with the goals of the City's economic development plan to retain existing industry, prevent conflicts between residential and industrial use, and promote investment and revitalization in a conservation area.

The trial court properly denied Eychaner's traverse and motion to dismiss.

The "Scope of the Project" Rule

Eychaner next argues that the trial court erred when it denied his motion *in limine* to exclude reference to his property's PMD zoning. He asserts that the zoning was inadmissible under the "scope of the project" rule or "project influence" rule. We agree. Generally, we review the denial of a motion *in limine* for an abuse of discretion. *Minos State Toll Highway Authority v. Heritage Standard Bank & Trust Co.,* 250 Ill. App. 3d 665, 673 (1993). But where the issue is one of statutory interpretation, our review is *de novo. People v. Childress,* 338 Ill. App. 3d 540, 547 (2003).

Generally, the valuation date of condemned property is the time of filing the petition for condemnation. *City of Chicago v. Riley,* 16 Ill. 2d 257, 264 (1959). The "scope of the project rule" is an exception to this rule, and is codified in the Eminent Domain Act, 735 ILCS 30/1-1-1 *et seq.* (West 2012). Regarding valuation, the rule states:

> "In the condemnation of property for a public improvement, there shall be excluded from the fair cash market value of the property any appreciation in value proximately caused by the improvement and *any depreciation in value proximately caused by the improvement.* However, such appreciation or depreciation shall not be excluded when property is condemned for a separate project

> conceived independently of and subsequent to the original project." (Emphasis added.) 735 ILCS 30/10-5-60 (West 2012) (formerly 735 ILCS 5/7-121 (West 2004) (no substantive differences)).

As Eychaner notes, this statue codifies the rule from *United States v. Miller,* 317 U.S. 369 (1943). See 3 Philip Nichols on Eminent Domain § 8A.01(3)(a)-(b) (3d ed. 1997).

The facts of *Miller* clarify application of the rule. In *Miller,* the government flooded an area which a railroad passed through. Miller, 317 U.S. at 370. To compensate the railroad, the government selected sites as possible alternatives for the railway. *Id.* at 371. In the intervening years between the flood and building the new rail line, a town sprung up on the now valuable waterfront property created by the flooding. *Id.* When time came to relocate the railway, the government filed an action in eminent domain to take the townspeople's land. *Id.* On the issue of just compensation, the trial court did not allow the jury to consider the increase in value that the flood caused, and the United State Supreme Court affirmed. The court reasoned that if "the public project from *the beginning* included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken." (Emphasis added.) *Id.* at 376-77. "The rule does not require a showing that the land ultimately taken was actually specified in the original plans for the project. It need only be shown that during the course of the planning or original construction it became evident that land so situated would probably

be needed for the public use." *United States v. Reynolds,* 397 U.S. 14, 21 (1970).

Similarly, application of Illinois's scope of the project rule requires a two-step project. That is, an "original project" must cause an increase or decrease in the value of the condemnee's land, followed by a separate project "conceived independently of and subsequent to the original" in which the condemnee's land is taken. 735 ILCS 30/10-5-60 (West 2012); see *Conti v. Rhode Island Economic Development Corp.,* 900 A.2d 1221, 1233-34 (R.I. 2006) ("scope-of-the-project-rule cases often involve drawn out governmental projects, piecemeal takings separated by noticeable gaps in time, and some evidence that, in the interim, the market values of neighboring properties increased because of the projects").

The rule ensures that the price of the condemned land reflects the condemnee's reasonable expectation that its land would or would not be taken as part of the original project. See *Merced Irrigation District v. Woolstenhulme,* 483 P.2d 1, 12 (Cal. 1971) ("the increase in value of land which is initially expected to be outside the boundaries of a proposed improvement, must be recognized to constitute a proper element of just compensation"). If the condemnee reasonably did not expect the government to include its land as part of the original project, the price should reflect any increase or decrease caused by that project. But if the condemnee did reasonably expect the taking as part of the original project, the price should not take the existence of that project into account.

The initial question is the meaning of the term "public improvement." See 735 ILCS 30/10-5-60 (West 2012). Courts read statutes to ascertain and give effect to the intent of the legislature as evidenced by the

plain and ordinary meaning of the statute's language. *People v. Donoho,* 204 III. 2d 159, 171 (2003). We may then consider "the reason for the law, the problems to be remedied, and the objects and purposes sought." *Id.* at 171-72.

"Public improvement" involves the ultimate use of the taken property or the public benefit resulting from the taking itself. The statute refers to the "public improvement" in terms of the purpose the taking. 735 ILCS 30/10-5-60 (West 2012). Where land is taken for a park or a highway or similar public project, the park or highway is the "improvement." But the government may also take land in a blighted area without a plan for future use. *City of Chicago v. Barnes,* 30 Ill. 2d 255, 256-57 (1964). Where there is no planned use, the definition of the "public improvement" becomes more nebulous. Then, the "public improvement" is the public benefit that results from the taking.

Here, the "public improvement" is Blommer's expanded industrial campus, the ultimate use of Eychaner's property.

We next turn to application of the Illinois "scope of the project" rule, which in this case turns on whether the taking and the depreciation caused by the PMD occurred as a single project or as separate projects "conceived independently" of each other. 735 ILCS 30/10-5-60 (West 2012). Like the takings in *Miller,* 317 U.S. at 376-77, this case involves a single project.

The record indicates that the creation of the PMD, the River West TIF, and the taking of Eychaner's land were all a single project. The City began the process of creating the PMD in late 1999 with the goal of protecting industrial users like Blommer. The City's study regarding the River West TIF indicated that it

was a "financial mechanism necessary to implement the goals and objectives of the PMD. The taking of Eychaner's land was not only an integral part of creating the PMD, but also served to carry out the goals of PMD and River West TIF. Namely, the preservation of the City's industry, prevention of conflicts between industrial and residential uses, job creation, and increased tax revenue.

The City argues that the inclusion of Eychaner's land in the PMD, and the corresponding depreciation, was not part of the project to expand Blommer's factory. But, the City and Blommer's conceived of the idea to expand Blommer's industrial campus during the process of creating the PMD. Blommer's support for the PMD was integral to its creation, and the City won that support by agreeing to help expand Blommer's facilities. Indeed, the expansion plans, which included Eychaner's land, were drawn up in May 2000, months before the City passed the ordinance creating the PMD.

The City further argues that Eychaner's land would have been included in the PMD even if it was not taken for Blommer's expansion. This, however, speculative. No evidence indicates what might have happened had the City not agreed to aid Blommer. There might have been no PMD at all, or perhaps the boundaries might have been altered. But speculation does not provide a basis to support the trial court's ruling. *Cf. Rogers v. Matanda, Inc.,* 393 Ill. App. 3d 521, 527 (2009) ("The existence of proximate cause cannot be established by speculation, surmise, or conjecture." (Internal quotation marks omitted.)); *Parks v. Brinkman,* 2014 IL App (2d) 130633, 67 ("Speculation cannot take the place of evidence."). Accordingly, the PMD zoning—as a depreciation proximately caused by the

improvement—should have been excluded under the Illinois "scope of the project" rule (735 ILCS 30/10-5-60 (West 2012)), and the trial court erred.

Eychaner characterizes the PMD zoning of his property as downzoning. We disagree. Generally, a collateral attack on the zoning at the time of a taking is not permitted in eminent domain proceedings. *Department of Public Works & Buildings v. Exchange National. Bank,* 31 Ill. App. 3d 88, 98 (1975). Downzoning is an exception. Where the condemnor rezones a parcel of land to depress its value in future eminent domain proceedings, the condemnee may attack the validity of the rezoning ordinance. *Id.* There is no evidence that the City rezoned Eychaner's land to depress its value.

Evidence of City's Motive behind PMD Zoning

Eychaner next argues that the trial court erred in excluding some evidence of how the City adopted the PMD zoning. Having held that the trial court erred in allowing evidence of the PMD zoning under the Illinois "scope of the project" rule, the jury should not consider how the City adopted the zoning. As our supreme court stated long ago, the purpose in taking the land, "[w]hether or not the project is necessary or advisable, or the necessity for taking the property, or whether more property is taken than necessary *** are not questions for the jury." *St. Clair County Housing Authority v. Quirin,* 379 Ill. 52, 57 (1942); see *Lake County Forest Preserve District v. O'Malley,* 96 Ill. App. 3d 1084, 1091 (1981) (holding that condemnor may not appeal to jury's self interests in valuing property).

Appraisers' Tesitmony

Eychaner raises three issues with the testimony at trial, including the trial court: (i) allowing the City's calling MaRous and Thouvenell, who had once been disclosed as Eychaner's experts; (ii) not permitting Eychaner to cross-examine MaRous on his opinion of the reasonable probability of rezoning; and (iii) refusing to strike MaRous' testimony after he violated its *in limine* order. We review each of these for an abuse of discretion, and find that the trial court abused its discretion in limiting the cross-examination of MaRous.

As to the first issue, Rule 218 states that "[a]ll dates set for the disclosure of witnesses *** shall be chosen to ensure that discovery will be completed not later than 60 days before the date on which the trial court reasonably anticipates that trial will commence, unless otherwise agreed by the parties. This rule is to be liberally construed to do substantial justice between and among the parties." Ill. S. Ct. R. 218(c) (eff. July 1, 2014). Failure to disclose an expert within the 60-day timeframe does not mean the trial court must automatically bar the witness. *Hartman v. Pittsburgh Corning Corp.,* 261 Ill. App. 3d 706, 719 (1994). "Rather, the imposition of sanctions for a violation of discovery rules has always been, and still remains, a matter largely within the sound discretion of the trial court." (Internal quotation marks omitted.) *Id.* The trial court should consider prejudice and surprise to the opposing party when developing a sanction for late designation of expert witnesses. *Id.* at 720.

The trial court did not abuse its discretion in allowing the City to call MaRous and Thouvenell. The City added these two witnesses on October 31, 2012,

when the trial was scheduled for November 5, 2012. The trial court declined to strike the two witnesses, but continued the start of trial to January 22, 2013. This course of action was well within the court's power. Because Eychaner formerly retained these witnesses, there was minimal prejudice to Eychaner's case that could not be cured by a simple continuance and verbal sanction. While the judge could have barred MaRous and Thouvenell from testifying, she was not required to do so.

Nevertheless, the trial court abused its discretion in limiting Eychaner's cross-examination of MaRous. Illinois Rule of Evidence 611(b) (eff. Jan. 1, 2011) states, "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." Where the trial court limited cross examination, we will only reverse if an abuse of discretion resulted in manifest prejudice to the limited party. *Bauer v. Memorial Hospital,* 377 Ill. App. 3d 895, 915 (2007).

But, the opinion of an expert is only as valid as the bases for that opinion. *Perona v. Volkswagen of America, Inc.,* 2014 IL App (1st) 130748, ¶ 51. A litigant may develop on cross-examination circumstances within the witness's knowledge or opinion that explain, discredit, or destroy the witness's testimony on direct although they may incidentally constitute new matter that aids the cross-examiner's case. *Anderson v. Mercy,* 338 Ill. App. 3d 685, 689,(2003). Facts, data, and opinions which form the basis of the expert's opinion but which are not disclosed on direct may be developed on cross-examination. *Id.* The cross-examiner may also elicit, emphasize, or otherwise call

attention to facts or opinions avoided or minimized on direct examination. *Id.*

On direct examination, MaRous testified as follows:

> "Q. [City's attorney:] *** [Y]ou provided an opinion of value of the subject property based on a highest and best use being commercial use permitted under PMD 5, correct?
>
> A. [MaRous:] As *part* of my opinions, yes.
>
> * * *
>
> Q. *** I want to show you Plaintiffs Exhibit No. 111.
>
> Do you recognize—do you understand what this says?
>
> A. Yes.
>
> Q. And can you read it to the jury?
>
> A. Michael MaRous' opinions as of August 24, 2005, the fair cash market value of the subject property based on a highest and best use being a commercial use permitted under the existing PMD 5 zoning regulation is $2,550,000. This is equivalent to $100 per square foot of land area.
>
> Q. And that is your opinion, correct?
>
> A. Under *that* highest and best use, correct." (Emphases added.)

On cross-examination, MaRous opined as follows:

> "Q. [Eychaner's attorney:] Now, [plaintiffs exhibit No. 111 is] you're opinion on the assumption that the highest and best use is a

commercial use permitted under the existing PMD 5 zoning regulations; is that correct?

* * *

A. That is correct.

* * *

Q. Under the—what are the Uniform Standards of Professional Appraisal Practice?

A. They are rules that appraisers are required to follow.

Q. And under the Uniform Standards of Professional Appraisal Practice, what is an extraordinary assumption?

A. It is simply an assumption of something that is not in place that could happen.

Q. Okay. And is it correct to say here that this opinion is based on an *extraordinary assumption* that the subject site remains bound to the PMD in perpetuity?

MR. ASARO [City's attorney]: Objection, motion in limine. Ask to be heard.

THE COURT: Overruled.

THE WITNESS [MaRous]: That is correct." (Emphasis added.)

The City's limiting of MaRous's opinion to a canned statement should not have limited Eychaner's cross-examination. MaRous stated on direct that the solicited opinion only reflected part of his valuation, and on cross he noted his opinion was based on an "extraordinary assumption" that Eychaner's property could not be rezoned. The court erred in disallowing Eychaner from probing the sufficiency of MaRous's

assumptions and the soundness of his opinions. *Halleck v. Coastal Building Maintenance Co.,* 269 Ill. App. 3d 887, 897-98 (1995).

The City argues that the trial court reasonably limited cross-examination of MaRous because Eychaner sought to elicit a different opinion from the one raised on direct. We disagree. It is possible to describe every conclusion an expert reaches as a separate opinion. It more accurate to describe MaRous's opinion regarding the reasonable probability of rezoning as an assumption underlying his valuation opinion. The weaknesses and strengths of assumptions underlying an expert's opinion constitute an area rightly explored and challenged on cross-examination. See *People v. Pasch,* 152 Ill. 2d 133, 179 (1992) (holding cross-examiner may probe expert's qualifications, experience, sincerity, weaknesses in basis, sufficiency of assumptions, soundness of opinion, and material reviewed but not relied on). Eychaner was entitled to impeach MaRous on cross-examination with his own opinion. This would undermine the reliability of MaRous's valuation opinion.

Last, the trial court did not abuse its discretion in refusing to strike MaRous' testimony for violating its *in limine* order. While MaRous did identify Eychaner as the one who originally retained him, the trial court struck that testimony. It later gave a curative instruction that the jury should disregard and not consider the statement. "A jury is presumed to have followed the court's instruction to disregard testimony." *Buckholtz v. MacNeal Hospital,* 337 Ill. App. 3d 163, 170 (2003). Eychaner submits no proof that the jury failed to follow the trial judge's instruction. See *Kamp v. Preis,* 332 Ill. App. 3d 1115, 1127 (2002) (a claim of prejudice from striken testimony without firm basis

does not indicate abuse of discretion). But the jury knowing that Eychaner originally retained MaRous may have compounded the other errors already noted. We are confident that the parties and witnesses will strictly comply with the trial court's rulings on motion *in limine* on remand.

The Jury Verdict

Eychaner argues that the jury's verdict was the product of a clear and palpable mistake based on the above errors. Because we are reversing for a new trial, we decline to address this issue.

Affirmed in part and reversed in part. Cause remanded.

APPENDIX E

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS COUNTY DEPARTMENT
LAW DIVISION

PROJECT: RIVER WEST TIF
Case No. 05 L 050792
Calendar: 2
Parcel BC-1

CITY OF CHICAGO, a municipal corporation,
Plaintiff,

vs.

FRED J. EYCHANER and UNKNOWN OWNERS,
Defendants.

FINAL JUDGMENT ORDER

THIS MATTER COMING ON TO BE HEARD upon the complaint for condemnation, as amended, of Plaintiff, THE CITY OF CHICAGO, a municipal corporation, for the ascertainment of the just compensation to be made for the taking by Plaintiff for the uses and purposes stated and set forth in its complaint, as amended, of the fee simple title to the real property identified in said complaint, as amended, as Parcel BC-1 and legally described in said complaint, and the Plaintiff, appearing by its attorneys, [redacted] Stephen Patton ,Corporation Counsel, Barbara Burke, Assistant Corporation Counsel, and Lenny D. Asaro of Neal & Leroy, LLC, Special Assistant Corporation Counsel; Defendant Fred J. Eychaner, appearing by his attorneys, Thomas Geselbracht of DLA Piper;

And it appearing to the Court that all parties defendant herein have been served with process in the matter and form as provided for by statute or have duly entered their appearances;

And the Court having jurisdiction of all the parties to this suit and the subject matter thereof, and all parties interested being before the Court, and the Court being fully advised in the premises and having ordered that a separate trial be had as to the real property described in the complaint, as amended, as Parcel BC-1, it was ordered that a jury be selected, examined and sworn to ascertain and report the just compensation to be made to the owner or owners of and party or parties interested in the property sought to be taken by these proceedings, according to the facts in the case as they have been made to appear from the evidence, and the jury, having heard the evidence adduced herein, the arguments of counsel, and instructions from the Court, brought in their verdict on January 28, 2013, in the amount of TWO MILLION FIVE HUNDRED THOUSAND DOLLARS AND 10/100 ($2,500,000.00).

Whereupon the parties move for judgment on said verdict and all persons interested being before the Court, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED AND ADJUDGED that the sum of money awarded by the jury in and by their verdict to the owner or owners of and party or parties interested in said real property described in the complaint filed herein, as amended, is just compensation for the taking of the fee simple title to said real property described as Parcel BC-1, and judgment is herein entered accordingly.

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff, within ninety (90) days from the date of entry of this order, shall deposit with the Treasurer of Cook County, Illinois, for the benefit of the owner or owners of and party or parties interested in Parcel BC-1 the sum of TWO MILLION FIVE HUNDRED THOUSAND DOLLARS AND 10/100 ($2,500,000.00) plus statutory interest on said sum from January 28, 2013, until the date of deposit of said sum with the Treasurer of Cook County, Illinois, as full compensation for the taking of the fee simple title to said real property identified as Parcel BC-1.

IT IS FURTHER ORDERED AND ADJUDGED that upon said deposit to the Treasurer of Cook County, Illinois, Plaintiff may enter in and upon Parcel BC-1 and use the same for its uses and purposes.

DATE:_____ ENTERED:

/s/ Margaret A. Brennan
JUDGE

[STAMP]
ENTERED
JUDGE MARGARET A.
BRENNAN-1846
FEB 11 2013
DOROTHY BROWN
CLERK OF THE
CIRCUIT COURT OF
COOK COUNTY, IL

DEPUTY CLERK:

APPENDIX F

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS COUNTY DEPARTMENT-LAW
DIVISION TAX AND MISCELLANEOUS
REMEDIES SECTION

No. 05 L 050792

CITY OF CHICAGO, a municipal corporation,

Plaintiff,

v.

FRED J. EYCHANER and UNKNOWN OWNERS,

Defendants.

MEMORANDUM DECISION AND ORDER

Plaintiff, the City of Chicago (City), a municipal corporation, filed a complaint to condemn the Defendant Fred J. Eychaner's (Eychaner) property in furtherance of its River West Tax Increment Financing Redevelopment Project pursuant to the Tax Increment Allocation Redevelopment Act (Act). 65 ILCS 5/11-74.4 (West 2003). Currently before the Court is, the Defendant's traverse, which challenges the City's authority to condemn the subject property. Eychaner alleges that the City failed to meet its burden in establishing a *prima facie* case for its authority in acquiring the subject property through the power of eminent domain.

Background

Traverse, a common law instrument, is the proper method by which a defendant objects to a condemning entity's authority to condemn. *Forest Preserve Dist. of DuPage County v. Miller,* 339 III. App. 3d 244, 250, 789 N.E.2d 916 (2d Dist. 2003). A property owner may elect to challenge a condemnation proceeding with a general traverse. *Forest Preserve Dist.,* 339 Ill. App. 3d at 250. The pleading requirements for a general traverse are minimal. *Forest Preserve Dist.,* 339 III. App. 3d at 252. Once a traverse is filed in Illinois, the burden is of the condemning body to make a *prima facie* case of the disputed allegations. *Lake County Forest Preserve Dist. v. First Nat'l. Bank of Waukegan,* 154 Ill. App. 3d 45, 51, 506 N.E.2d 424 (2d Dist. 1987). The condemning body establishes a *prima facie* case for the necessity of a condemnation by introducing a resolution or ordinance of the governing body which *makes* a finding that the condemnation is necessary. *Lake County Forest Preserve,* 154 Ill. App. 3d at 51. Once a condemning body has established a *prima facie* case, the burden shifts to the defendant to show that there was an abuse of discretion by the condemning body. *Lake County Forest Preserve,* 154 Ill. App. 3d at 51.

The subject property is known as 460 to 468 North Jefferson Street, Chicago, IL 60608, a vacant parcel of 25,440 square feet. Defendant Eychaner is an owner of the subject property, with other persons or entities (Unknown Owners) claiming some right, title or interest in fee, or some lesser estate in the property. The City is a municipal corporation organized as a Home Rule unit of local government under the Illinois Constitution of 1970.

Based on its Home Rule authority, the City Council passed an ordinance on December 11, 1991, creating the Community Development Commission (CDC), which assumed all "rights, powers, duties and obligations" of the former Commercial District Development Commission and former Department of Urban Renewal. Chicago Municipal Code § 2-124-020. Further, this ordinance enabled the CDC to recommend to the City that it "acquire by purchase, gift, lease, condemnation, option or otherwise any rights in real property" to carry out a redevelopment plan. Chicago Municipal Code § 2- 124-030.

A Joint Review Board (Board), established in accordance with the Act, 65 ILCS 5/11-74.4-5(b) (West 2003), convened to consider the approval of the River West Tax Increment Financing Redevelopment Plan (Plan). This Board recommended to the CDC the approval of the Plan, designation of the River West Redevelopment Project Area (Area), and adoption of Tax Increment Allocation Financing (TIF). On September 26, 2000, the CDC adopted Resolution 00-CDC-101, which accepted the Plan for review and fixed a time and place for a public hearing. On November 14, 2000, based on Resolution 00-CDC-112, the CDC recommended that the City Council approve the Plan. Pursuant to Sections 5/11-74.4-4 and 5/11-74.4-5 of the Act, the City made the Plan and other reports available to the public prior to holding a public hearing. Pursuant to 65 ILCS 5/11-74.4-6 (West 2003), notice of the hearing was given to all taxpayers having property within the Area.

On January 10, 2001, the City Council passed several ordinances. In one ordinance, the City Council approved the Tax Increment Redevelopment Plan for the Area. Journal of Proceedings of the City Council

(JOP), 49902-49982. The City Council found that the Area, as a whole, had not been subject to growth and development through private investment, and for this reason, it could not be expected to develop without adopting the Plan. According to the Plan, the Area qualified as a conservation area under the Act, making it eligible for classification as a redevelopment project area. The Plan listed the following among its goals and objectives: reducing or eliminating conditions that qualified the Area as a conservation area; providing economic development in the Area; employing residents; improving utilities, roadways, transit facilities, and infrastructure; and creating an environment that would contribute to the health, safety, and general welfare of residents. JOP, 49916.

Another ordinance on January 10, 2001 designated the area for redevelopment pursuant to the Act, noting that conditions existed in the Area to qualify it as a redevelopment project area and conservation area. JOP, 49984-49990. The last ordinance of January 10, 2001 adopted the use of TIF to finance the project's redevelopment costs pursuant to 65 ILCS 5/11-74.4-8 (West 2003). JOP, 49991-49997. In compliance with Section 5/11-74.4-4(c) of the Act, the City Council authorized the Corporation Counsel to negotiate on its behalf to acquire various parcels within the Area, including the subject property. The Corporation Counsel attempted to negotiate with the Defendant, but the parties were unable to agree on an acquisition price.

Based on the January 10, 2001 ordinances, the City Council adopted another ordinance on June 19, 2002 to acquire various parcels of property within the River West Tax Increment Financing District in accordance with the Plan through the power of eminent domain,

including the subject property. JOP, 88641-88642. In the ordinance, the City Council determined that it was "useful, desirable and necessary that the City of Chicago acquire" the property parcels and that the acquisition was "necessary and required for the home rule public purpose of improving a commercially blighted area." JOP, 88642.

On August 24, 2005, the City filed a complaint to condemn the subject property. On January 23, 2006, the Defendant filed a traverse, challenging the City's authority to condemn the subject property. The City Council approved a redevelopment agreement between the City and Blommer Chocolate Company (Blommer Chocolate) on February 8, 2006. Through this agreement, the City would convey the subject property to Blommer Chocolate for redevelopment in furtherance of the Plan's goals.

Based on these facts, the Defendant challenges the authority of the condemning body, the City of Chicago.

Discussion And Analysis

As a sovereign entity, the State of Illinois has an inherent right to condemn property, "subject to the state constitutional mandate that private property shall not be taken or damaged for public use without just compensation to its owner." *Southwestern Dev. Auth. (SWIDA) v. Nat'l City Envtl., L.L. C.,* 199 Ill. 2d 225, 235, 768 N.E.2d 1 (2002). The power of eminent domain can be used "only on the occasion, in the mode and by the agency prescribed by the legislature, and only those corporations to whom the legislature has delegated the authority can exercise such right." *St. Louis C. R. Co. v. Blumberg,* 325 Ill. 387, 393, 156 N.E. 298 (1927).

The Illinois Supreme Court has long held that the exercise of the eminent domain power is within the bounds of judicial scrutiny and that the determination of whether a given use is a public use is a judicial function. *People ex rel. Tuohy v. City of Chicago,* 394 III. 477, 481, 68 N.E.2d 761 (1946). At the same time, the Court has instructed that "great deference should be afforded the legislature and its granting of eminent domain authority." *SWIDA,* 199 Ill. 2d at 236. When reviewing the exercise of such authority, the Supreme Court has cautioned that the task of defining whether a taking is for a public use is not always an easy one.

> The purpose may be highly beneficial to the public as well as to private interests; and, on the other hand, the use put to land acquired by private interests by eminent domain may be highly beneficial to the public, without giving the latter any control over the property taken.
>
> The problem is rendered more complex by development arising since the adoption of the constitution, such as needs for acquiring property for social, medical or health purposes, as well as for the application of new inventions which may be adapted to public use. Uses for purposes not contemplated at the time may be, and frequently are, declared by the legislature to be public uses for which the power of eminent domain may be properly used.

People ex rel. Tuohy, 394 Ill. at 481-82.

In this case, Defendant makes two main arguments in support of the traverse. First, he argues that the River West Redevelopment Project Area is not a

blighted area and that absent blight, the City may not exercise the right of eminent domain solely for the purpose of redevelopment. To do so, Defendant contends, is to permit a taking without a public use. Second, Defendant claims that the taking is unconstitutional because the City will convey the land to Bloomer Chocolate, a private entity, under an agreement that already exists. Taking property from one private person and conveying it to another, Defendant argues, does not constitute a public use.

In addition, Defendant asserts that the City has not met its burden here because the June 19, 2002 ordinance refers to a "commercially blighted area," when in fact the area is unequivocally not blighted. It is, instead, a "conservation area," as the January 10, 2001 ordinance states and as the City concedes. According to Defendant, this factor is significant because to be a proper public use as a constitutional matter, the area must be blighted or a slum, whereas a lesser standard may be applied in determining whether an area qualifies as a redevelopment or TIF area for purposes of the Act.

The City maintains that the property is being taken in conformance with the Plan, which is designed to prevent blighted conditions to the commercial and industrial district and to conserve existing businesses and industry in the Area. According to the City, the Plan was properly applied after following the provisions of the Act, and the City Council then enacted various ordinances approving the designation as a redevelopment area and the use of tax incremental financing and authorizing the acquisition of Defendant's property. By producing competent evidence of these facts, the City asserts that it has satisfied its burden to establish its right to condemn.

In addition, the City counters Defendant's assertions by arguing that Illinois courts have consistently recognized the proper authority of the legislature to provide for condemning property in connection with a redevelopment and TIF plan under the Act. It maintains that no court has drawn a distinction between a blighted area and a conservation area for purposes of determining whether the taking involved a public use. In fact, the City asserts, the factors to be considered in designating an area as one or the other are similar. The City also argues that a redevelopment plan in a conservation district, as authorized by the Act, is a proper public purpose. Further, the City asserts that the conveyance of the property to Bloomer Chocolate does not offend the constitution because such a conveyance is consistent with the goals of the Plan and will be carried out in a manner that benefits the public by creating jobs, eliminating traffic problems, and increasing the tax base.

Defendant places great weight on the Supreme Court's decision in *SWIDA,199* Ill. 2d 225, to support his arguments. Its position is essentially that *SWIDA* requires this Court to hold that this taking violates Article I, Section 5 of the Illinois Constitution, without further proof.[1] Ill. Const. 1970, art. I, § 15.

Upon close examination of the Supreme Court's opinion in *SWIDA,* the Court has concluded that the case does not stand for the broad propositions that Defendant asserts. Although the Supreme Court found the taking in that case to be invalid, it did not employ

[1] Defendant's traverse challenges the taking under the Fifth and Fourteenth Amendment to the United States Constitution and the Illinois Constitution's takings clause. The arguments, however, have been confined to the public use requirement under the Illinois takings clause.

"a bright-line test" to determine whether the public was the primary beneficiary of the taking. *SWIDA,* 199 Ill. 2d at 240. Although it did not adopt the notion that the line between "public use" and "public purpose" had been totally obliterated, it used the terms interchangeably in many places in the opinion.

Additionally, it adhered to the established concept that "[t]he term "public purpose' is not a static concept. It is flexible, and is capable of expansion to meet conditions of a complex society that were not within the contemplation of the framers of our constitution."' *Id.* at 237 (quoting *People ex rel. Adamowski v. Chicago R.R. Terminal Authority,* 14 Ill. 2d 230, 236, 151 N.E.2d 311 (1958)). It reaffirmed that economic development is an important public purpose and that the taking of slums and blighted areas for purposes of redevelopment is a public use regardless of the subsequent use of the property. *SWIDA,199* Ill. 2d at 238-39.

With respect to a court's reviewing role, the Supreme Court recognized the universally-accepted rule that "'whether a given use is a public use is a judicial function.'" *Id.* at 237 (quoting *People ex rel Tuohy,* 394 I11 at 481). It did not, however, sway from the traditional principle that "[g]reat deference should be afforded the legislature and its granting of eminent domain authority." *SWIDA,* 199 III. 2d at 236.

In this Court's view, there were two determinative factors that led the. Supreme Court to invalidate the taking in *SWIDA.* First, the real purpose of the taking, as established by the facts, was to benefit Gateway, a private party. Significantly, the Court equated this taking with the one in *Limits Industrial R.R. Co. v. American Spiral Pipe Works,* 321 Ill. 101, 110, 151 N.E. 567 (1926), wherein the Court characterized the

taking as a "subterfuge to give color of right to the attempt to condemn land." In both cases, the evidence revealed private transactions preceding the decision to condemn the property that made the articulated purpose of the taking suspicious. Second, in *SWIDA,* the Authority's actions "were not clothed in an independent legitimate governmental decision to further a planned public use." 199 Ill. 2d at 240. The Authority did not conduct a thorough study of the parking situation, formulate an economic plan identifying the parking needs of the area, or circumscribe the amount of land required to be taken. These two factors are not present on this record.

While the City entered into an agreement with Bloomer Chocolate for the intended expansion of its business in the River West Redevelopment Project Area in February 2006, no facts akin to those in *SWIDA* or *Limits Industrial Railroad* have been shown. All that is present here is that the City entered into an agreement with Bloomer Chocolate several years after the Plan, TIF designation, and taking ordinances were duly enacted by the City Council. In short, this case is consistent with a long line of authority that holds that there is no constitutional prohibition against using public funds in a manner that provides benefits to private interests, as long as the money is used for a public purpose. *People ex rel. City of Canton v. Crouch,* 79 M. 2d 356, 368, 403 N.E.2d 242 (1980); *People ex rel. City of Urbana v. Paley,* 68 111. 2d 62, 368 N.E.2d 915 (1977); *City of Chicago v. Boulevard Bank National Ass* 'n, 293 Ill. App. 3d 767, 688 N.E.2d 844 (1st Dist. 1997); *Vill. of Wheeling v. Exchange Nat'l Bank of Chicago,* 213 Ill. App. 3d 325, 332, 572 N.E.2d 966 (1st Dist. 1991).

Furthermore, unlike the deficient economic and planning process in *SWIDA,* there was a comprehensive plan for the River West Tax Increment Financing Redevelopment Project with delineated goals and objectives. The City's Plan enumerates its specific goals and objectives. The City investigated the Area prior to determining that it qualified as a conservation area pursuant to the Act. JOP, 49944. According to the City's Plan, 91 of 103 buildings in the Area were 35 years of age or older and five of 13 of the Act's qualifying factors were satisfied. JOP, 49944. These factors included: deterioration of structures and surface improvements; presence of structures below minimum code standards; excessive vacancies; lack of community planning; and lag in growth of equalized assessed value. JOP, 49944-45.

In addition, the City adhered to statutory requirements in holding a public hearing, providing notice to taxpayers, and making relevant plans and documents available to the public. Aided with the Plan for the project area, the City then passed various ordinances in keeping with the statutory criteria of the Act. All of these factors legitimized the City's governmental decision to acquire the subject property, a crucial component missing from the taking process in *SWIDA.*

The Court finds nothing in the authority cited that would permit this Court to apply the rule that Defendant proposes, that in the context of economic redevelopment, "public use" under the Illinois Constitution permits the use of eminent domain only for purposes of clearing blight and slums and then only in "true" cases of blight and slums, not as the term blight is defined by the redevelopment and TIF statutes. As stated above, the notion that the legislature has broad

authority to define a public purpose was unaltered by the Supreme Court in *SWIDA*.

In the face of challenges on public purpose or use grounds in connection with economic redevelopment programs, courts have consistently upheld the taking where the evidence satisfied statutory criteria. *See, e.g., Chicago v. Boulevard Bank,* 293 Ill. App. 3d 767; *Wheeling v. Exchange Nat'l Bank,* 213 Ill. App. 3d 325; *City of Chicago v. Gorham,* 80 Ill. App. 3d 496, 400 N.E.2d 42 (1st Dist. 1980). In fact, the Appellate Court has found, in connection with a redevelopment plan of a downtown Chicago block, that "clearance and redevelopment of blighted commercial areas as well as residential slums satisfies a public purpose." *Chicago v. Gorham,* 80 Ill. App. 3d at 499 (citing *People ex rel. City of Urbana,* 68 Ill. 2d 62), wherein the Supreme Court found economic revitalization of Urbana's downtown to be a public purpose).

To the extent that Defendant distinguishes these cases on their facts, no facts have been presented to challenge the CDC and City Council's findings. To the extent that Defendant argues that all cases that the City cites involved blight, not a conservation area, the Court does not accept Defendant's narrow reading of the higher courts' decisions. Indeed, a reading of those cases persuades the Court that no basis exists to require a showing of blight and slums alone to establish a public use as required by the Illinois Constitution in this context.

In this case, the Plan and Project anticipated various benefits to the public, ranging from the construction of public improvements, like utilities, to the replacement of blight and vacated properties with new developments. JOP, 49914. In general, the plan was intended to conserve a commercial and industrial

area. Specifically, it was intended to preserve diminishing confectionary manufacturing businesses in Chicago, in the hope of creating additional industrial jobs, securing existing jobs, and expanding the tax base. No contrary evidence refutes the City's contention that the agreement with Bloomer Chocolate requires that company to improve and to use the property in conformance with the purposes of the Plan. The new configuration of the area is designed to cure traffic problems by providing additional space for truck loading and delivery. Given these factors, the Plan encompasses proper public uses and, on its face, contains no suggestion that Blommer Chocolate is the primary beneficiary of the redevelopment project, rather than the public in general.

Finally, the Court finds no reason to grant the traverse on the basis of the disparity between the language of the June 2002 ordinance and that of the plan and the January 2001 ordinance. It is possible that the City Council used the term "commercially blighted area" because that was the language previously used in the Municipal Code of Chicago for designating an economic redevelopment area. *See Chicago v. Gorham,* 80 Ill. App. 3d at 497 (citing Municipal Code of Chicago (1977), ch. 15.1, § 15.1 — 1(d)). Significantly, the definition provided in that ordinance included the same kinds of factors that go into the definition of blight and conservation area in the current Act. Nonetheless, whether the discrepancy results from a scrivener's error, as the City contends, or is the result of the City Council's looser construction of the term "blight" is not material to the issue presented. The City concedes that the area is not blighted, and the Plan and other ordinances make clear that the area is a conservation, not blighted, area.

The critical issues is the one the Court has discussed above. As stated previously, the Court finds no legal basis to conclude that the use of eminent domain for economic redevelopment must be predicated on a finding of blight alone. The cases by which this Court is bound establish that a legislative judgment that eliminating conditions that verge on blight is a proper public purpose. Given that being designated as either a blighted area or a conservation area is sufficient to qualify as a redevelopment project area under the Act, and given that the designation of a conservation area is less exacting with regard to the features that must be present to satisfy the statute, the inconsistent language in the acquisition ordinance is not sufficient to hold invalid the City's exercise of its condemnation authority. In short, the Plan, approval ordinance, and designation ordinance all relied upon the Area's classification as a conservation area, which, taken together, provide a basis for use of the City's condemning authority on this record.

As the Court was about to issue this Memorandum Decision and Order, it received Defendant's motion to cite a decision of the Ohio Supreme Court, *City of Norwood v. Homey,* Ohio St. 3d, 2006-Ohio 3799 (Ohio Supreme Court, July 26, 2006), as supplemental authority. In preparing this Order, the Court had read and considered the case when doing its own research. While the Ohio decision is similar in its analysis to *County of Wayne v. Hathcock,* 471 Mich. 445, 684 N.E.2d 765 (2004), for the reasons stated previously, the Court is not persuaded that it is consistent with our Supreme Court's decisions in *SWIDA* in particular and other controlling Illinois precedent in general.

For all the reasons stated, the Court finds that the City put on sufficient evidence to establish its

authority to take the property in question. No other evidence refutes the City *prima facie* case. Accordingly, the City has met its burden. The traverse is denied.

IT IS THEREFORE ORDERED:

1. The Defendant's traverse is denied.
2. The case is set for status on further proceedings and Defendant's motion to cite supplemental authority on August 29, 2006.

Date: Aug. 21, 2006 ENTERED:

/s/ Rita M. Novak 1741
Rita M. Novak
Associate Judge

[STAMP]
JUDGE RITA M. NOVAK
AUG 21 2006
Circuit Court-1741

APPENDIX G

IN THE
SUPREME COURT
OF ILLINOIS

No._____

CITY OF CHICAGO, a municipal corporation,

Plaintiff-Appellee-Respondent,

v.

FRED J. EYCHANER and UNKNOWN OWNERS,

Defendant-Appellant-Petitioner.

Petition for Leave to Appeal from the
Appellate Court of Illinois,
First Judicial District,
No. 1-19-1053

There Heard on Appeal from the
Circuit Court of Cook County,
No. 05 L 050792,

Hon. Rita M. Novak and Hon. James M. McGing,
Judges Presiding.

PETITION FOR LEAVE TO APPEAL
OF FRED EYCHANER

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Counsel for Defendant-
Appellant-Petitioner Fred Eychaner

E-FILED
6/12/2020 4:19 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

I.

PRAYER FOR RELIEF

Plaintiff-Appellant-Petitioner Fred Eychaner, pursuant to Illinois Supreme Court Rule 315, respectfully requests the Illinois Supreme Court to grant leave to appeal from the decisions of the Illinois Appellate Court, First Judicial District.

II.

JUDGMENT BELOW

There are two Appellate Court opinions in this case. The City of Chicago is taking Fred Eychaner's land, which is neither blighted nor a slum, to give it to his neighbor Blommer Chocolate Company,[1] in the name of economic development. Eychaner's Traverse challenging the constitutional basis for the taking was denied in 2006. After a jury trial on just compensation, the Appellate Court affirmed the denial in No. 1-13-1833 on January 21, 2015, holding that the taking was not for Blommer Chocolate's private benefit, but instead that preventing future blight was a proper public use. *City of Chicago v. Eychaner*, 2015 IL App (1st) 131833 ("*Eychaner I*"). However, the Appellate Court also reversed for a new trial on just compensation. After the second jury trial, Eychaner moved for reconsideration of the denial of the Traverse, both to seek further judicial review of the Appellate Court's earlier ruling and because the City had changed the economic development plan on which the taking was

[1] During the course of this case, Blommer Chocolate Company was sold to Fuji Oil Holdings, Inc. of Osaka, Japan, for approximately $750 million. (C. 8248) For clarity and consistency, references remain to "Blommer" or "Blommer Chocolate."

pretextually based. On May 11, 2020, the Appellate Court again affirmed in No. 1-19-1053 ("*Eychaner II*").

III.

POINTS RELIED UPON FOR REVERSAL OF THE APPELLATE COURT

1. Leave to appeal should be granted to resolve the conflict with the holding of the Illinois Supreme Court in *Southwestern Illinois Dev. Auth. v. National City Environmental, LLC*, 199 Ill.2d 225 (2002) ("SWIDA").

2. Leave to appeal should be granted because the prevention of future blight is too speculative a justification to constitute a proper public use or purpose for the taking of private property from one individual to give to another. To the extent *SWIDA* or *Kelo v. City of New London*, 545 U.S. 469 (2005) ("*Kelo*"), permit such takings, *SWIDA* should be overruled and *Kelo* lacks clarity, has been significantly criticized, and is inconsistent with prior U.S. Supreme Court precedent.

3. Leave to appeal should be granted because the City's stated purpose for the taking was pretextual, where the actual purpose of giving Eychaner's non-blighted land to Blommer Chocolate Company was determined before an economic development plan was adopted, and then where the City changed its plan from industrial retention to office and residential redevelopment before the taking was ever accomplished.

IV.

STATEMENT OF FACTS

This is an eminent domain case in which private property is being taken from one private individual to give it to another. The facts are undisputed:

- Defendant Fred Eychaner's property is a vacant parcel of 25,440 square feet at the southwest corner of Grand and Jefferson in Chicago, Illinois, located just to the north of the Blommer Chocolate factory. (C. 114)
- The City of Chicago has not found or determined the Eychaner property to be blighted, or a slum. (C. 121, 124)
- On August 24, 2005, the City filed this eminent domain proceeding to acquire all of the Eychaner property. (C. 74-81) According to the City,

> The City will obtain title to the subject property through the condemnation lawsuit. The property will be sold to Blommer Chocolate Company after its acquisition in accordance with the Redevelopment Agreement and the Agreement for the Sale and Redevelopment of Land between the parties pursuant to City Council authorization.

(C. 123) Aerial photographs of the immediate area are at C. 5528-31, 7563, 7566, 8322.

The Project for Which the Property is Being Taken

In 1999, the City of Chicago was working to create a new Planned Manufacturing zoning district ("PMD") to protect the Tribune Company's printing plant. (C. 1139) The new PMD was proposed to encompass not only the Tribune plant but also the Blommer Chocolate factory. (C. 1142-48) The change to PMD zoning, based on a planning study funded by the Tribune Company, was part of a concerted effort by the City to block the trend of residential development from "threatening" manufacturing jobs. (C. 734-35, 756-61;

see also C. 910) It would include setting up a tax increment financing ("TIF") redevelopment district to create incentives for industrial users to remain. (C. 758, 767)

Blommer had other concerns. As the trend of development in the area turned from industrial to residential, Blommer had opposed nearby zoning changes to residential because it was concerned about complaints from residents about its operation. (C. 731) If residential uses were developed on adjoining properties, the environmental standards Blommer faced might become more stringent. This threatened dire consequences, including that Blommer might not be able to continue its operations in Chicago. (C. 1061-62) On February 21, 2000, Blommer Chocolate officially expressed its opposition to the proposed PMD zoning. (Sup. C. 23-25) Blommer would try to make its operations more friendly to new residential neighbors, but was concerned that some would find the chocolate manufacturing operations intolerable. "If this were to happen, it is possible that the best solution for Blommer, and frankly, for the City, would be that Blommer relocate." (Sup. C. 24) And Blommer was looking to the day when it might then have to sell – "not being included in the proposed PMD would provide us with some flexibility in finding another use for the property." (Sup. C. 25; see also *Eychaner I*, ¶¶ 11-13)

At a public hearing on the proposed PMD, Blommer's president said that PMD zoning would keep Blommer from achieving "full value" when it came time to sell its land. (C. 864-67) The local alderman, Walter Burnett, conceded that there would be an adverse effect on Blommer. (C. 938) Ald. Burton Natarus agreed that Blommer posed "a very, very

serious problem," and both he and the Plan Commission chair urged the City's planning commissioner to meet with Blommer and "work something out." (C. 867-70, 941-44) Ald. Natarus was emphatic: "You can't leave. I won't let you leave." (C. 870)

Blommer's opposition to the PMD was a political bombshell. The Plan Commission deferred action on the proposed PMD (C. 951-56), while the local press ran stories about Blommer's opposition (C. 959, 962-67). The developer of Kinzie Station, four new residential towers to be located across the street south of Blommer Chocolate, intervened to try to obtain Blommer's support. (C. 738) At a March 27, 2000, meeting, the City and Blommer began to hammer out a resolution. Blommer Chocolate again conceded that the underlying issue was the PMD's effect on the value of Blommer's property, and countered by proposing City assistance to expand Blommer's industrial campus, including by acquiring adjoining land. (C. 1187) In a letter from the planning commissioner after the meeting, the City expressed its commitment to create a TIF district to finance infrastructure improvements and land acquisitions, but the quid pro quo was explicit: "Your public support for [the PMD zoning] is crucial in getting this measure through the legislative process." (C. 1200) Blommer understood that the Eychaner property was to be included in the potential acquisitions. (C. 739)

Blommer's site plan for its proposed industrial campus expansion designated the Eychaner property to be acquired by the City and used for "Extended New Employee Parking." (C. 1204) The Blommer proposal specifically called for the City to reimburse it for the acquisition of the Eychaner property. (C. 1358, 1375) On June 19, 2000, Blommer formally stated what it

would take to drop its opposition to the PMD, despite its concern that being included in the PMD would eventually require Blommer to sell its property at a substantial discount. (C. 1310-11) Blommer summarized its assessment of a "win/win situation for the parties involved" – approval of the PMD for the Tribune Company and the City; approval of zoning for Kinzie Station; and expansion of Blommer Chocolate's industrial campus. (C. 1311-12) Property acquisition for Blommer was explicit – including the Eychaner property, which along with two others "would be deeded to Blommer for $1". (C. 1313)

When the Plan Commission took up the PMD zoning again on August 17, 2000, it was supported by the Tribune Company (C. 1037), and the developer of Kinzie Station (C. 987, 1044, 1055). Fred Eychaner, owner of the subject property, opposed the PMD (C. 989-90), but Blommer dropped its opposition because of the City's promises (C. 1014). The Plan Commission recommended approval. (C. 1052)

To follow up on its commitments to Blommer Chocolate in the "land for PMD" deal, on September 27, 2000, the Chicago City Council formally approved the PMD, changing the zoning of the Eychaner property from M2-5 to PMD-5. (C. 1175-83) On January 10, 2001, the City Council designated the River West Tax Increment Financing Redevelopment Project Area and approved the River West Tax Increment Financing Redevelopment Plan ("River West TIF Plan") under the Tax Increment Allocation Redevelopment Act, 65 ILCS 5/11-74.4-1 et seq. (2000) (the "TIF Act"). (C. 197-296)

The TIF Act authorizes two kinds of redevelopment areas. A "blighted area" contains to a meaningful extent a threshold level of blighting factors reasonably

distributed throughout the project area. 65 ILCS 5/11-74.4-3(a) (2000). A "conservation area" also contains blighting factors, but not in the intensity or concentration of a "blighted area," such that designation as a "conservation area" means that an area is "not yet a blighted area" but "may become a blighted area." 65 ILCS 5/11-74.4-3(b) (2000). The River West TIF Plan, "intended to provide the financial mechanism necessary to implement the goals and objectives of [the] P.M.D" (C. 1215), designated the project area including Eychaner's land only as a "conservation area." (C. 104, 109, 211, 261)

Designating a redevelopment area and adopting a redevelopment plan under the TIF Act gives a municipality three tools. First is the ability to undertake public financing of redevelopment projects in the redevelopment area. 65 ILCS 5/11-74.4-8 (2000). On January 10, 2001, the City Council adopted tax increment financing for the River West TIF Redevelopment Project Area. (C. 287-93) Second is the ability to use eminent domain to acquire property. 65 ILCS 5/11-74.4-4(c) (2000). By ordinance on June 19, 2002, the City Council authorized the eminent domain acquisition of the Eychaner property. (C. 294-96) Third is the ability to enter into redevelopment agreements consistent with the TIF redevelopment plan. 65 ILCS 5/11-74.4-4(b)(2000). The City Council eventually approved a TIF redevelopment agreement with Blommer Chocolate on February 8, 2006, including conveyance of the Eychaner property to Blommer, and its inclusion in the expanded Blommer industrial campus. (C. 1480)

The result of this "unified, comprehensive solution" was a "win-win situation." (C. 750) According to Blommer's Jack Larsen, it was a "collective effort,"

which included the Kinzie Station re-zoning, the PMD re-zoning, the TIF district and the Blommer Chocolate industrial campus expansion and associated acquisitions. (C. 749-50) *Eychaner I* found, "[T]he City conceived of the PMD [zoning including the subject property] and River West TIF as part of an economic revitalization plan. . . . The record indicates that the creation of the PMD, the River West TIF, and the taking of Eychaner's land were all a single project." *Eychaner I*, ¶¶ 77, 90.

The Eminent Domain Suit

On February 21, 2002, Blommer Chocolate's real estate broker made a private offer to acquire the Eychaner property, because that was how the City wanted to handle it. (C. 747, 1426-31) When nothing came of the private offer, the City advised Mr. Eychaner on April 26, 2002, that it would seek authority to acquire the subject property. (C. 1434) On August 24, 2005, the City filed this eminent domain suit. (C. 74)

Eychaner filed a Traverse challenging the City's authority to use eminent domain as violating both the state and federal constitutions. (C. 135) On August 21, 2006, Judge Rita M. Novak issued a Memorandum Decision and Order denying defendant's Traverse and sustaining the City's Complaint to Condemn. (C. 382) Upon defendant's motion, and over the City's objection, Judge Novak certified her order denying the Traverse for immediate, interlocutory appeal (C. 642), but the Appellate Court denied Eychaner's Rule 308 Application for Leave to Appeal (C. 661).

The case then proceeded to jury trial, which returned a verdict of just compensation totaling $2.5

million. (C. 5467) Defendant appealed.[2] On January 21, 2015, the Appellate Court affirmed the denial of the Traverse, but otherwise reversed the judgment and remanded for a new trial on just compensation. *Eychaner I*. Upon remand, a second jury trial was held before Judge James M. McGing. It resulted in a verdict of $7.1 million. (C. 7519) Defendant's Post-Trial Motion acknowledged that defendant was bound by the 2015 Appellate Court ruling affirming the denial of the Traverse, but raised the state and federal takings issues to preserve them for further review beyond the Appellate Court. (C. 7588-90) Then, building on evidence that emerged at the second jury trial on just compensation, the Post-Trial Motion sought rehearing of the City's authority to take, based on the changed circumstances of the City's adoption of a new approach, policy and plan for economic redevelopment of the area that includes the property. (C. 7590-7600)

The Significance of the Plan, and the City's Change of Plan

Relying on *People ex rel. Gutknecht v. City of Chicago*, 3 Ill.2d 539 (1954), the Appellate Court in

[2] The City deposited the $2,500,000 first jury verdict, plus interest, with the Treasurer of Cook County on February 27, 2013. (C. 5580-81) Because defendant appealed the City's authority to use eminent domain to take his property, Eychaner made no attempt to collect the condemnation award. Because the same issue of the City's authority to use eminent domain is raised on this appeal, those funds remain on deposit with the Treasurer today. After the second jury trial, rather than deposit additional funds to increase the deposit to equal the amount of just compensation determined by the second jury, the City moved to stay enforcement of the Final Judgment Order. (C. 8356) That motion was granted (C. 8372), so the City has not yet paid the full amount of just compensation. The property has therefore not yet been taken.

Eychaner I held in 2015 that, even where the property is neither blighted nor a slum, like here, "the government may use the power of eminent domain to prevent *future blight* in a conservation area such as the River West TIF." *Eychaner I*, at ¶ 69 (emphasis added). The Appellate Court distinguished *SWIDA* and followed *Gutknecht* based on the existence here of the River West TIF Plan – "a well-developed, publicly vetted, and thoughtful economic development plan." *Eychaner I*, at ¶ 71-74.

> Thus, the use of eminent domain to expand Blommer's campus passes constitutional muster because it aligns with the City's economic development plan to retain existing industry, prevent conflicts between residential and industrial use, and promote investment and revitalization in a conservation area.

Id. at ¶ 78. The decision also relied upon *Kelo* to emphasize that, in the ordinary course, courts "defer to the [government]'s exercise of [the taking] powers." Id. at ¶ 70; id. at ¶ 63 (noting that its decision was "[g]uided by *SWIDA*, *Gutknecht* and *Kelo*.")

Before the second jury trial, however, the City changed its plan. Chicago has no comprehensive plan, but periodically the City does prepare partial planning documents for certain areas. (C. 8267, 8312) In the late 1980s and early 1990s, PMDs were developed as a zoning tool to combat displacement of industrial areas from encroaching residential uses by prohibiting residential and most retail uses within PMDs. (C. 8078) The City established PMD-5, including Eychaner's property, to further its then-goal to protect and preserve industrial and manufacturing uses in River West, historically one of a select set of industrial areas

in the City. (C. 7609, 7680-81; see expression of City's industrial retention policy at C. 1176-77; see also *Eychaner I*, ¶ 20)

In conjunction with PMD-5, the City established the River West TIF. It reiterated the City's broader objectives with regard to industrial retention, noting an inherent incompatibility between new residents and existing industry that could work to push the industrial users out, due to the rise in land values and property taxes, the incentive to sell to high-bidding residential developers, and the increase in complaints from neighboring residents. The City deemed it critical then to protect and enhance the remaining industrial areas. (C. 7609; see also *Eychaner I*, ¶ 22) The River West TIF Plan was to provide the financial mechanism, plus the use of eminent domain, to implement the goals and objectives of PMD-5. (C. 7681)

However, in the almost 20 years since the River West TIF Plan was adopted, the City has substantially revised its planning for the area, in keeping with the trend of development toward office and multi-family high-rise residential. (C. 8290; R. 2649) In 2016, Mayor Rahm Emanuel announced new goals and a change in direction. (C. 8291; R. 2653-54) A City study of the 700-acre North Branch Industrial Corridor, including the Eychaner property, found that, between 1990 and 2016, manufacturing uses in that area decreased from 73 percent to 20 percent (C. 8291-92, R. 2656-59), and manufacturing jobs decreased by 40 percent (C. 8112). Recognizing that PMD zoning was outmoded and not in alignment with current land uses and employment trends for the area, the Plan Commission adopted the North Branch Industrial Corridor Framework Plan (the "North Branch Plan")

on May 18, 2017 (C. 8208), nearly 12 years after this suit was filed.

The North Branch Plan – one of Chicago's area, but not comprehensive, plans (C. 8267; R. 2528) – recommended eliminating or reducing PMD zoning to more accurately accommodate existing and projected market demands, including an ongoing shift from traditional manufacturing towards high-tech offices and other uses. (C. 8079) The North Branch Plan also established modern land use parameters to assess future development proposals and land use transitions in the North Branch Industrial Corridor – including the subject property – to mixed-use, commercial, retail and residential projects. (C. 8078)

Implementing the City's New Plan

On July 26, 2017, the City Council adopted an ordinance to implement the North Branch Plan to accommodate mixed-use growth within the North Branch and River West areas while generating funds to relocate industrial uses to other locations in the City (the "Implementation Ordinance"). (C. 8207) The Implementation Ordinance rezoned the northern and southern portions of the North Branch Corridor, thereby eliminating the PMD in those areas. (C. 8241-47) The southern portion, encompassing the Blommer Chocolate redevelopment area and the Eychaner property, was re-zoned from PMD to Downtown Service District. (C. 8246, 8292; R. 2660)

Rather than preserving existing industrial uses, the Implementation Ordinance provided incentives to relocate industrial users out of the North Branch Corridor to other "receiving" industrial corridors in the City. It established both the Industrial Corridor System Fund, and "conversion areas" in former PMD

districts. (C. 8208) Any rezoning in a conversion area now requires payment of a conversion fee to the Corridor Fund. (C. 8209) However, industrial users who undertake to relocate their existing facilities from conversion areas to replacement sites in certain receiving corridors are exempted from paying the conversion fee to the City; instead, they may actually receive money from the Corridor Fund as an incentive for such relocation. (C. 8211-12)

The new North Branch Plan is consistent with the multi-million dollar trend of development in River West, since this suit was filed, from manufacturing to mid-rise or high-rise residential uses. "[T]hings have changed dramatically here in the past 10 or 15 or 20 years." (C. 8286; R. 2633-34; see also C. 8323 (showing zoning changes away from manufacturing between 1960 and 2018)) Kinzie Park to the east was developed beginning in 2001 and includes a high-rise multi-family structure, a mid-rise multi-family building, and townhomes. (C. 8283, 8290; R. 2623, 2650) Kinzie Station to the south represents even more significant private investment in residential development of former manufacturing property – four luxury high-rise towers containing over 1,600 dwelling units which began construction in 2003. (C. 8282, 8284, 8297, 8310; R. 2619, 2625, 2678, 2732) "There has been a significant renaissance of a whole new look of development." (C. 8286; R. 2633-34; see also aerial photograph of subject property, Kinzie Park and Kinzie Station at C. 8322)

The new developments have been matched by an increase in the value of real estate. For example, the first jury set the value of the subject property as of August 24, 2005, at $2.5 million. (C. 5467) On remand, the Circuit Court granted a new valuation date,

holding: "The real estate market and the value of the condemned property changed substantially [from 2005 to 2016]." (C. 6262) The parties later stipulated to yet another new valuation date of March 7, 2018 (C. 6844), and both presented valuation theories to the second jury premised on a highest and best use of the property as high-rise residential. That jury set the fair cash market value as of March 7, 2018, at $7.1 million. (C. 7519)

Meeting this rise in values, the City in 2017 and 2018 authorized a mega-development dubbed the "River District" on the Tribune Company's land immediately north of the subject property across Grand Avenue. (C. 8285, 8292-96; R. 2629, 2660-74) A 7-acre tract was rezoned to allow up to 310 residential units and 1,546,385 square feet of office and retail. (C. 8320) Between that tract and the subject property, a 30-acre campus was rezoned to allow up to 4,099 residential dwelling units and 8,474,692 square feet of office and retail. This area includes the Tribune printing plant, the protection of which was the original impetus for the single, unified project as part of which the property is being taken. *Eychaner I*, ¶¶ 77, 90.

Thus, the City itself has recognized that today, contrary to when the River West TIF Plan was adopted in 2001, private investment, and private development, abounds in the area. As a certified land planner testified at the second just compensation trial:

> The bottom line is, the area has gentrified, rejuvenated from a manufacturing core to a very high-end residential area, and the change has been significant. All of that's well expressed in the City's own plans in their North Branch Industrial Corridor Study. (C. 8297; R. 2679)

Despite the change in plan, Judge McGing denied defendant's Post-Trial Motion in a written Opinion and Order on April 24, 2019. (C. 8374) Defendant appealed, but the Appellate Court affirmed on May 11, 2020. *Eychaner II*.

V.

ARGUMENT

I. LEAVE TO APPEAL SHOULD BE GRANTED TO RESOLVE THE CONFLICT WITH THIS COURT'S HOLDING IN *SWIDA*.

In *SWIDA*, this Court held that private property may not be taken by eminent domain from one individual to give to another private party simply to spur economic development, unless the property is blighted or a slum. 199 Ill.2d at 238. On this point, *SWIDA* specifically observed that eminent domain must be used "with restraint, not abandon" (id. at 242), and that eminent domain is subject to a strict requirement that the property be taken for "public use" (id. at 238).

From the very beginning of this case, the conflict with *SWIDA* has been clear and acknowledged. In denying Eychaner's Traverse, Judge Novak certified for immediate appeal, stating that the issue of the City's authority to acquire the non-blighted property by eminent domain is "well-defined" here and "nearly a pure question of law." She stated, "The import, scope and meaning of the Illinois Supreme Court's decision in [*SWIDA*] give valid grounds for disagreement as to the question of law." (C. 642-43)

When the Appellate Court finally reached the issue in 2015, it improperly relied on *Gutknecht* to create an unwarranted exception to *SWIDA*. Since the *SWIDA* decision, most condemnation cases in which a chal-

lenge has been raised to the use of eminent domain for economic redevelopment have been diverted to the issue of whether the "slum or blight" exception to the public use requirement – as recognized in *SWIDA* (199 Ill.2d at 238) – applies. See, e.g., *Southwestern Illinois Dev. Auth. v. Al-Muhajirum*, 318 Ill. App. 3d 1005, 1009 (5th Dist. 2001) (blight exception applied to "virtually uninhabitable" property, located "in the heart of a blighted area," that included "unoccupied and unattended slums").

That could not be done here, because the "conservation area" in which the Eychaner property is located is by statutory definition neither blighted nor a slum. See 65 ILCS 5/11-74.4-3(b) (2000). Instead, the Appellate Court reached back to *Gutknecht*, a *pre-SWIDA* decision, to extend the "slum or blight" exception to a taking to prevent "future blight" where the taking is supported by a "well-developed, publicly vetted, and thoughtful economic development plan." See *Eychaner I*, at ¶¶ 69-78. In relying on *Gutknecht*, the Appellate Court here took the same position that the government agency had taken before the Illinois Supreme Court in *SWIDA*. That agency too relied on *Gutknecht* (199 Ill.2d at 237), as did Justice Freeman in his *SWIDA* dissent (199 Ill.2d at 261). But *SWIDA* did not include prevention of future blight as a proper public use. See 199 Ill.2d at 238. Nor did the *SWIDA* majority rely on *Gutknecht* (other than to cite it for the wholly conventional proposition that public purpose is not a static concept, see 199 Ill.2d at 237).

SWIDA's majority opinion, not Justice Freeman's dissent, is the law. *Ellguth v. Blackstone Hotel, Inc.*, 408 Ill. 343, 347 (1951). If *SWIDA* bars takings for mere economic development, with an exception only for eliminating actual slums and blight, then

Gutknecht's comment that takings may prevent blight, where as of yet there is no blight, must be of dubious continued validity. This Court should grant leave to appeal to overrule the Appellate Court 2015 decision[3] in order to restore the *SWIDA* rule that, while eminent domain may be used to eliminate slums and blight, it may not be used in the name of economic development for a naked transfer of private property from one private party to another.

II. LEAVE TO APPEAL SHOULD BE GRANTED TO BAR TAKINGS TO PREVENT FUTURE BLIGHT, AND *SWIDA* OR *KELO* MAY NOT PERMIT A DIFFERENT RESULT.

Kelo held that eminent domain may be used in the name of economic development even though it confers a substantial private benefit. In addition to *Gutknecht*, the Appellate Court relied upon *Kelo* to uphold the City's decision to wield eminent domain here in the name of addressing future blight, consistent with Illinois's "lock-step" approach to the Takings Clause. See *Hampton v. Metro. Water Reclamation Dist. of*

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[3] This petition in 2020 for leave to appeal the Appellate Court's decision in 2015 is timely, because the 2015 order remanded for a new trial on just compensation, did not dispose of all parties and all claims, and was thus interlocutory. See *People ex rel. Scott v. Silverstein*, 87 Ill.2d 167, 171 (1981). Interlocutory review is not encouraged, and under Supreme Court Rule 318 there was no waiver for failing to petition for discretionary leave to appeal from the 2015 order. Returning to the Circuit Court after conclusion of the Appellate Court's 2015 review still preserved the right to petition the Illinois Supreme Court for leave to appeal the 2015 decision. *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 36. The City moved to dismiss this appeal as untimely, but the Appellate Court refused, instead affirming its 2015 decision based on the law-of-the-case doctrine (*Eychaner II*, at ¶¶ 32-34), as Eychaner had requested, to pass the issue on to this Court for review.

Greater Chicago, 2016 IL 119861, ¶¶ 10-16. The Appellate Court further concluded that *Kelo* and *SWIDA* were consistent, i.e., that *SWIDA* permits takings in the name of economic development to prevent future blight.

The Appellate Court was wrong: *SWIDA* does not permit such takings. But even if this Court were to find otherwise, this case squarely demonstrates why *SWIDA* to that extent should be overturned and why *Kelo* was wrongly decided. "Future blight" is a concept far too subjective, speculative and broad to meaningfully restrain government power. Economic development and prevention of future blight are the opposite sides of the same coin. Improving the economy is the same as preventing its decline. Merely because a city thinks that a parcel may be put to a higher or better use is not enough to justify its taking. See *Southwestern Illinois Dev. Auth. v. National City Environmental, LLC*, 304 Ill. App. 3d 542, 552 (5th Dist. 1999), aff'd, 199 Ill.2d 225 (2002). A municipal plan to raise a property to a supposedly higher and better use with a sweetheart private developer, like the City's plan here, extends the concept of "future blight" as public use beyond all recognition. Other courts are in accord. See, e.g., *99 Cents Only Stores v. Lancaster Dev. Agency*, 237 F.Supp.2d 1123, 1130-31 (C.D. Calif. 2001) (rejecting the prevention of "future blight" as a proper public purpose to justify eminent domain; the position that "no redevelopment site can ever be truly free from blight because blight remains ever latent, ready to surface at any time" is "untenable" and "defies logic"); *City of Norwood v. Horney*, 110 Ohio St.3d 353, 383-84 (2006).

To the extent *Kelo* gave license for such takings, it created an unworkable rule vulnerable to being

overturned. The *Kelo* decision is poorly reasoned, lacks clarity, and fails to meaningfully constrain governmental action. The Takings Clause, like every other clause in the Fifth Amendment, is intended to limit government power. Although there are instances where eminent domain is necessary, the presumption – as reflected in the constitutional text – is that the use, development, and enjoyment of private property should belong to the property owner, not the government.

But Kelo flips that common-sense intuition on its head. It gives local governments virtually unbridled authority to engage in takings, so long as they are done in the name of economic development and supported by some kind of plan. It transformed a substantive check on government power – the public use requirement – into a procedural checklist for government takings. That is what happened here: after the City stated its goal of economic development and produced an *ad hoc* (not even comprehensive) plan, it had near-unfettered leave to give Eychaner's land to Blommer.

Kelo was subject to two strongly-worded dissents at the time of its publication, and calls for its overruling have only amplified since. See Gideon Kanner, Kelo v. New London: Bad Law, Bad Policy, and Bad Judgment, 38 Urb. Law. 201 (2006). Even Justice Stevens, the author of the *Kelo* majority opinion, has acknowledged that the decision was based on incorrect assumptions. Justice John Paul Stevens (Ret.), Kelo, *Popularity*, *and Substantive Due Process*, 63 Ala. L. Rev. 941, 946 (2012).

As Justice O'Connor noted in her *Kelo* dissent, eliminating "future blight" is not consistent with Supreme Court precedent prior to *Kelo*. Cases before

Kelo limited "public purpose" to when "the targeted property inflicted affirmative harm on society." 545 U.S. at 500 (O'Connor, J., dissenting). The Appellate Court should have followed that rule here. Leave to appeal should be granted to correct this error.

III. THE RATIONALE OF PREVENTING FUTURE BLIGHT WAS PRETEXTUAL, AND LEAVE TO APPEAL SHOULD BE GRANTED.

Even if *Kelo* remains in force, an exception identified in *Kelo* is that a taking cannot be supported by "the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." Here, Eychaner's land is being taken to bestow a private benefit on Blommer. The stated rationale of preventing future blight is a post hoc pretext, and leave to appeal should be granted consistent with Illinois precedent and *Kelo*.

A taking's actual purpose is the lodestar for determining whether the taking is for a proper public use. Determining whether an asserted purpose for the taking is mere pretext is the realm of the courts. "Unfortunately, the *Kelo* majority did not define the term mere pretext." *Franco v. Nat'l Cap. Revital. Corp.*, 930 A.2d 160, 172 (D.C. 2007) (internal quotation marks omitted). Instead, Justice Kennedy's concurrence says a court:

> . . . should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court . . . must strike down a governmental classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.

545 U.S. at 491 (Kennedy, J., concurring). The *Kelo* taking passed muster because the "identities of most of the private beneficiaries [of the New London redevelopment plan] were unknown at the time the city formulated its plans." Id. And the Appellate Court did recognize the possibility of pretext here, but rejected it based on the existence of the City's plan to preserve industrial uses. *Eychaner I*, at ¶ 70-72. But this case is precisely the opposite of *Kelo*. The identify of the private beneficiary of the taking here – Blommer Chocolate – was not unknown before the plan supposedly to combat future blight and preserve the existing industrial use was adopted. Instead, the benefit to Blommer was part of the whole deal. The Appellate Court's statement that the "land for PMD deal" was not the impetus behind both the PMD and the River West TIF Plan (id., at ¶ 77) is contradicted by its own holding that they, plus the taking from Eychaner and the giving to Blommer, were all part of a single, unified project (id., at ¶ 90). The plan was in fact adopted specifically to keep Blommer Chocolate from leaving Chicago. Under these circumstances, the speculative rationale of combatting future blight through a pretextual, gerrymandered development plan could not be a proper public use.

Now, even that plan has been replaced by the City with a new plan, not to preserve industrial uses, but to replace them with offices and residences. Public use is determined as of the time of the taking, which here has not yet occurred. The threat of future blight is no longer; after almost 20 years Blommer is not failing but has been sold to the Japanese for three-quarters of a billion dollars. Yet still the old plan is advanced to justify this taking. What was pretext when this case started in 2005 cannot now be the foundation for a taking as time, the trend of development and city

plans have moved far beyond it. It is time to acknowledge that this is a naked taking for private benefit.

Illinois rejects eminent domain for uses that appear proper on their face but whose true purposes are impermissible. See *Deerfield Park Dist. v. Progress Dev. Corp.*, 22 Ill.2d 132 (1961) (taking to create a park but actually to block integrated housing). So do other states.[4] When the legislative determinations are mere pretext to cover takings for private benefit, the courts must step in to prevent improper use of the eminent domain. Leave to appeal should be granted to reverse this taking and dismiss this case.

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[4] See, e.g., *Pheasant Ridge Assocs. Ltd. P'ship v. Town of Burlington*, 506 N.E.2d 1152, 1157 (Mass. 1987) ("The public purposes for which the site purportedly was to be taken were not purposes for which the town intended in good faith to take and use the property. They were selected as a device in the erroneous belief that, as generally lawful public purposes, they would make the taking proper."); *New England Estates, LLC v. Town of Branford*, 988 A.2d 229, 252 (Conn. 2010) (bad faith taking violates the takings clause); *Earth Management, Inc. v. Heard County*, 283 S.E.2d 455, 459-60 (Ga. 1981); *County of Hawaii v. C & J Coupe Family Ltd. P'ship*, 198 P.3d 615, 647 (Haw. 2008); *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 337 (Penn. 2007).

VI.

CONCLUSION

For each of the foregoing reasons, the Illinois Supreme Court should grant leave to appeal. Fred Eychaner respectfully requests this Court to reverse the judgment below and to order this case dismissed.

FRED EYCHANER

June 12, 2020 By: /s/ Thomas F. Geselbracht
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