SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX A

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

[Filed January 23, 2006]

No. 05 L 050792
Parcel BC-1

CITY OF CHICAGO,

Plaintiff,

v.

FRED J. EYCHANER and UNKNOWN OWNERS,

Defendants.

TRAVERSE

Defendant Fred J. Eychaner, by DLA Piper Rudnick Gray Cary US LLP, his attorneys traverses the allegations of the Complaint for Condemnation of the City of Chicagoan that the City is without authority to file said Complaint or take the subject property via eminent domain. In support of this Traverse, defendant states:

1. On January 10, 2001, the City of Chicago (the "City") designated defendant's property for acquisition herein as part of the River West Tax Increment Financing Redevelopment Project pursuant to 65 ILCS 5/11-74.4-1 *et seq*., the Tax Increment Allocation Redevelopment Act (the "Act").

2. The City adopted an ordinance on June 19, 2002 authorizing the acquisition of defendant's property through the power of eminent domain.

3. The City's June 19, 2002 ordinance of acquisition was based on the City's January 10, 2001 ordinance of designation.

4. The City's June 19, 2002 ordinance of acquisition purported to find the taking of defendant's property to be "necessary and required" for the public purpose of improving a "commercially blighted area."

5. However, the city's January 10, 2001 ordinance of designation did not find the River West Tax Increment Financing Redevelopment Project Area to be a "commercially blighted area." The City's January 10, 2001 ordinance of designation did not find the River West Tax Increment Financing Redevelopment Project Area to be blighted at all. Instead, the City's January 10, 2001 ordinance of designation found the River West Tax Increment Financing Redevelopment Project Area to be a "conservation area" under the Act.

6. The River West Tax Increment Financing Redevelopment Project Area did not and does not meet the Act's definition of a blighted area, and the eligibility study approved by the Chicago City Council only found the River West Tax Increment Financing Redevelopment Project Area to be a "conservation area" under the Act.

7. The public purpose for which the City is attempting to use the power of eminent domain herein is not to clear slums or eliminate blight, but for economic redevelopment.

8. The City of Chicago is attempting to take defendant's property by the power of eminent domain in order to convey the property to another, favored developer.

9. The City's use of eminent domain to take defendants' property does not satisfy constitutional

requirements. Specifically, the City intends to transfer defendant's property to another private entity for that private entity's personal profit. The City's intended use is neither a proper public use nor a proper public purpose under the law, and, therefore, the taking of the defendant's property violates the 5th and 14th Amendments to the United States Constitution and Article I, Section 15 of the Illinois Constitution of 1970:

A. The City intends to transfer the property after the taking to a private entity to be used for a private purpose and private use.

B. The proposed use confers a benefit merely an individual, private entity as opposed to the community at large.

C. No law controls the proposed private use to be made of the property after its taking by the City and transfer to a private entity.

D. The public will not reap the benefit of public possession of the property and a private entity will exercise control over the property and not the municipality.

E. The public will not be entitled to use the property, not as a mere favor or by permission of the owner, but by right.

10. The taking of the defendant's property by the City is not the least restrictive means consistent with the attainment of the City's goals, and therefore the taking of the defendant's property by the City violates the 5th and 14th Amendments to the United States Constitution and Article I, Sections 2 and 15 of the Illinois Constitution of 1970.

WHEREFORE, defendant Fred J. Eychaner traverses the Complaint for Condemnation and moves

this Court to dismiss the complaint with prejudice and to assess attorneys' fees and costs against plaintiff pursuant to 735 ILCS 5/7-123.

FRED J. EYCHANER

By: /s/ Thomas F. Geselbracht]
One of His Attorneys

Thomas F. Geselbracht
Karen S. Way
DLA PIPER RUDNICK GRAY CARY US LLP #41519
203 North LaSalle Street
Suite 1800
Chicago, Illinois 60601
(312) 368-4094/2152

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

CERTIFICATE OF SERVICE

I, Thomas F. Geselbracht, an attorney, hereby certify that I caused the foregoing TRAVERSE to be served upon:

Rick Taylor
Assistant Corporation Counsel
City of Chicago
Suite 1610
30 No. LaSalle Street
Chicago, Illinois 60602

by depositing a copy in the United States Postal Service mail drop at 203 North LaSalle Street, Chicago, Illinois, addressed to the above counsel and with proper postage pre-paid, before 5:00 p.m. this 23rd day of January, 2006.

/s/ Thomas F. Geselbracht

SUPPLEMENTAL APPENDIX B

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

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NO. 05L 50792
PARCEL: BC-1
CALENDAR 2

———

CITY OF CHICAGO, a municipal corporation,

Plaintiff,

v.

FRED J. EYCHANER and, UNKNOWN OWNERS

Defendants.

———

PROJECT: RIVER WEST TIF CONDEMNATION

———

THE CITY OF CHICAGO'S RESPONSE TO DEFENDANT'S TRAVERSE

NOW COMES the Plaintiff, CITY OF CHICAGO, a municipal corporation, by and through its attorneys, MARA S. GEORGES, Corporation Counsel, STEVEN J. HOLLER, Chief Assistant Corporation Counsel, and RICK TAYLOR, Assistant Corporation Counsel, and responds to Defendant's Traverse filed herein by Defendant, FRED J. EYCHANER, by and through his attorneys THOMAS F. GEISELBRACHT and KAREN S. WAY, DLA Piper Rudnick Gray Cary UA LLP, as follows:

BACKGROUND

The City is acquiring the property commonly known as 460 to 468 North Jefferson Street, Chicago, IL 60608 and further identified by Property Index Numbers 17-09-107-004-0000, 17-09-107-005-0000 and 17-09-107-006-0000 ("Property") in the furtherance of the redevelopment of the River West Redevelopment Project Area ("Area") pursuant to Tax Increment Allocation Financing ('TIF") in accordance with the Illinois Tax Increment Allocation Redevelopment Act, 65 [Illegible] 5/11-74.4-1, et seq. (2004) ("Act").

The Joint Review Board established in accordance with Section 5/11-74.4-5 ("Board") was convened concerning the approval of the River West Tax Increment Financing Redevelopment Plan ("Plan"), designation of the Area, and adoption of the TIF. This Board recommended to the Community Development Commission of the City of Chicago ("CDC") the approval of the Plan, designation of the Area, and adoption of Tax Increment Financing ("TIF"). Based upon this, the CDC, on November 14, 2000, as adopted in Resolution 00-CDC-112 (See attached as Exhibit A) recommended to the City Council that it approve the Plan and the other related matters.

As a function of the CDC meeting held on November 14, 2000, the City pursuant to Sections 5/11-74.4-4 and 5/11-74.4-5 of the Act, was required to hold a public hearing concerning the approval of the Plan, the designation of the Area as a "redevelopment area" pursuant to the Act, and the adoption of the TIF within the Area all pursuant to the Act. The Plan and all eligible reports had previously been made available to the public for inspection and review in advance of such public meeting in accordance with requirements under the Act beginning September 26, 2000.

In accordance with Section 5/11-74.4-6 of the Act, notice of the hearing was given to all taxing districts having property within the Area and the Department of Commerce and Community Affairs of the State of Illinois by certified mail on August 2, 2000. Also, notice was given to the taxpayers within the area by certified mail on August 7, 2000. Publication notice of the hearing was published in the Chicago Sun-Times and Chicago Tribune on October 16, 2000 and October 23, 2000.

After the CDC's passage of Resolution 00-CDC-112 City Council on January 10, 2001, passed separate ordinances approving the Plan (Journal of Proceedings of the City Council "J.O.P." pages 49901 to 49982, see Exhibit B), designating the area for redevelopment (J.O.P. pages 49983 to 49990, see Exhibit B) and adopting the use of TIF to finance redevelopment costs (J.O.P. pages 49991 to 49998, see Exhibit B).

The City Council found that in accordance with the Act, the area on a whole has not been subject to growth and development through investment by private enterprise and would not be expected to be developed without adoption of the Plan. Additionally, in compliance with Section 5/11-74.4-4 (c) of the Act, and in accordance with the Plan, the City Council authorized the Corporation Counsel to negotiate on behalf of the City for the acquisition of the certain parcels contained within the Area, and if negotiations were not successful, institute eminent domain proceedings to acquire such parcels.

On June 19, 2002, the City Council adopted an ordinance which authorized the acquisition of the subject property in accordance with the River West Redevelopment Plan because the acquisition is necessary and required for the home rule public

purpose of improving a *commercially blighted area* (See Exhibit C).

As a premise to the Plaintiffs response, it is important to note that in accordance with §7-102 of the Eminent Domain Act, there is a duty on a sanctioned condemning public body to follow certain necessary procedures when condemning property within the State of Illinois (735 ILCS 5/7-102 (2002)). A condemnee can challenge the condemnor's motives or necessity of the taking on various grounds which indicate that the condemning party has violated those requirements. Therefore, if for some reason a party challenges a condemning body's right to condemn, the condemning body by competent prima facie evidence shifts the burden to the Defendant by showing proof of its right to condemn (*Lake County Forest Preserve v First National Bank of Waukegan*, 154 Ill.App. 3d 45, 506 NE2d 424 (1987)).

With the aforementioned being stated by the City, this Court should deny the Defendant's Traverse for the following reasons. As prima fade evidence, the City has provided valid ordinances and resolutions which authorize the City to acquire the parcels in order to further the redevelopment purposes in the TIF Act and Plan. Within the Ordinances and in accordance with the Plan, the City Council authorized the acquisition of the Property for the necessary public purpose of advancing the redevelopment goals and objectives of the Act and the Plan in redeveloping an area that qualified as a "conservation area" under the Act (See Exhibit A).

THE CITY'S AUTHORITY

First and foremost, the City is a home rule unit of government by virtue of the provisions of the

Constitution of the State of Illinois of 1970 and as such it may exercise any power or perform any function pertaining to its government and affairs. One such function is to acquire real property by condemnation at the CDC's recommendation pursuant to Chapter 2-124-030 of the Municipal Code of the City of Chicago("Code"). Chapter 2-1240-010(f) defines a "redevelopment area" as "a slum, blighted, deteriorated or deterioration area" where certain conditions are present and provides that as long as an area is approved as a redevelopment area pursuant to a redevelopment plan, the City has authority to exercise eminent domain in such area.

The Plan found that it was necessary to redevelop and designate the Area as a "conservation area" to prevent blighted conditions to the Area's industrial and commercial district and to conserve existing businesses and industry in the Area. The City further found that the Plan met the statutory requirements for a "conservation area" and could be designated as a "redevelopment project area" under the Illinois Tax Increment Allocation Redevelopment Act (J.O.P. pages 49907, January 10, 2001)).

This Court and other Illinois Courts have recognized that where a corporate authority has passed resolutions and ordinances in accordance with its authority to use eminent domain as a tool to acquire property, it has established prima facie evidence of its authority. See *City of Chicago v Walker*, 50 Ill.2d 69, 71, 277 NE2d 129, 130 (1972), *School Trustees v Sherman Heights Corp.*, 201112d 357, 359, 169 NE2d 800, 802 (1960) and *Village of Wheeling v Exchange National Bank of Chicago*, 213 Ill.App.3d 325, 572 NE2d. 966 (1991). In *Village of Wheeling*, where the Village was seeking to acquire property pursuant to a TIF Rede-

velopment Plan, the Court found that the Village's use of eminent domain was based upon the classification of the land as a *blighted* and a *conservation area* and, therefore, the Village established a prima fade case for condemnation (Id. 331)(emphasis added). Accordingly, where the ordinances and resolutions establish the right to acquire the property, this Court cannot and should not substitute its judgment or rethink the legislatures's judgment in passing said ordinances or resolutions. As such, the Court must uphold the legislation unless there is no conceivable basis for legislative judgment or findings.

The City has made a prima facie case in establishing it's authority to acquire the subject property by submitting the enabling ordinances which show that the taking is necessary and pursuant to public purposes. As such, the City has established by prima facie evidence its right to acquire and the burden shifts to the Defendant to show there was an abuse of discretion by the corporate body. *Lake County Forest Preserve District v First National Bank of Waukegan*, 154 Ill.App.3d 45, 506 NE2d 424 (1987).

ISSUES PRESENTED

1. Whether the Ordinance dated January 10, 2001 designating the Area as a "Conservation Area" and the Ordinance dated June 19, 2002 authorizing the acquisition of the subject property which states that the acquisitions of the three(3) desired parcels is because the properties are in a "Commercially Blighted Area" negates the City's necessity and public purpose of acquiring the subject property in the furtherance of the Redevelopment Plan.

2. Whether the City's use of eminent domain to acquire the subject property and the eventual

conveyance to a private entity is not a proper public purpose as allowed pursuant to the Eminent Domain Act.

3. Whether the City's use of eminent domain to acquire the subject property and the eventual conveyance to a private entity is not a proper public use as allowed pursuant to the Eminent Domain Act.

4. Whether the taking of the Subject property by the City pursuant to the Eminent Domain Act as a necessary and appropriate taking violate the 5th and 14th Amendments of the United States Constitution and Article 1, Section 2 and 15 of the Illinois Constitution of 1970.

PLAINTIFF'S RESPONSES

The Defendant raises four (4) issues which the Defendant believes support its request to this Court that it should grant a traverse and conclude that this matter should be dismissed. Many of issues raised by the Defendant do not meet the sufficiency test of providing clear and convincing evidence to establish grounds for traverse because most of the arguments are not supported by any factual evidence nor are the arguments based upon existing statutory and/or case law governing eminent domain matters. Nonetheless, the City will address each of arguments posed by the Defendant.

I. The authority approved and adopted by the City Council in the January 10, 2001 Ordinance as to the purpose for acquiring the property within the designated "Conservation Area" clearly indicates its public purpose for acquisition.

The Defendant alleges that the City does not have the authority to acquire because the January 10, 2001

Ordinance authorizing acquisitions of parcels within the River West Area refers to the redevelopment area as a "conservation area" while the June 19, 2002 Ordinance authorizing the acquisition parcels in question refers to the redevelopment area as a "commercially blighted area". Defendant gives extreme and undue weight to this linguistic distraction. This is unwarranted because, under both the Municipal Code and the Act, a redevelopment area is a redevelopment area.

Section 65 ILCs 1-74.4-3(n) of the Tax Increment Allocation Redevelopment Act ("Act") states in pertinent part:

> "Redevelopment plan" means the comprehensive program of the municipality for development or redevelopment intended by the payment of redevelopment project costs to reduce or eliminate those conditions the existence of which qualified the redevelopment project areas as a "blighted area" or "conservation area" or combination thereof or "industrial park conservation area . . ."

Additionally, the "Act" in Section 65 ILCS 5/11-74.4-2(b), states in pertinent part:

> "It is hereby found and declared that in order to promote and protect the health safety, morals, and welfare of the public, that blighted conditions need to be eradicated and conservation measures instituted, and that redevelopment of such areas be undertaken; that to 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. *The eradication of blighted areas and treatment and improvement of conservation areas and industrial park conservation areas by redevelopment projects is hereby declared to be essential to the public interest.* [Emphasis Added]"

It is clear from the language used by the state legislature in the creation of the Act, that regardless of whether the purpose for acquisition is to eliminate blighted conditions or to prevent blight in a conservation area, both such acquisitions serve a essential public purpose. No Illinois Court has ever said a municipality has any different acquisition or condemnation powers in an area that qualifies as a "conservation area" under the TIF Act than in an area that qualifies as a "blighted area" under the TIF Act. The TIF Act itself expressly recognizes both are redevelopment areas on equal footing, defining "redevelopment project area" as "an area designated by a municipality . . . in respect to which municipality has made a finding that there exists conditions which cause the area to be classified as . . . a blighted area or conservation area." 65 ILCS 5/11-74.4-3(p).

Defendant asks this Court to focus solely on three words and to ignore the Municipal Code, TIF Act, the CDC Resolution, the Plan and the City's three 2001 Ordinances all of which clearly establish the public purpose for the taking and the Area's "redevelopment project area" status in the June 19, 2002 Acquisition Ordinance. To focus on three words and to ignore all such prior approvals or findings would be inappropriate.

At worst the use of the phrase "commercial blighted area" is a scrivener's error. This phrase does not

appear in the TIF Act, but is found in a parallel redevelopment Statute, 65 ILCS 5/11-74.2, et seq. that appears in the Municipal Code Section of Illinois Compiled Statutes. Also, the idea that because of the perceived ambiguity, the City Council in approving the June 19, 2002 Ordinance was doing so under the mistaken premise that the property was located only in a blighted area. To accept this premise as a valid argument would be the furtherest from the intent and purpose of the City Council when it adopted the TIF Plan in January 10, 2001: Section 5 of the 2001 Ordinance makes clear that derives from the City's authority and purpose for the taking in "Section 5/11-74.4-4 (c) of the Act and the Plan, pursuant to which the Corporation Counsel is authorized to negotiate for the acquisition by the City of parcels contained within the Area . . . [Emphasis added}" (J.O.P., January 10, 2001, page 49905). This Ordinance clearly indicates the City's intent and purpose for the acquisition. For example, in contrast, the June 19, 2002, Ordinance identifies in particular those parcels to be acquired in accordance with the approved Plan. There was no language used that either amended the Plan or the Area designation. On the contrary, the June 19, 2002 Ordinance was adopted to compliment the Plan or in addition to the Plan. The use of the term "commercially blighted area" does not in any way change the intent of the City Council when it adopted the TIF Plan. Additionally, the proper analysis of the ordinances must be that the June 19, 2002 Ordinance be incorporated into the January 10, 2001 Ordinance. As a result of this incorporation, the City's intent for acquisition becomes clearer and in no way does the perceived ambiguity conflict with the City's purpose and necessity of acquisition.

II. The City's use of eminent domain to acquire property in furtherance of the redevelopment of a statutory redevelopment project area is an acceptable public purpose for acquisition, regardless of whether such area is a "blighted area" or a "conservation area".

The Defendant alleges that because the Area is not a designated "blighted area," the use of eminent domain is not to clear slum or eliminate blight and, therefore, should not be allowed. The City could not disagree morel Illinois, Courts have long recognized the use of eminent domain as an acquisition tool that a municipality may use, along with TIF assistance, in redeveloping statutory TIF redevelopment project areas. This is true regardless of whether the TIF area is designated as blighted area, a conservation area, some combination of both a blighted area and conservation area, or an industrial park conservation area, *Board of Education*, *Pleasantdale School District No. 107*, *Cook County*, 341 Ill.App.3d 1004, 793 N.E. 2d 856, 276 Ill. Dec. 97 (2003). Under the TIF Act the designation of an area as a conservation area is to prevent further blight to that area designated by a municipality . . . in respect of which the municipality has made a finding that there exist conditions which cause the area to be qualified as an industrial park conservation area, or a blighted area or conservation area or a combination of both blighted areas and conservation areas." 65 ILCS 5/11-74.4-3(p). Although there are different designation requirements for these different types of redevelopment project areas, once such requirements are satisfied, and a redevelopment project area has been designated, the TIF Act makes no distinction whatsoever as to a municipality's ability to exercise its eminent domain powers or, to provide

TIF assistance in connection with the redevelopment of such redevelopment project areas.

Under 65 ILCS 5/11-74.4-3 the designation requirements for blighted areas and conservation areas are spelled out, and such tests are very similar. "Blighted area" designation requires a finding of 5 or more statutory blighting factors. 65 ILCS 5/11-74.4-3(a). "Conservation area" designation, as to any improved area, requires a finding of 3 or more of the same statutory blighting factors, plus a finding that 50% or more of the structures in the area have an age of 35 years of age or more. As a result of the presence of such factors, the Illinois legislature has decreed that such an area "is not yet a blighted area but because of a combination of such . . . factors is detrimental to the public safety, health, morals or welfare and such area may become a blighted area." (65 ILCS 5/11-74.4-3(b) (2004)) Thus, designation of a "conservation area" is in the nature of a preventive strike by the municipality to avert a further downturn in an area's condition. But once designated, it is a full-fledged "redevelopment project area," having the same rights and powers as a "blighted area." The TIF Act makes clear that such rights and powers include the municipality's right "[w]ithin a redevelopment project area, [to] acquire . . . by eminent domain . . . land and other property . . . in the manner and at such price the municipality determines is reasonably necessary to achieve the redevelopment objectives of the plan and project." 65 ILCS 5/11-74.4.4(c). Illinois Courts have repeatedly recognized the acquisition of parcels in a "conservation area" as an acceptable public purpose. *City of Carbondale ex rel. Ham v Eckert*, 76 Ill.App.3d 881, 395 N.E. 2d 607, 32 Ill.Dec. 377 (1979), *County Collector v D.R.G. Inc.*, 63 Ill.App.3d 506, 377 N.E.2d 1230, 18 Ill.Dec. 594 (1978), *City of Dekalb v Anderson*,

43, Ill.App.3d 915, 357 N.E.2d 837, 2 Ill.Dec. 617 (1976), *La Salle National Bank v City of Chicago*, 6 Ill.App3d 306, 285 N.E.2d 465 (1972), *Chicago Title and Trust Co. v City of Chicago*, 130 Ill.App.2d 45, 264 N.E. 2d 730 (1970), *Guaranty Bank & Trust Company v City of Chicago*, 112 Ill.App.2d 378, 251 N.E. 2d 384 (1969), *City of Chicago v Zwick Co.*, 27 Ill.2d 128, 188 N.E. 2d 489 (1963), *City of Chicago v Central National Bank of Chicago*, 5 Ill.2d 164, 125 N.E.2d 94 (1955) and *People ex rel. Gutknecht v City of Chicago*, 3 Ill.2d 539, 121 N.E.2d 791(1954).

The public purposes and benefits realized from the redevelopment of redevelopment project areas are described at great length at the beginning of the TIF Act., 65 ILCS 5/11-74.4-2. Such subsection states that such purposes are the "removal of and to alleviate adverse conditions"," to encourage private investment," to "restore and enhance the tax base of the taxing district," the "eradication of blighted areas and treatment and improvement of conservation areas," all of which are expressly "declared to be essential to the public interest." 65 ILCS 5/11-74.4-2(c); see also *People ex rel. City of Canton*, 79 Ill.2d at 360, 38 Ill.Dec. 154, 403 N.E.2d 242 (1980); *Castel Properties, Ltd. v. City of Marion*, 259 Ill.App.3d 432, 433-34, 197 Ill.Dec. 456, 631 N.E.2d 459 *(1994 Board of Education of Community High School District No. 218 v. Village of Robbins*, 327 Ill.App.3d 599, 602, 262 Ill.Dec. 312, 765 N.E.2d 449 (2001).

The above cases all held that the acquisition of parcels [in a blighted area] pursuant to the TIF Act was a necessary and appropriate municipal action in the furtherance of the redevelopment project area in question and as such, was for an acceptable public purpose Additionally, the Courts have upheld the

acquisition of properties designated in "conservation areas" pursuant to Section 74.4-3(n) of the TIF Act. The Court in *City of Chicago v Boulevard Bank National Association*, 293 Ill.App.3d 767, 688 N.E.2d 844, 228 Ill.Dec. 146, (1997), which involved a challenge to the City of Chicago's authority to acquire the Oliver Building pursuant to the TIF Act in the furtherance of North Loop Redevelopment Plan. There, the Court upheld the validity of 65 ILCS 5/11-74.4-3(n), which states a municipality has established a redevelopment plan for rehabilitation of an area to reduce or eliminate the blighted area or conservation area existence that area qualifies as a redevelopment project area (Id. at 772,773).

Acquisition pursuant to the area designation as a "conservation area" accomplished in accordance with the Plan provides the City with all the necessary legislative authority and purpose for acquisition to the same extent as a "blighted area" designation. Because the River West Area qualifies as a "conservation area", the City's, acquisition of Defendant's parcel serves as an acceptable public purpose. Defendant has not presented any case law or legislative findings to support its contention that the "conservation areas" and "blighted areas" are on a different footing, because no such law or findings exist.

III. The City's proposed conveyance of the Defendant's property to a private party does not negate the public purpose use that justifies the taking.

The Defendant contends that the City's proposed transfer of the condemned property to a private entity is not an acceptable public use of the property. Additionally, the Defendant contends that the public will not benefit or be able to use the property and only

the eventual private entity will receive the benefit from this acquisition.

The City disagrees in that the public will benefit from this redevelopment project because of the preservation of exiting jobs, the creation of 40 to 60 higher paying industrial jobs and the increase in its tax base for providing City services is a public use consistent with the Plan.

The Illinois Legislature has addressed the issue of what is the public benefit that can be derived from governmental actions done for public purposes. Section 20 ILCS 620/2, Legislative declaration of public purpose, states in pertinent parts:

> Section 2. Legislative declaration of public purpose, the General Assembly hereby finds, determines and declares:
>
> (a) that the loss of job opportunities for the residents of the State is a serious menace to the health, safety, morals and general welfare of the people of the entire state;
>
> (b) that a vigorous, growing economy is a basic source of job opportunities;
>
> (c) that protection against the economic burdens associated with the loss of job opportunities, the consequent spread of economic stagnation and the resulting harm to the tax base can be best provided by promoting, attracting, stimulating, retaining and revitalizing industry, manufacturing, and commerce within the State; (h) that the provision of such additional incentives by the State and its political subdivisions will relieve conditions of unemployment, maintain existing

> levels of employment, create new job opportunities, retain jobs within the State, increase industry and commerce within the State, thereby creating job opportunities for the residents of the State and reducing the evils attendant upon unemployment, and increase the tax base of the State and its political subdivisions.
>
> It is hereby declared to be the policy of the State, in the interest of promoting the health, safety, morals and general welfare of all the people of the State, to provide incentives which create new job opportunities and retain existing commercial businesses and industrial and manufacturing facilities within the State and related job opportunities, and it is further determined and declared that the relief of conditions of unemployment, the maintenance of existing levels of employment, the creation of new job opportunities, the retention of existing commercial business and industrial and manufacturing facilities within the State and related job opportunities, the increase of industry and commerce within the State, the reduction of the evils attendant upon unemployment, and the increase and maintenance of the tax base of the State and its political subdivision are public purposes and for the safety, benefit, and welfare of the residents of this State. [Emphasis added] 20 ILCS 620/2 et seq.

It is clear from this statute that when the State or a municipality takes initiative for economic development purposes under the guise of public purpose, the legislature has clearly indicated that the public will

benefit from that public use to preserve jobs and industry, increase the tax base, and create new jobs for the community.

The form of Redevelopment Agreement between the City and Blommer Chocolate Company ("Blommer) that was approved by the City Council on February 8, 2006, contemplates that the City will convey the Defendant's acquired properties to Blommer for redevelopment in the furtherance of the Plan's goals and objectives. Blommer has already begun to rehabilitate and expand its existing chocolate manufacturing business, to create 40 to 60 additional manufacturing jobs, and retain the existing manufacturing jobs (J.O.P., February 8, 2006, pages 69121 to 69213). Creation and retention of manufacturing jobs is critical to the City at a time when a number of long-time confectioners, such as Brachs and Fannie Mae, in the City have shuttered their doors and moved operations out-of-state or to foreign locations. The City's actions to preserve and expand the business of Blommer here in Illinois meets the criteria for public use pursuant to the public purpose declaration of the Illinois General Assembly, Section 20 ILCS 620/2 et seq. (2004).

Illinois Courts on numerous occasions cases upheld the action of the condemning body where the condemnation of private property was for a private redevelopment and use. In Chicago, many of the redevelopment projects beginning in the 60's up to the present were for purposes and uses of private entities. The revitalization of the Central Loop Area is a direct result of acquisitions that were eventually redeveloped by a private entity.

In *Chicago v Boulevard National Bank Association*, 293 Ill.App. 3d 767, 688 N.E. 2d 844, 288 Ill.Dec. 146 (1997) the Defendant contended that the City should not be allowed to acquire the Oliver Building as part of an assemblage site with the Oriental Theater, all of which was to be redeveloped by a private entity. The Court upheld the taking and the use of TIF funds to have a private entity redevelop properties in accordance with the North Loop TIF Act.

Additionally, Illinois Courts have otherwise held that where the property to be taken is to be for "public use", that public use can mean public usefulness, utility, advantage or benefit, as compared to strict, actual usage. It is not essential that the entire community receive or share the benefit. The use can be confined to a particular district and still be public *(People ex rel Tuohy v City of Chicago*, 394 Ill. 477, 483, 68 N.E.2d 761 at 483)(See also *Berman v Parker*, 348 U.S. 26 (1954).

More recently, the Illinois Supreme Court addressed this issue of public use in *Southwestern Illinois Development Authority v National City Environmental*, *L.L.C.*, 199 Ill.2d 225, 768 N.E.2d 1. 263 Ill.Dec. 241 (2002). ("SWIDA"). In SWIDA, the Court reviewed whether the taking of private property by a governmental body for conveyance to another private entity satisfied the public use requirement. The SWIDA court stated that "[c]learly, the taking of slum and blighted areas is permitted for the purposes of clearance and redevelopment, regardless of the subsequent use of the property" Id. at 238.

In the matter before this Court, the public purposes being advanced are those enumerated in the TIF Act and the River West Plan--the institution of conservation measures to prevent blight, the creation and

retention of jobs, and the bolstering of the City's tax base. Such public purposes satisfy the public use requirement.

IV. The intended conveyance to a private entity done in accordance with the Redevelopment Plan and in accordance with the TIF Act does not violate the 5th and 14th Amendment of the U.S. Constitution and Article 1, Section 2 and 15 of the Illinois Constitution.

The Defendant alleges that the City's use of eminent domain to acquire the Defendant's property for the eventual conveyance to Blommer violates the 5th and 14th Amendment of the U.S. Constitution and Article 1, Section 2 and 15 of the Illinois Constitution. The City disagrees because the existing Federal and State laws as well as Court findings support the type of taking and purpose for the taking that the City is using to acquire the subject property. Although the Courts have touched on takings for economic purposes, the City's efforts are consistent and in accordance with the TIF Act, the Eminent Domain Act and the U.S. Constitution.

The City addressed its authority to take for the stated public use and public purpose in responses II and III above. Within these responses, it cited to legal authority it possesses to acquire the subject property. Defendant in its Traverse does not provide any factual or legal reason for its objection. Defendant's basis for objection is that the taking is purely for a private purpose and not for the rehabilitation of conservation areas or blighted area as provided for pursuant to Illinois Law.

The 5th Amendment of the U.S. Constitution states that private property shall not be taken for public

use, without just compensation. Neither Federal or State law have limited public use taking to be that exclusively for public development as a school or other government facility. The Federal Courts have upheld this premise of allowing taking by a governmental entity for the eventual use by a private entity in *Berman* where the Court held that the use of condemnation for acquiring the property from one private entity for the benefit of another private entity where the taking was in conjunction with a comprehensive redevelopment plan of the governmental acquiring entity and not that of the end user. Id at 33. Also the Court went further in *Hawaii Housing Authority v Midkiff*, 467 U.S. 299, 81 L.Ed 2d 186, 104 S.Ct. 2321 (1984) when it held that the exercise of eminent domain power is related to a conceivable public purpose especially when the land did not remain with the government but was transferred to a private entity.

Most recently, the U.S. Supreme Court in *Kelo v City of New London*, 125 S.Ct. 2655, 162 L.Ed.2d 439,(2005) where the City of New London, Connecticut approved a redevelopment plan to create in excess of 1000 jobs to increase the tax and other revenue and revitalize an economically distressed city by acquiring property to later be conveyed to Pfizer Pharmaceuticals for redevelopment, found that the proposed use was a public use under the Taking Clause of the U.S. Constitution. The Court held that the taking qualifies as public use pursuant to the 5th Amendment, economic development is an acceptable government function, and there is no clear way to distinguish economic development from public purpose. The majority in Kelo upheld the premise that the State legislature finding of purpose is a legitimate determination for the authorization of the use of eminent

domain for economic development, a certain finding of public benefit to the public is not necessary and the courts review of the legislative intent is very narrow. Therefore, if the condemning body's effort to use condemnation is consistent with the laws of the state where the condemnor is located and in accordance with an approved redevelopment plan, the taking does not violate existing State or Federal laws. As recited earlier in this brief, the City has established its prima fade authority and purpose to condemn in accordance with the TIF Act and its home rule authority by presenting to the Court a certified copy of the Ordinance authorizing the acquisition pursuant to the Plan.

The Defendant alleges that the City's condemnation action violates his 14th Amendment right by depriving him of his property. Although the Defendant makes this blanket allegation, it is not supported in his Traverse with any factual or legal basis the 14th Amendment of the U.S. Constitution states that no state shall make or enforce any law . . ., nor shall any State deprive any person of life, liberty or property, without due process of law. The filing of a condemnation action by the City to acquire his property by eminent domain does not deprive him of his property as a violation of the 14th Amendment.

Illinois Courts have upheld the position that the filing of a condemnation action to acquire property as part of a redevelopment initiative does not violate the owners 14th Amendment property rights. The Court in *Towne v Town of Libertyville*, 190 Ill.App. 3d, 546 N.E.2d 810, 137 Ill.Dec. 865 (1989), held that "the decision of a condemning body to acquire property by eminent domain is not itself a "taking of the property, and no question of due process is presented thereby"

(Id. at 568) Additionally, the Court in *Towne* found that "no taking occurs until the execution of a purchase agreement or the conclusion of eminent domain proceedings" (Id. at 568). We believe the key to what the Court is saying that a violation of the 14th Amendment can not occur until the condemning body begins to exercises control over the property or it fail to properly compensate the owner for the relinquishment of his or her rights. That is not the case in the immediate case before this court, we are still in the process of addressing the City's authority to condemn. Therefore, as long as this matter is before this Court and the parties have not settled such matter, the Defendant's 14th Amendment rights to his property have not been violated nor has he been deprived of his due process rights to pursue any allowable action to protect those property rights.

The Defendant fails to point to any particular violation by the City of its efforts to acquire other than in a general and sweeping allegation of violation of Federal and State Laws. Defendant's attack boils down to his implied and not clearly stated disagreement with the City's judgment and ultimate use planned for the Subject Property. Finally, it is well established that "the taking of land for redevelopment of slum and blighted areas is a taking for a public purpose, and the fact that a portion will be sold for private purposes does not render the condemnation invalid." *City v Walker*, 50 Ill. 2d 69, 71 (1971-1972).

The City intends to acquire the subject property in order to prevent further blight to the Area. Illinois Courts have found that "the acquisition of a slum and blight area and the removal of slum conditions is in and of itself a public purpose regardless of the use thereafter made of the property." (*People ex. rel*

Adamowski v Chicago Land Clearance Commission, 14 Ill 2d 74, 79, 150 N.E. 2d 792 (1958)). Therefore, ". . . the acquisition of a slum and blighted area and the removal of slum conditions is in and of itself a public purpose regardless of the use thereafter made of the property." (*Chicago Land Clearance Commission v White*, 411 Ill. 310, 104 N.E. 2d 236, 239, (1952)). Therefore, the City's efforts which are consistent with existing Federal and State Laws and consistent with Illinois law and the findings of Illinois Courts does not violate any protection rights alleged by the Defendant.

CONCLUSION

The City has provided this Court with its prima facie evidence in support of its authority and necessity of acquisition of the Subject Property pursuant to a public purpose by providing resolutions and ordinances that approve the redevelopment in accordance with the River West Redevelopment Plan, the designation of the Area as a conservation area and in need of commercial conservation and the payment for this redevelopment with TIF funds. The burden shifts to the Defendant to show or rebut the City's prima facie evidence with clear and convincing evidence to the contrary. Many of the Defendant's arguments are based upon conjectures and beliefs and are not supported by clear and convincing evidence. The City believes that the Defendant fails to meet his burden and, therefore, the taking is proper and this action for a traverse and motion to dismiss should be denied.

Respectfully submitted,

CITY OF CHICAGO,
a municipal corporation

By: /s/ Rick Taylor
Rick Taylor
Assistant Corporation Counsel
Real Estate and Land Use Division

Attorney Number 90909
MARA S. GEORGES
CORPORATION COUNSEL

Rick Taylor
Assistant Corporation Counsel
30 North LaSalle Street
Suite 1610
Chicago, Illinois 60602
(312) 744-7377

SUPPLEMENTAL APPENDIX C

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

No. 05 L 050792
Parcel BC-1

CITY OF CHICAGO,

Plaintiff,

v.

FRED J. EYCHANER and UNKNOWN OWNERS,

Defendants.

REPLY IN SUPPORT OF TRAVERSE

Defendant Fred J. Eychaner, by DLA Piper Rudnick Gray Cary US LLP, his attorneys, submits the following reply memorandum in support of his Traverse of the allegations of the Complaint to Condemn of the City of Chicago.

I. *Undisputed Facts*

The following facts are undisputed:

1. The subject property is a vacant parcel of 25,440 square feet at the southwest corner of Grand and Jefferson in Chicago, Illinois. (*See* ¶¶ 2 and 5 of City of Chicago Answers to Defendant's First Set of Interrogatories.)

2. The City of Chicago has not determined that the subject property is blighted. (*See* ¶ 21 of City of Chicago Answers to Defendant's First Set of Interrogatories.)

3. The City of Chicago has not determined that the subject property is a slum. (*See* 25 of City of Chicago Answers to Defendant's First Set of Interrogatories.)

4. On August 24, 2005, the City of Chicago filed the subject eminent domain proceeding to acquire all of the subject property. (*See* Complaint to Condemn; *see also* ¶ 3 of City of Chicago Answers to Defendant's First Set of Interrogatories.)

5. "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." 22(d) of City of Chicago Answers to Defendant's First Set of Interrogatories.)

II. Undisputed Law

A. EMINENT DOMAIN MAY NOT BE USED TO ACQUIRE PROPERTIES MERELY FOR ECONOMIC REDEVELOPMENT.

The Illinois Supreme Court firmly established in *Southwestern Illinois Development Authority v. National City Environmental, LLC*, 199 Ill.2d 225 (2002), that even though economic redevelopment is a proper public purpose, the tool of eminent domain acquisition is not available to the government unless the public, after the taking, will have the unfettered right to use the property. As the Illinois Supreme Court stated in *SWIDA*, an increase in economic revenues due to redevelopment cannot justify the involuntary taking of private property:

> While we do not deny that this expansion in revenue could potentially trickle down and

> bring corresponding revenue increases to the region, revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power of the government. . . . The power of eminent domain is to be exercised with restraint, not abandon.

199 Ill.2d at 241, 242. The *SWIDA* court confirmed that the public, not a private interest, must be the intended beneficiary of a taking (199 Ill.2d at 240), and that the public purpose requirement and the public use requirement, although somewhat related, are still distinct (199 Ill.2d at 237). "The right of a sovereign to condemn private property is limited to takings for a public use. U.S. Const., amend. V; Ill. Const. 1970, art. I, § 15. . ." 199 Ill.2d at 235. To satisfy the public use requirement, something more than a mere benefit to the public must flow from the project for which the property taken (199 Ill.2d at 239); the public must be able to use or enjoy the property taken, after the condemnation, not as a mere favor or by permission of the owner, but by right (199 Ill.2d at 238).

B. EMINENT DOMAIN MAY BE USED TO ACQUIRE PROPERTIES IN THE ECONOMIC REDEVELOPMENT CONTEXT TO CLEAR SLUMS OR ELIMINATE BLIGHT.

SWIDA acknowledged an important exception to the rule set forth above:

> Clearly, the taking of slums and blighted areas is permitted for purposes of clearance and redevelopment, regardless of the subsequent use of the property. See, *e.g., Village of Wheeling v. Exchange National Bank of Chicago*, 213 Ill. App. 3d 325, 1991); *City of*

Chicago v. Gorham, 80 Ill. App. 3d 496 (1980);
City of Chicago v. Walker, 50 Ill.2d 69 (1971).

199 Ill.2d at 238. *Gorham* was a blight-elimination taking in which private property was replaced with the State of Illinois building in downtown Chicago. *Walker* was a slum-clearance taking in which private property was replaced by a portion of the University of Illinois' Chicago Circle campus. *Village of Wheeling* was a taking under the tax increment redevelopment statute of property specifically found to be blighted. Thus, even if property is taken for economic redevelopment purposes from one private entity to give it to another private entity, the taking may be proper if the property is blighted or a slum.

III. Procedural Posture

On January 23, 2006, defendant filed his Traverse. The City argues that the Traverse is insufficient because it is not supported by evidence. (City Response 7, 18, 21) The City's Response, of course, only tests the legal sufficiency of defendant's Traverse, and offers certain evidence in support of the Complaint to Condemn. To the extent that counter-evidence is necessary, defendant requests a hearing and the opportunity to present such evidence. But the Traverse passes the test of legal sufficiency, and the City's response is not enough to shift the burdens to defendant.

A traverse challenges the tight to condemn, and will result in dismissal where the condemning agency cannot show its right to use eminent domain upon proper proof. *Lake County Forest Preserve Dist. v. First National Bank of Waukegan*, 154 Ill. App. 3d 45, 51 (2nd Dist. 1987). The pleading requirements for a traverse are minimal – all that is necessary is that it

be clear to the court that the right to condemn is being challenged. *See City of Chicago v. Riley*, 16 Ill.2d 257, 259-60 (1959); *Village of Skokie v. Gianoulis*, 260 Ill. App. 3d 287, 297 (1st Dist. 1994); *Forest Preserve Dist. of Du Page County v. Miller*, 339 Ill. App.3d 244, 251 (2nd Dist. 2003). Defendant's Traverse clearly meets those requirements here.

The City's real point appears to be that, by filing the ordinances underlying the acquisition, the City has satisfied its burden in response to the Traverse. However, the typical presumption which shifts the burden of proof from the condemnor to the property owner where the condemnor pleads into court an ordinance authorizing acquisition does not apply here. The June 19, 2002 ordinance authorizing the acquisition of the subject property by the City of Chicago is both internally inconsistent and inconsistent with the City's sworn position in this case. Because of the inconsistency, the presumption of validity cannot attach to the City's action in filing this eminent domain proceeding.

The June 19, 2002 ordinance was specifically based on the redevelopment plan for the River West Tax Increment Financing District ("the Plan"). Even the City agrees. (City Response 10) That redevelopment plan found that the area within the River West Tax Increment Financing District was not blighted, but did qualify as a conservation area under the Tax Increment Allocation Redevelopment Act (65 ILCS 5/11-74.4-1 *et seq*.). The June 19, 2002 ordinance went on to find that acquisition of the subject property was necessary "to achieve the objectives of the Plan" – to redevelop the subject property as a conservation area.

However, the June 19, 2002 ordinance then purported to find that acquisition of the subject property

was necessary to improve a "commercially blighted area." The ordinance authorizing acquisition was thus internally inconsistent as to whether the subject property was or was not blighted. The City now characterizes the use of the term "commercially blighted area" as a "scrivener's error" (City Response 9), which is understandable in light of the clear finding that the River West TIF District was not blighted. But the conflicting purposes and rationales found in the ordinance authorizing acquisition mean that no presumption, and no shifting of the burden of proof, could thereby arise.

In support of the presumption, the City cites *Walker, Wheeling, Trustees of Schools v. Sherman Heights Corp.*, 20 Ill.2d 357 (1960), and *First National Bank of Waukegan*, but none are on point. *Walker* and *Wheeling* involved properties that were specifically found to be blighted. That is not the case here. *Sherman Heights* involved a finding that property was needed for playgrounds for a high school, and *First National Bank* involved a finding that property was necessary for a forest preserve; neither case involved blight. None of the cases relied upon by the City involved inconsistent and ambiguous findings regarding blight like those in the ordinance authorizing acquisition here.

The inconsistency has been resolved by the City's Answers to Interrogatories. It is now undisputed that the City of Chicago has never found the subject property or the River West TIF District to be blighted. Thus, the basis for the use of eminent domain found in the June 19, 2002 ordinance – that the property is "commercially blighted" – *is false on its face*. Because the ordinance authorizing acquisition does not set forth a clear and apparent basis for the authority of

the City to use eminent domain, the burdens remain with the City.

This case therefore presents the simple question of whether private property may be condemned to take from one private individual and give it to another for purposes of economic redevelopment, where the property lies in a conservation area but is neither blighted nor a slum.

IV. *Argument*

Because there is no public use involved, the City of Chicago is prohibited from using the tool of eminent domain to take the subject property. The City advances four arguments attempting to justify the taking of Fred J. Eychaner's property to give it to Blommer Chocolate, but none of the arguments pass muster.

A. THE PUBLIC PURPOSE THAT CAN JUSTIFY THE USE OF TAX INCREMENT FINANCING IS NOT THE PUBLIC USE REQUIRED TO JUSTIFY THE USE OF EMINENT DOMAIN.

The City first argues that, because the subject property is within a "conservation area," there is a proper public purpose for acquiring the property. (City Response 7-10) The City confuses "public purpose" with "public use." While the redevelopment of a conservation area may be suffused with a public purpose, thus allowing under the TIF Act the expenditure of public funds or the voluntary acquisition of private property, that is not enough to meet the additional requirement of public use for the exercise of the power of eminent domain. "Public purpose" and "public use" are related, but different. SWIDA 199 Ill.2d at 237. To exercise the power of eminent domain,

the public must be able to use or enjoy the property taken, after the condemnation, not as a mere favor or by permission of the owner, but by right. 199 Ill.2d at 238. That requirement is clearly not being met here.

The City points out that the TIF Act declares the eradication of blighted areas to be essential to the public interest. (City Response 8) That may be the case, but the subject property is not blighted, as even the City admits. And the designation of the surrounding area as a "conservation area" is admission by the City that in fact the area is not blighted. *(See* 65 ILCS 5/11-74.4-3(b) (such an area "is not yet a blighted area."); City Response 11) Even though there may be a public purpose for the City's actions here, the City cannot use eminent domain merely for economic redevelopment without satisfying the public use requirement.

B. MERE QUALIFICATION FOR TIF DOES NOT DEMONSTRATE BLIGHT.

The City could still accomplish an economic redevelopment public purpose if the eminent domain taking of the subject property were part of an effort to clear slums or eliminate blight. But the City admits that it has never found the area to be blighted or a slum. In fact, it is demonstrably not. Therefore, the *SWIDA* exception does not apply, and eminent domain may not be used to take the subject property here.

The City argues that, so long as the project qualifies under the TIF Act, eminent domain may be used as a tool to implement the project. (City Response 10) This is incorrect and directly contrary to *SWIDA*. The City relies upon *Board of Education, Pleasantdale School Dist. v. Village of Bur Ridge*, 341 Ill. App. 3d 1004 (1st Dist. 2003), but that case was a challenge by

other taxing bodies to the designation of a TIF district. The case did not involve the use of eminent domain. The distinction is critical. There are special rules that apply to the use of eminent domain that go beyond the statutory requirements of the TIF Act. Merely because a project qualifies for tax increment financing is no reason to necessarily conclude that it also qualifies for the use of eminent domain.

The City cites nine cases that the City says involve conservation areas, and the City argues that these cases establish that acquisition of parcels in a TIF conservation area is an acceptable public purpose. (City Response 12) The cases cited do not support the City's argument. The cases cited do not involve eminent domain (*City of Carbondale ex rel. Ham v. Eckert* 76 Ill. App. 3d 881 (5th Dist. 1979) (sale, not acquisition, of urban renewal properties; *LaSalle Nat'l Bank v. City of Chicago*, 6 M. App. 3d 306 (1st Dist. 1972) (zoning of parcel at Foster and Sheridan); *Chicago Title and Trust Co. v. City of Chicago*, 130 M. App. 2d 45 (1st Dist. 1970) (zoning litigation); *Guaranty Bank and Trust Co. v. City of Chicago*, 112 Ill. App. 2d 378 (1st Dist. 1969) (challenge to zoning)); do not involve conservation areas (*LaSalle; City of X Chicago v. Central Nat'l Bank of Chicago*, 5 Ill.2d 164 (1955) (eminent domain of property at Rush and Delaware under the Parking Act)); involved an unrelated issue of eminent domain law (*County Collector v. D.R.G. Inc.*, 63 M. App. 3d 506 (1st Dist. 1978) (right to award as between owner and tax purchaser)); arose under a different statute (*City of Dekalb v. Anderson*, 43 App. 3d 915 (2nd Dist. 1976) (urban renewal statute); *City of Chicago v. Zwick*, 27 Ill.2d 128 (1963) (Urban Renewal Consolidation Act); *Ham* (Urban Community Conservation Act); *People ex rel. Gutknecht v. City of Chicago*, 3 Ill.2d 539 (1954)

(Urban Community Conservation Act); or involved the use of eminent domain to acquire slums or blighted properties (*Anderson*; *Zwick*). And even if the cases did establish a public *purpose* for conservation areas, that is not the public use that *SWIDA* requires for the exercise of eminent domain.

The City also relies on *City of Chicago v. Boulevard Bank N.A.*, 293 Ill. App. 3d 767 (1st Dist. 1997). But in that case, the City relied on ordinances "establishing the blighted character of the subject area," and there was "no question" as to whether the area was blighted. 293 Ill. App. 3d at 771, 781. There are no such ordinances here, and even the City agrees that the area has not been found to be blighted.

The City argues that the public benefits of 'ELF designation are the same regardless of whether the redevelopment area is blighted, or just a "conservation area" (City Response 10-12), and appears to argue that once a property qualifies for TIF, the "slum or blight exception" of *SWIDA* applies (City Response 16-17). But the "slum or blight exception" to the public use requirement is far narrower than the factors that allow a property to qualify under TIF.

The most salient application of the "slum or blight" exception is *Southwestern Illinois Development Authority v. Al-Muhajirum*, 318 Ill. App. 3d 1005 (5th Dist. 2001). In that case, the court associated "blight" with slum-like conditions, and characterized such "derelict" properties as "unoccupied," "unattended," "virtually uninhabitable," "no doubt rat-infested" and "strewn with rusted junk, discarded cans, bottles and garbage bags." 318 Ill. App. 3d at 1009. "The basic character of the locale is still one of ruin and urban decay. The area is blighted." *Id.*

It is a far cry from such urban devastation to a mere disagreement as to the highest and best use of property. Fred J. Eychaner's property in this case is currently vacant. The City may contend that Mr. Eychaner is not putting his property to its highest and best use. But the same Appellate Court that decided *Al-Muhajirum* also decided, regarding the use of property as a scrap yard, that "Although this may not be the highest and best use of the property, such use does not render the land blighted." *Southwestern Illinois Development Authority 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 the property to a higher and better private use with a sweetheart private developer, like the City's plan here, cannot rest on the "slum or blight" exception.

The limits of blight are somewhere in between. Cases that discuss the concept include:

- *Norwegian American Hospital v. Department of Revenue*, 210 Ill. App. 3d 318, 320 (1st Dist. 1991) "tenement buildings in *disuse or disrepair* which the administrators described as a 'zone of blight' (emphasis added).
- *People ex rel. City of Urbana v. Paley*, 68 Ill.2d 62, 66 (1977), in which "a serious case of urban blight" was evidenced by *"general economic deterioration* and a proliferating number of *vacant* buildings and buildings with *structural and mechanical infirmities"* (emphasis added).
- *City of Chicago v. R. Zwick Co*., 27 Ill.2d 128, 134 (1963), where the evidence sub-

stantiating a finding of slum and blight was that a great many structures suffered from *dilapidation and obsolescence,* with an average age of 75 years, stove heat was predominant and many structures lacked sanitary facilities.

- *City of Chicago v. Gorham*, 80 Ill. App. 3d 496 (1st Dist. 1980), in which the fact of blight was not contested but was evidenced by a 92% commercial *vacancy* rate and the *deteriorated condition* of three-quarters of the structures.

It thus appears that judicial confirmation of a finding of blight requires some element of disuse, disrepair or structural infirmity.

There is no hint whatsoever of any of these elements here. The City has offered no evidence of blight, and the City has made no finding of blight that may be presumed valid.

C. TAKING THE SUBJECT PROPERTY TO GIVE IT TO BLOMMER CHOCOLATE IS NOT A PUBLIC USE.

The City cites the preservation of existing jobs, the creation of new jobs and an increase in the tax base as factors that make the taking here a taking for a public use. (City Response 14) The City is incorrect, because even if there is a public purpose to the City's actions, that does not satisfy the eminent domain requirement of public use.

Nearly 60 years ago, a four-part test was laid down in the context of slum clearance to determine whether a private use after public acquisition to clear slums could meet the constitutional public use requirement:

1. The use must affect a community as distinguished from an individual;
2. A law must control the use to be made of the property;
3. The title must not be vested in a person or corporation as private property to be used and controlled as private property;
4. The public must reap the benefit of public possession and use and no one can exercise control except the municipality.

People ex rel. Tuohy v. City of Chicago, 394 Ill. 477, 485 (1946); *see also Dep't of Public Works v. Farina*, 29 Ill.2,4 (1963) (*Tuohy* sets forth criteria of public use). Even the City relies here on Tuohy. (City Response 16)

The taking here does not meet the Tuohy test. The City's answers to interrogatories make it clear that the third and fourth elements of the test will be violated here – title will be vested in a private entity as private property, there will be no public possession and someone other than the City will exercise control over the subject property upon its acquisition. (¶ 22(d) of City of Chicago Answers to Defendant's First Set of Interrogatories.) The City argues that the benefits of preserving existing jobs, creating new jobs and increasing the City's tax base satisfies the public use requirement. (City Response 14-15) *SWIDA* is directly to the contrary.

This is a classic economic redevelopment taking, of the kind barred by the Illinois Supreme Court in *SWIDA*. The City has no authority to use eminent domain, the Traverse should be granted and the condemnation should be dismissed with prejudice.

D. THE ILLINOIS PUBLIC USE REQUIREMENT IS MORE STRINGENT THAN THE PUBLIC USE CLAUSE OF THE U.S. CONSTITUTION.

With the law of Illinois squarely against it, the City relies on *Berman v. Parker*, 348 U.S. 26, 99 L.Ed.2d 27, 75 S.Ct. 98 (1954), *Hawaii Housing Authority v. Midkiff*, 467 U.S. 299, 81 L.Ed.2d 186, 104 S.Ct. 2321 (1984) and *Kelo v. City of New London*, 545 U.S. __, 162 L.Ed.2d 439, 125 S.Ct. 2655 (2005). None of these cases overrule or supersede *SWIDA*. As explained in Kelo,

> We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline.

162 L.Ed.2d at 457, 125 S.Ct. at 2668. Illinois has done so by virtue of *SWIDA*. Therefore, the fact that some states may allow the taking of private property from one person to give to another for purposes of economic development has no bearing on the City of Chicago's ability to do so here. Article I, section 15 of the Illinois Constitution of 1970, as interpreted in *SWIDA*, forbids the City of Chicago from exercising the power of eminent domain for economic redevelopment on property that is neither blighted nor a slum. It forbids the condemnation here.

V. <u>*Conclusion*</u>

The City is attempting to condemn Fred J. Eychaner's property to give it to Blommer Chocolate in the name of economic redevelopment. The property is neither blighted nor a slum, and the City has never found it to be so. The property is not being taken for

public use, and therefore it is improper to use the tool of eminent domain, even in pursuit of a proper public purpose. The Traverse should be granted, and the Complaint to Condemn dismissed with prejudice.

FRED J. EYCHANER

By: Thomas F. Geselbracht
One of His Attorneys

Thomas F. Geselbracht
Karen S. Way
DLA Piper Rudnick Gray Cary US LLP #41519
203 North LaSalle Street
Suite 1800
Chicago, Illinois 60601
(312) 368-4094/2152

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

CERTIFICATE OF SERVICE

I, Thomas F. Geselbracht, an attorney, hereby certify that I caused the foregoing REPLY IN SUPPORT OF TRAVERSE to be served upon:

Rick Taylor
Assistant Corporation Counsel
City of Chicago
Suite 1610
30 No. LaSalle Street
Chicago, Illinois 60602

by depositing a copy in the United States Postal Service mail drop at 203 North LaSalle Street, Chicago, Illinois, addressed to the above counsel and with proper postage pre-paid, before 5:00 p.m. this 23rd day of March, 2006.

/s/ Thomas F. Geselbracht

SUPPLEMENTAL APPENDIX D

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

No. 13-1833

CITY OF CHICAGO, a municipal corporation,

Plaintiff-Appellee,

v.

FRED J. EYCHANER and UNKNOWN OWNERS,

Defendant-Appellant.

Appeal from the Circuit Court of
Cook County, Illinois;
No. 05 L 050792;
Hon. Rita M. Novak and
Hon. Margaret A. Brennan,
Judges Presiding.

BRIEF AND ARGUMENT OF
DEFENDANT-APPELLANT

Thomas F. Geselbracht
DLA PIPER LLP (US)
203 No. LaSalle Street
Suite 1900
Chicago, Illinois 60601
(312) 369-4094

Counsel for Defendant-Appellant Fred Eychaner

ORAL ARGUMENT REQUESTED

I.

POINTS AND AUTHORITIES

STATEMENT OF FACTS

65 ILCS 5/11-74.4-1 *et seq.* (2000) 3

65 ILCS 5/11-74.4-3(a) (2000) 4

65 ILCS 5/11-74.4-3(b) (2000) 4

65 ILCS 5/11-74.4-8 (2000) 4

65 ILCS 5/11-74.4-4(c) (2000) 4

65 ILCS 5/11-74.4-4(b) (2000) 5

ARGUMENT

I. THE CITY OF CHICAGO MAY NOT USE THE POWER OF EMINENT DOMAIN TO TAKE FRED EYCHANER'S NON-BLIGHTED PROPERTY TO GIVE IT TO BLOMMER CHOCOLATE COMPANY IN THE NAME OF ECONOMIC REDEVELOPMENT.

A. Standard of Review.

Southwestern Illinois Development Authority v. Al-Muhajirum, 318 Ill. App. 3d 1005, 744 N.E.2d 308 (5th Dist. 2001) 11

B. Clear Illinois Supreme Court Precedent Prohibited The City's Taking *in the Name of Economic Redevelopment.*

Southwestern Illinois Development Authority v. National City Environmental, LLC, 199 Ill.2d 225, 768 N.E.2d 1 (2002)................................. 11-12 and *in passim*

City of Chicago v. Walker,
50 Ill.2d 69, 277 N.E.2d 129 (1971)................ 12

Village of Wheeling v. Exchange National Bank of Chicago,
213 Ill. App. 3d 325, 572 N.E.2d 966 (1st Dist. 1991).. 12

City of Chicago v. Gorham,
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II.

NATURE OF THE CASE

This is an eminent domain case in which the property owner filed a Traverse to challenge the authority of the City of Chicago to use the power of eminent domain to acquire his non-blighted property to give it to the property owner next door in the name of economic redevelopment. The Traverse was denied; and the Circuit Court certified the issue for immediate, interlocutory appeal; but the Appellate Court refused leave to appeal. The case was then tried to a jury verdict. The denial of the Traverse, evidentiary issues at the trial arising from the Circuit Court's violation of the "project influence rule" and the City's improper use of an appraisal witness, plus the amount of the verdict, are all being appealed.

III.

ISSUES PRESENTED FOR REVIEW

1. May the City of Chicago use eminent domain to take property from one person to give it to another in the name of economic redevelopment, where the property is neither blighted nor a slum?

2. Did the "project influence rule" bar consideration of the Planned Manufacturing zoning of the property, where the taking of the property to give it to Blommer Chocolate Company was consideration for Blommer Chocolate Company's political support for the enactment of the Planned Manufacturing zoning?

3. Should the trial judge have barred evidence of the history and circumstances of the enactment of the Planned Manufacturing zoning when it was offered to address the reasonable probability of a change in that zoning?

4. Should the City have been allowed to add two new appraisers to its list of witnesses on the eve of trial, and thus change its presentation of the case?

5. Should the trial judge have barred defendant from cross-examining the City's newly added expert to elicit his opinion that in fact there was a reasonable probability of re-zoning, and his opinion that the property condemned had a far higher fair cash market value in light of that?

6. Once the City's newly added expert testified in violation of the trial court's in limine order that he had originally been hired by defendant, should all of his testimony have been stricken?

7. Was the jury's verdict the result of clear and palpable mistake?

IV.

STATEMENT OF JURISDICTION

The Appellate Court has jurisdiction pursuant to Illinois Supreme Court Rule 303 as the appeal of a final judgment order entered on the verdict. The Circuit Court denied defendant's Traverse challenging the authority and necessity for the take on August 21, 2006 (C. 313), but certified the issue for appeal (C. 571). The Appellate Court denied leave to appeal the certified question on November 9, 2006. *City of Chicago v. Eychaner,* No. 1-06-2923. (C. 590) The Circuit Court then empaneled a jury, which returned its verdict of just compensation on January 28, 2013. (C. 3502) Judgment was entered on the verdict on February 11, 2013. (C. 3572) Defendant timely filed his Post-Trial Motion on February 21, 2013 (C. 3635), but it was denied on May 15, 2013. (C. 4119) Defendant filed his Notice of Appeal on June 10, 2013. (C. 4120)

V.

STATEMENT OF FACTS

The following 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. (C. 64)
- The City of Chicago has not found or determined the Eychaner property to be blighted, or a slum. (C. 71, 74)
- On August 24, 2005, the City of Chicago filed this eminent domain proceeding to acquire all of the Eychaner property. (C. 2-9)
- According to the City of Chicago, "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. 73)

The Eychaner property is located just north of the Blommer Chocolate factory, and just west of a 34-story apartment building on the edge of the Chicago River. (For aerial photographs of the immediate area, *see* C. 3614-16; Supp. C. 350, 402)

On November 14, 2000, the Chicago Community Development Commission recommended to the Chicago City Council that the City designate the River West Tax Increment Financing Redevelopment Project Area and approve the River West Tax Increment Financing Redevelopment Plan under the Tax Increment Allocation Redevelopment Act, 65 ILCS 5/11-74.4-1 *et seq.*

(2000) (the "TIF Act"). (C. 108-131) The Chicago City Council did so on January 10, 2001. (C. 132-231) The Eychaner property is included within the redevelopment project area and is thus covered by the River West TIF redevelopment plan. (C. 31, 36, 138, 196)

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 Redevelopment Project Area – containing the Eychaner property – was designated by the City of Chicago only as a "conservation area." (C. 146)

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. 222-28) 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 acquisition of the Eychaner property through the use of eminent domain. (C. 229-31) The City Council found it "useful, desirable and necessary" that the City acquire the Eychaner property for redevelopment, and that the acquisition of the Eychaner property was "necessary and required for

the home rule public purpose of improving a commercially blighted area." (C. 195)

Third is the ability to enter into redevelopment agreements consistent with the TIF redevelopment plan for particular projects within the redevelopment area. 65 ILCS 5/11-74.4-4(b)(2000). On February 8, 2006, the Chicago City Council approved a TIF redevelopment agreement with Blommer Chocolate Company. That redevelopment agreement involves partial City financing of a phased expansion of Blommer's candy manufacturing facilities. (C. 1040-87) Phase II of the expansion includes the City's acquisition of the Eychaner property, conveyance of the land to Blommer, and its inclusion in the expanded Blommer industrial campus. (C. 1044)

On August 24, 2005, the City of Chicago filed its Complaint to Condemn in the Circuit Court of Cook County to acquire the Eychaner property by eminent domain. (C. 2-9) On September 15, 2006, the City filed an Amended Complaint to Condemn to correct a scrivener's error. (C. 29-36) On January 23, 2006, defendant Fred Eychaner filed his Traverse challenging the City's authority to use eminent domain. (C. 39-42) The Traverse noted that the City's January 10, 2001, designation ordinance did not find the River West TIF Redevelopment Project Area to be blighted, but rather to be a "conservation area" under the TIF Act, because the eligibility study approved by the City Council only found the River West TIF Redevelopment Project Area to be a "conservation area" under the TIF Act. (C. 40)

The Traverse also noted that the public purpose for which the City is attempting to use the power of eminent domain herein is not to clear slums or to eliminate blight, but rather economic redevelopment – specifically, to take Mr. Eychaner's property by the

power of eminent domain in order to convey the property to a favored developer – Blommer Chocolate Company. (C. 40) The Traverse alleged that the City's intended use is not a proper public use under the law, and therefore the taking of the Eychaner property violates the 5th and 14th Amendments to the United States Constitution and Article I, Sections 2 and 15 of the Illinois Constitution of 1970. (C. 40)

After briefing and argument on defendant's Traverse, the Circuit Court issued its Memorandum Decision and Order on August 21, 2006, denying defendant's Traverse and sustaining the City's Complaint to Condemn. (C. 313) Upon defendant's motion, and over the objection of the City of Chicago, the Circuit Court certified the order denying the Traverse for immediate, interlocutory appeal on October 5, 2006. (C. 571) In certifying the issue for interlocutory appeal, the Circuit Court found, *inter alia:*

> 2. The issue of the City of Chicago's authority to use eminent domain to acquire defendant's property is well-defined in this case, based on the facts that are undisputed or assumed on defendant's Traverse, thus rendering the issue nearly a pure question of law.
>
> 3. The import, scope and meaning of the Illinois Supreme Court's decision in *Southwestern Illinois Development Authority v. National City Environmental, LLC,* 199 Ill.2d 225, 768 N.E.2d 1 (2002) give valid grounds for disagreement as to the question of law.

(C. 571-72) Notwithstanding the Circuit Court's certification, the Appellate Court denied Eychaner's

Rule 308 Application for Leave to Appeal on November 9, 2006. (C. 590)

The case then proceeded to jury trial. The trial judge[1] denied several motions *in limine*. First, defendant moved to bar evidence of the zoning of the subject property pursuant to the "project influence rule," because the restrictive zoning in place on the date of value – Planned Manufacturing District (PMD) – had been adopted as part of a political deal that included the City's commitment to acquire defendant's property and give it to defendant's neighbor, Blommer Chocolate Company, in return for Blommer's support of the PMD zoning. (C. 647-1107) This motion was denied on December 20, 2007. (C. 1123; R. 18-072 to -080[2])

Then, the City moved to bar the evidence of how the City's commitment to acquire the Eychaner property fit into the City's enactment of the restrictive PMD zoning. (C. 1959-3099) Defendant argued that this evidence was admissible to show that the restrictive PMD zoning was *ad hoc* rather than carefully planned, and that there was therefore a reasonable probability that the restrictive zoning would be changed to allow high-rise residential development like the 34-story apartment building immediately to the east, rather than just manufacturing uses like the Blommer Chocolate plant to the south. (Supp. C. 1350-51; C. 3393-3401) The trial judge granted the City's motion

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[1] The rulings on the Traverse and on defendant's first motion *in limine* were made by Judge Rita M. Novak. All subsequent rulings now on appeal were made by Judge Margaret A. Brennan, who presided at the jury trial.

[2] The Circuit Court Clerk separately paginated each volume of the Report of Proceedings. References to the Report of Proceedings are therefore to the volume and page number in the record, *i.e.,* "R. 18-072" refers to Volume 18, page 72 of the record.

in part, and excluded the bulk of the evidence. (C. 3423; R. 20-125 to -249; R. 21-002 to -007)

The City prepared its case with two appraisers, James Gibbons and Kathy Dart, each of whom testified that there was no reasonable probability that the restrictive PMD zoning would be changed. (C. 1912, 1920; R. 24-086, 23-178) Defendant prepared his case with three appraisers. Dale Kleszyniski and Joseph Thouvenell were of the opinion that there was a reasonable probability of a change in zoning to allow high-rise residential development. Michael S. MaRous had two alternative opinions of value. The first, prepared at the direction of counsel, was premised on the extraordinary assumption that there could be no change in the PMD zoning, and concluded that the value of the subject property would thus be $2,550,000. (R. 21-122; C. 3469; C. 2233-38) For the second, MaRous exercised his professional judgment and concluded that there actually was a reasonable probability of a change in zoning, to allow high-rise residential development, leading to a fair market value of $3,560,000. (R. 21-120; C. 2233, 3468)

The trial judge denied the City's motion *in limine* to bar evidence of reasonable probability of re-zoning, after an evidentiary hearing. (C. 1888) Five days before the scheduled start of trial, the City added Thouvenell and MaRous as its trial witnesses – thus changing the presentation of its case to now include a reasonable probability of re-zoning. (C. 1918-24) Defendant moved to strike the City's last-minute designation (C. 1894-1924), but the City was allowed to use the new witnesses (C. 1957-58). Thereafter, defendant formally abandoned Thouvenell and MaRous as appraisal witnesses. (C. 3384)

On the morning that trial commenced, the City moved to bar any cross-examination of MaRous to elicit his $3,560,000 opinion of value premised on his belief that there was a reasonable probability of re-zoning. (C. 3468) The trial judge granted the City's motion. (R. 21-124)

The range of appraisal testimony presented to the jury at trial was:

Name	Zoning opinion	Value
•James Gibbons	No reasonable probability of re-zoning	$1,400,000
•Kathy Dart	No reasonable probability of re-zoning	$1,530,000
•Joseph Thouvenell	Reasonable probability of re-zoning	$3,600,000
•Dale Kleszyniski	Reasonable probability of re-zoning	$5,100,000

Based on the extraordinary assumption that would there never be a change in zoning, Michael S. MaRous testified to the jury of a fair cash market value of $2,550,000. (R. 22-029, 22-081 to -082)

In light of the new alignment of appraisers following the City's last-minute designation of Thouvenell and MaRous, defendant had moved to bar any testimony that he had previously employed Thouvenell and MaRous. (C. 3450-54). That motion was granted. (C. 3455) However, during the City's redirect examination, MaRous testified:

> 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.

(R. 22-084) Defendant's motion to strike this testimony was granted (R. 22-084), but the trial judge refused to strike all of the MaRous testimony (R. 22-089 to -095). Instead, the jurors were instructed not to concern themselves with who may have requested MaRous to perform an appraisal of the subject property. (R. 22-098 to -099)

The jury returned a verdict of just compensation totaling $2,500,000. (C. 3502) Judgment was entered on the verdict (C. 3572-74), and the City of Chicago deposited the amount of the verdict plus interest with the Treasurer of Cook County on February 27, 2013. (C. 3668-69) Because defendant has appealed the City of Chicago's authority to use eminent domain to take away his property, and the jury verdict, Mr. Eychaner has made no attempt to collect the condemnation award.

Defendant timely filed his Post-Trial Motion on February 21, 2013. (C. 3635-46) After briefing and argument, defendant's post-trial motion was denied on May 15, 2013. (C. 4119)

Notice of appeal was filed on June 10, 2013. (C. 4120-22)

VI.

ARGUMENT

The City of Chicago has no right to use eminent domain to take defendant's property. Its basis for doing so – to foster economic redevelopment by giving defendant's property to another private party – is a taking for private use, not public use, and is banned by clear Illinois Supreme Court precedent. The "blight exception" does not save the City, because the City itself has found that the property is neither blighted

nor a slum. Defendant's Traverse should have been granted, and this condemnation case never should have been allowed to proceed.

To compound this error, the issue of just compensation was sent to the jury under false premises. The very zoning which 'defined the uses permitted on the property, and thus its value, was part of the project for which the property was being taken. The zoning was tainted, and just compensation should have been determined without reference to it. In addition, once the tainted zoning was used, the jury should have been allowed to hear that it was adopted in an *ad hoc* manner, in a deal that traded eminent domain acquisition of defendant's property for the political support of defendant's neighbor for zoning sought by The Tribune Company. This evidence was relevant to show that there was a reasonable probability that a truly neutral municipality would have re-zoned the property to allow residential high-rise development like the 34-story apartment building next door.

Finally, the verdict was the result of clear mistake. The verdict was just 2% less than the opinion of an appraiser who was proceeding under the extraordinary assumption that the zoning could never be changed, whom the City was allowed to add to its witness list on the eve of trial, a witness whom the City was able to identify as formerly employed by defendant. The jury was not allowed to hear that this appraiser's actual opinions, based on his professional judgment without any extraordinary assumptions, were that there was a reasonable probability of re-zoning, and a fair market value more than 42% higher than the verdict.

The judgment should be reversed, and this eminent domain proceeding dismissed with prejudice. In the

alternative, the judgment should be reversed, and the case remanded for a new jury trial on just compensation.

I. THE CITY OF CHICAGO MAY NOT USE THE POWER OF EMINENT DOMAIN TO TAKE FRED EYCHANER'S NON-BLIGHTED PROPERTY TO GIVE IT TO BLOMMER CHOCOLATE COMPANY IN THE NAME OF ECONOMIC REDEVELOPMENT.

A. Standard of Review.

"[T]he overriding question of whether an eminent-domain action is constitutionally sound is a matter for *de novo* review." *Southwestern Illinois Development Authority v. Al-Muhajirum,* 318 Ill. App. 3d 1005, 1008, 744 N.E.2d 308, 310 (5th Dist. 2001).[3]

B. Clear Illinois Supreme Court Precedent Prohibited The City's Taking in the Name of Economic Redevelopment.

Illinois law is clear that the constitution does not allow private property to be taken by eminent domain to give the property to another private party, simply to spur economic development, unless the property is either blighted or a slum. *Southwestern Illinois Development Authority v. National City Environmental, LLC,* 199 Ill.2d 225, 238, 768 N.E.2d 1, 9 (2002) ("SWIDA"), *citing Village of Wheeling v. Exchange National Bank of Chicago,* 213 Ill. App. 3d 325, 572 N.E.2d 966 (1st Dist. 1991); *City of Chicago v. Gorham,* 80 Ill. App. 3d 496, 400 N.E.2d 42 (1st Dist. 1980); and

[3] The trial court's factual finding that the subject property is neither blighted nor a slum would be reviewed under the manifest weight standard (*Al-Muhajirum,* 318 Ill. App. 3d at 1007-08, 744 N.E.2d at 310), but that finding is not being appealed here.

City of Chicago v. Walker, 50 Ill.2d 69, 277 N.E.2d 129 (1971).

The Circuit Court certified the following issue for appeal in this case: "May a municipality use the power of eminent domain to take private property from one individual in connection with an economic redevelopment project to give to another private entity where the subject property is neither blighted nor a slum?" (C. 572) This issue follows directly from *SWIDA,* and is squarely framed by the particular facts here.

Defendant's property is being taken by the City of Chicago to give it to Blommer Chocolate Company, a private party, in the name of economic redevelopment. The City, in its answers to interrogatories early on in this case, admitted it. (C. 73) The City has not found defendant's property to be blighted, or a slum. (C. 71, 74) The taking is specifically based on the redevelopment plan for the River West TIF District (C. 2-4, 29-31), which did not find the area within the River West TIF District to be blighted, but did find that it would qualify as a conservation area. (C. 144, 146, 174-185)

No case law authorizes the use of eminent domain to take private property from one private party to give it to another where the property is not blighted, but is in a conservation area. Merely because the City thinks that defendant's property may be put to a higher or better use is not enough to justify the use of eminent domain. *Southwestern Illinois Development Authority v. National City Environmental, LLC,* 304 Ill. App. 3d 542, 552, 710 N.E.2d 896, 904 (5th Dist. 1999), *aff'd,* 199 Ill.2d 225, 768 N.E.2d 1 (2002). A municipal plan to raise the property to a supposedly higher and better use with a sweetheart private developer, like the City's plan here, cannot rest on the "slum or blight" exception to *SWIDA.*

The City of Chicago exceeded its constitutional authority in taking Mr. Eychaner's property to give it to Blommer Chocolate Company. This Court should now vacate the judgment, reverse the Circuit Court, grant defendant's Traverse, and dismiss this cause with prejudice.

In *SWIDA,* the Illinois Supreme Court considered the taking of vacant private property by eminent domain in the name of economic redevelopment to turn the property over to a privately owned racetrack for its use as parking. The owner's traverse had been denied, upholding the condemnation, but the Appellate Court reversed, and the Supreme Court affirmed. The Supreme Court Ailed that eminent domain must be used "with restraint, not abandon" (199 Ill.2d at 242, 768 N.E.2d at 11), and that eminent domain is subject to a strict requirement that the property be taken for "public use" *(id.,* at 238, 9).

In the decade since the *SWIDA* decision, most condemnation cases in which a challenge has been raised to a municipality's authority to use eminent domain for economic redevelopment have been diverted to the issue of whether the "slum or blight" exception to the public use requirement – an exception recognized in *SWIDA* (199 Ill.2d at 238, 768 N.E.2d at 9) – applies. *See, e.g., Southwestern Illinois Development Authority v. Al-Muhajirum,* 318 Ill. App. 3d 1005, 1009, 744 N.E.2d 308, 311 (5th Dist. 2001), where the property taken was "virtually uninhabitable," located "in the heart of a blighted area," and included "unoccupied and unattended slums," and the blight exception clearly applied.

The Appellate Court's other post-SWIDA cases have not overturned the rule dictated by the *SWIDA* majority. *Village of Round Lake v. Amann,* 311 Ill.

App. 3d 705, 715, 725 N.E.2d 35, 44 (2nd Dist. 2000), held that *SWIDA* did not apply to a taking for a public right-of-way that would primarily serve only one private entity because the "plaintiff was not acquiring private property for the purpose of transferring it to another private entity." Here, of course, the City is. And the City's acquisition here is not a "substitute condemnation," where Blommer is being given Eychaner's property to compensate Blommer for land lost to a proper public project, as in *City of Chicago v. Midland Smelting Co.,* 385 Ill.App.3d 945, 974, 896 N.E.2d 364, 391 (1st Dist. 2008).

This case offers a unique opportunity to re-affirm the *SWIDA* holding because of the particular facts involved. The "slum or blight" exception does not apply here, because the vacant property is neither blighted nor in a slum. The City of Chicago admits it (C. 7, 73, 74); the Circuit Court so found (C. 318, 324); and the very designation of the Eychaner property in a "conservation area" under the TIF Act is by definition a determination that the area is not blighted. 65 ILCS 5/11-74.4-3(b). Furthermore, it is undisputed that the Eychaner property is being taken by eminent domain as part of an economic redevelopment project, to convey the property to another private entity for that private entity's private use and profit – Blommer Chocolate Company. (C. 73)

Thus, this case clearly tests whether the Supreme Court meant what it said in *SWIDA* – that eminent domain may not be used to take private property for economic development unless the public, after the take, is entitled to use the property not as a mere favor or by permission of the owner, but as a matter of right (199 Ill.2d at 238, 768 N.E.2d at 9). In *SWIDA,* the Supreme Court's majority noted the distinction

between the requirement of "public purpose" – which all expenditures of public funds must satisfy – and the more stringent requirement of "public use" – which only applies to exercises of the power of eminent domain. 199 Ill.2d at 237, 768 N.E.2d at 8.

Justice Freeman dissented in *SWIDA,* citing prior cases which had equated the restrictions of "public purpose" and "public use." 199 Ill.2d at 254-59, 768 N.E.2d at 1720). In the later case of *Friends of the Park v. Chicago Park District,* 203 Ill.2d 312, 786 N.E.2d 161, 174 (2003), Justice Freeman (this time in a special concurrence) called the *SWIDA* case dead, because the majority decision in *Friends of the Park* upheld the expenditure of public funds to renovate Soldier Field based on the loose "public purpose" standard instead of a strict "public use" standard. Justice Freeman thought that *Friends of the Park* necessarily overruled *SWIDA.* Justice Freeman was emphatic:

> By this holding, the majority recognizes what it refused to acknowledge in *Southwestern Illinois Development Authority.* It only remains for this court to explicitly overrule the "public entitlement" requirement advanced in *Southwestern Illinois Development Authority.*

203 Ill.2d at 335, 786 N.E.2d at 174.

However, the *Friends of the Park* majority disagreed with Justice Freeman. The opinion of the Illinois Supreme Court in that case noted that spending money to renovate Soldier Field met the loose requirement of "public purpose," and that the stricter requirement of "public use" did not come into play because there was no exercise of eminent domain in *Friends of the Park.* 203 Ill.2d at 323, 786 N.E.2d at 168. Thus, the members of our Supreme Court are split on the correct

meaning and import of *SWIDA,* but the majority upholds the important constitutional principle that prohibits the exercise of eminent domain for a private use.

In the summer of 2006, the two other branches of government weighed in on the issue with the passage of eminent domain reform legislation. The General Assembly amended the eminent domain article of the Code of Civil Procedure to prohibit the use of eminent domain for economic development, except where the property being condemned is itself blighted or a slum; and the governor signed the new act into law. Public Act 941055 (2006); 735 ILCS 30/5-5-5. The reform legislation, however, is prospective only, and does not apply to the present case.[4]

There may thus be, as Judge Novak said, substantial ground for disagreement in the constitutional law of eminent domain – but the disagreement was resolved in Illinois by *SWIDA*. Must the exercise of eminent domain for economic redevelopment meet the strict and special requirement of "public use," or may it be wielded so long as it meets the looser and more general requirement of "public purpose" that due process requires of all governmental action? If the answer is the former, then defendant's Traverse

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[4] It should be noted, however, that while the Eminent Domain Act now bars the use of eminent domain "unless it is for a public use", there is an exception for the acquisition of property in furtherance of a TIF redevelopment plan. 735 ILCS 30/5-5-5(a), (b). The TIF exception does not apply, however, to "any acquisition of property in a conservation area for which the condemnation complaint is filed more than 12 years after the effective date of' the Act. 735 ILCS 30/5-5-5(a-10)(iii). The legislature thus recognizes that conservation areas are not blighted, and do not fall under the blight exception.

should have been granted and the Complaint to Condemn dismissed; if the latter, then the Circuit Court was correct in denying the Traverse and sustaining the Complaint to Condemn.

Based on the binding *SWIDA* precedent, the Circuit Court's answer and analysis here was wrong. The Circuit Court's decision followed the lead of Justice Freeman's dissent in *SWIDA* and his special concurrence in *Friends of the Parks.* Judge Novak first found, *inter alia,* that ". . . 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." (C. 321) She then found an adequate public purpose in the acquisition of defendant's property to preserve "diminishing confectionary manufacturing businesses in Chicago" and "eliminating conditions that verge on blight" (C. 323, 324-25), and found 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" (C. 323).

In denying the Traverse in this case, Judge Novak fused together the requirements of "public purpose" and "public use." Her opinion expressly rejected the distinction between the two (C. 320), which the Illinois Supreme Court majority had said in *SWIDA* had been "blurred somewhat in recent years" but "still exists and is essential." 199 lll.2d at 237, 768 N.E.2d at 8. Judge Novak considered the Ohio Supreme Court's decision in *City of Norwood v. Homey,* 2006 Ohio 3799, 853 N.E.2d 1115 (2006), which had likewise recognized the distinction, building upon both the Illinois Supreme Court's decision in *SWIDA* and the Michigan Supreme Court's decision in *County of Wayne v. Hathcock,* 471

Mich. 445, 684 N.E.2d 765 (2004). But Judge Novak held to the contrary, stating that the distinction between public purpose and public use was not consistent with "*SWIDA* in particular and other controlling Illinois precedent in general." (C. 325) Judge Novak adopted the dissenting position rejected both in *SWIDA* itself and in the emerging trend of state court eminent domain cases across the nation. In this manner Judge Novak erred.

In *Kelo v. City of New London,* 545 U.S. 469, 489, 162 L.Ed.2d 439, 457, 125 S.Ct. 2655, 2668 (2005), the United States Supreme Court left the issue of whether a municipality may condemn private property from one person to give to another private individual in the name of economic development up to the individual states to resolve. Illinois resolved the issue in *SWIDA,* and the City's use of eminent domain here does not meet the requirements of *SWIDA.*

The City claimed below that a long line of Illinois cases has held that "governmental entities can acquire property for economic development purposes regardless of the end use and location of the property." (C. 356-58) None of the cases on which the City relied considered the Illinois Supreme Court's ruling in *SWIDA.* In light of the Illinois Supreme Court's emphatic holding in *that* case that economic development alone is not enough to establish a proper public use to justify eminent domain, absent blight or a slum, and the undisputed facts in *this* case that the Eychaner property is neither blighted nor in a slum, the Circuit Court's error is clear.

The City argued below that defendant has not challenged the constitutionality of the designation of the property in a redevelopment area under the TIF Act. (C. 358) The City confused the issue. Defendant is

not challenging and has not challenged the expenditure of public funds or special public financing arrangements. The constitutional requirement of "public purpose" for such treatment is not at issue here. What defendant has challenged is the lack of any "public use" in the City's taking of defendant's property by eminent domain to give it to Blommer Chocolate Company in the name of economic redevelopment. That narrow question, focused only on the use of eminent domain, is the issue here, and this case is apparently the first in Illinois to depart from *SWIDA's* majority holding. By denying defendant's Traverse, the Circuit Court narrowed the impact of *SWIDA* contrary to its holding, clearly erred, and should be reversed.

* * * *

Sections II to V Omitted

SUPPLEMENTAL APPENDIX E

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

No.13-1833

CITY OF CHICAGO, a municipal corporation,
Plaintiff-Appellee,

v.

FRED J. EYCHANER and UNKNOWN OWNERS,
Defendants-Appellants.

Appeal from the Circuit Court of
Cook County, Illinois
County Department, Law Division
No. 05 L 050792
The Honorable Rita M. Novak and
Margaret A. Brennan, Judges Presiding

BRIEF OF PLAINTIFF-APPELLEE

STEPHEN R. PATTON
Corporation Counsel of the City of Chicago
30 N. LaSalle St., Suite 800
Chicago, Illinois 60602
(312) 744-0468

BENNA RUTH SOLOMON
Deputy Corporation Counsel
MYRIAM ZRECZNY KASPER
Chief Assistant Corporation Counsel
JUSTIN A. HOUPPERT
Assistant Corporation Counsel

Of Counsel

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NATURE OF THE CASE

Plaintiff-appellee City of Chicago filed suit seeking to condemn a parcel of property owned by defendant-appellant Fred J. Eychaner. Eychaner filed a traverse challenging the constitutionality of the taking. The circuit court denied that traverse, and this court denied Eychaner's petition under Illinois Supreme Court Rule 308 for interlocutory review of that decision. The case proceeded to trial, and a jury awarded Eychaner $2,500,000 in just compensation. Eychaner appeals. No questions are raised on the pleadings.

ISSUES PRESENTED

1. Whether the circuit court properly held that the City's taking of Eychaner's property for purposes of economic development and prevention of blight was constitutionally permissible.

2. Whether the circuit court abused its discretion by allowing the jury to hear evidence related to the property's current zoning.

3. Whether the circuit court abused its discretion by preventing the jury from hearing evidence regarding the purpose of the taking.

4. Whether the circuit court abused its discretion by allowing the City to call Eychaner's abandoned expert witnesses, by limiting cross-examination of one of those experts, or by denying Eychaner's motion to strike that expert's testimony after he revealed his prior employment by Eychaner.

5. Whether the verdict was the result of clear and palpable mistake.

JURISDICTION

The circuit court entered judgment on the jury's verdict on February 11, 2013. C. 3572-74; A. 36-38.[1] Eychaner filed a post-trial motion on February 21, 2013. C. 3635-47. The circuit court denied that motion on May 15, 2013. C. 4119; A. 39. On June 10, 2013, Eychaner filed a notice of appeal. C. 4120-22; A. 40-42. This court has jurisdiction over this appeal from a final judgment pursuant to Ill. Sup. Ct. R. 303.

STATEMENT OF FACTS

Planned Manufacturing District No. 5. The City's zoning code allows for the designation of an area as a Planned Manufacturing District ("PMD") as a means to "foster the city's industrial base"; "maintain the city's diversified economy"; "strengthen existing manufacturing areas"; "encourage industrial investment, modernization, and expansion by providing for stable and predictable industrial environments"; and "promote growth and development of the city's industrial employment base." Municipal Code of Chicago, Ill. § 17-6-0401 (2014). In early 2000, the City's Department of Planning and Development (the "Department") proposed the creation of a new PMD number five ("PMD-5") within the City's Chicago/Halsted Corridor, a heavily industrial area located approximately one mile northwest of the Loop. C. 138; 666-66(r); C. 885(r). The area contained nine industrial firms, including

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[1] The record on appeal consists of seventeen, consecutively paginated volumes of common-law record, which we cite as "C. ___"; six, consecutively paginated volumes of supplemental record, which we cite as "Supp. C. ___"; and eight volumes of record of proceedings (numbered Volumes 18-25), which we cite as "Tr. [volume] at [page(s)]." We cite the reverse side of record pages as "___(r)." We cite the appendix to Eychaner's opening brief as "A. ___."

the printing and distribution center of the Chicago Tribune ("Tribune"), a manufacturing plant of Water Saver Faucet Company ("Water Saver"), a processing plant of Blommer Chocolate Company ("Blommer"), Lake Shore Tile and Marble, Lakeside Construction, Warren Plumbing Company, FCCI Construction, and Hercules Ironworks. C. 671(r). Together, these companies provided approximately 2,800 jobs, including approximately 1,900 industrial jobs. *Id.* The proposed PMD-5 also included a vacant lot owned by Eychaner and located just north of Blommer's plant at the southwest corner of Grand Avenue and Jefferson Street. C. 785-85(r).

As required by the City's Municipal Code, Municipal Code of Chicago, Ill. § 17-13-0703, the Department held a community meeting on January 12, 2000 to discuss the proposed PMD-5. C. 666. A Department representative explained that the proposed PMD-5 was intended "to protect the 2800 jobs that are located within its boundaries" and "to strengthen the industrial users in the area whose operations have been threatened by recent residential encroachment." C. 666(r). All of the properties within the proposed PMD-5 were "zoned with some kind of industrial designation," C. 669(r), and, accordingly, the uses of the properties within the proposed PMD-5 had "historically . . . been exclusively industrial," *id.* The area's Alderman explained that recent residential development nearby had resulted in increasing conflicts between the new residential uses and the industrial uses. C. 668-68(r). In particular, heavy truck traffic, especially overnight, created conflicts with residents who were trying to sleep. C. 670(r). The creation of an exclusively manufacturing and commercial PMD in the Chicago/Halsted Corridor would protect the existing industrial users by creating a "buffer" around

them to prevent additional conflicts arising from continued residential development in the area. C. 679. The City representatives also explained that the City intended "to create incentives" to encourage the remaining industrial users within the proposed PMD-5 to invest in improvements and other developments through the creation of a Tax Incremental Financing ("TIF") district in the same area pursuant to the Illinois Tax Increment Allocation Redevelopment Act (the "Act"), 65 ILCS 5/11-74.4-1 et seq. (2012). C. 671(r); C. 691(r)-92.

The City's Plan Commission then held special hearings on March 16, 2000 and August 17, 2000 to consider the proposed PMD-5, as required by the City's Municipal Code, Municipal Code of Chicago, Ill. § 17-13-0705. C. 717-17(r); C. 781-82. A Department representative testified that the proposed PMD-5 would send "a clear message about our long-term intentions for this area that it remain an industrial and commercial area" and would prevent smaller properties and vacant parcels within the area from being developed for future residential uses. C. 718(r)-19. Representatives from the Tribune and Water Saver testified in support of the proposed PMD-5. C. 744-745(r); C. 749-49(r); C. 809-10. Representatives of Blommer also appeared at the hearings, and, at the first hearing, expressed their opposition to Blommer's inclusion on the southern edge of PMD-5 because of concerns that PMD-5 would not provide a sufficient buffer between Blommer and proposed residential development immediately to the south of the plant. C. 719(r)-25. At the second hearing, a Blommer representative testified that Blommer had worked with the City and the residential developer to formulate a plan to create a buffer and to internalize Blommer's operations to alleviate truck traffic and noise that

might conflict with nearby residential uses. C. 797(r)-800. These plans satisfied Blommer's concerns, and, thus, Blommer withdrew its objection to its inclusion in PMD-5. *Id.*

On September 27, 2000, the City Council passed an ordinance adopting PMD-5. C. 885(r)-89(r). The ordinance stated, "It is the policy of the City of Chicago to foster growth of the City's manufacturing and commercial base to maintain a diversified economy," C. 885(r), and reiterated the City's "commit[ment] to the retention of existing manufacturing and commercial firms and the development of modern facilities in the City for these firms," C. 885(r)-86. The ordinance included a list of thirty-two permitted and twenty special uses of property within PMD-5, which included a range of industrial, commercial, and entertainment uses. C. 887-88(r).

The River West TIF Plan and Project. The City also identified the area as a potential TIF district under the Act to encourage new development and investment in the area and to combat "the decaying nature of the infrastructure" and the presence of "buildings which . . . are not necessarily at the highest level of maintenance." C. 671(r); C. 691(r). In the Act, the General Assembly declared that the presence of such "blighting factors" in municipalities across the state endangers "stable economic and physical development," and results in "blighted areas" and "areas requiring conservation." 65 ILCS 5/11-74.4-2(a). Both "blighted areas" and "areas requiring conservation" demand "excessive and disproportionate expenditure of public funds," and suffer from "inadequate public and private investment, unmarketability of property, growth in delinquencies and crime, and housing and zoning law violations . . . together with an abnormal

exodus of families and businesses." *Id.* An area that qualifies as a blighted area or a conservation area is referred to as a "redevelopment project area." *Id.* 5/11-74.4-3(p).

Under the Act, a redevelopment project area is defined as either a blighted area or a conservation area depending on how many and to what extent certain statutory blighting factors exist. A blighted area exhibits five or more blighting factors "to a meaningful extent" and "reasonably distributed" throughout the redevelopment project area; a conservation area exhibits three or more of those blighting factors and, in addition, is an area in which at least fifty percent of the structures are thirty-five years old or older. 65 ILCS 5/11-74.4-3(a), (b). Thus, conservation areas are those that although not yet "blighted areas," are "rapidly declining and may soon become blighted areas if their decline is not checked," *id.* 5/11-74.4-2(a). To prevent conservation areas from becoming blighted areas, the General Assembly directed that "blighted conditions need to be eradicated and conservation measures instituted, and that redevelopment of such areas be undertaken," and declared such action was "essential to the public interest." *Id.* 5/1174.2(b).

To combat blighting factors in both conservation areas and blighted areas, the Act empowers municipalities to acquire property by eminent domain, *see* 65 ILLS 5/11-74.4-4(c), and to create a commission to make recommendations on designating redevelopment project areas, adopting redevelopment plans, and undertaking redevelopment projects, *id.* 5/11-74.4-4(k). A "redevelopment plan" is a "comprehensive program of the municipality for development or redevelopment intended by the payment of redevelopment project costs to reduce or eliminate those conditions the

existence of which qualified the redevelopment project area as a "'blighted area' or 'conservation area.'" *Id.* 5/11-74.4-3(n). In turn, a "redevelopment project" is "any public and private development project in furtherance of a redevelopment plan." *Id.* 5/11-74.4-3(o). The Act requires public notice and hearings on proposals for redevelopment project areas, redevelopment plans and redevelopment projects, *id.* 5/11-74.4-4(a), and, before any public hearing, a municipality must appoint a joint review board of community members, which issues a recommendation on the proposal, *id.* 5/11-74.4-5(b). In 1991, in accordance with the Act, the City Council established the Community Development Commission ("Commission") to accomplish everything necessary for redevelopment, including acquiring property through condemnation. Municipal Code of Chicago, Ill. § 2-124-020 to -060 (2014).

In September 2000, the Commission accepted for review a redevelopment plan ("Plan") prepared by the Department regarding the proposed River West Tax Increment Financing Redevelopment Area ("River West Area"). C. 109-29. The 68-page Plan documented the deteriorated condition of the area and the need for redevelopment. C. 137-41.

Specifically, it stated, "The health and vitality of the Loop is indirectly attributable to the strength of the immediate vicinity . . . . [I]f the surroundings are deteriorated or blighted, businesses and developers are less inclined to invest nearby." C. 138. "For this reason, the City desires to maintain and strengthen the areas surrounding the Loop, including the Project Area." *Id.* In addition to the deteriorated conditions in the River West Area, the Plan also noted the problems posed by new residential developments to existing industry in the area: "The inherent incompatibility

between new residents and existing industry and commercial businesses can force these industries and commercial businesses out of the area." C. 139. The Plan stated the City's determination "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." *Id.* Thus, the goal of the Plan was "that the entire Project Area be revitalized through a coordinated public and private enterprise effort of reinvestment, rehabilitation and redevelopment of uses compatible with a strong, stable area . . . ." C. 144.

The Plan also included a detailed eligibility study documenting the blighting factors present in the area. C. 175-85. Those blighting 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." C. 175-76. And these blighting factors were "reasonably distributed through the entire Project Area," in which "[n]inety-one (91) of one hundred three (103) buildings are thirty-five (35) years of age or older." C. 175. Thus, the Plan concluded that the River West Area met the requirements of a "conservation area," and, on that basis, qualified as a redevelopment project area. *Id.*; C. 146. The Plan concluded that its implementation would "benefit the City, its residents, and all taxing districts by eliminating conditions that could become blighted conditions, improving economic well-being, and improving the community living, working and learning environment." C. 143.

After reviewing the Plan, testimony from the public hearing, and the review board's recommendation, the Commission found that the River West Area "has not

been subject to growth and development through investment by private enterprise and would not reasonably be expected to be developed without the adoption of the Plan," C. 207, and recommended that the City Council approve the Plan, designate the area a redevelopment project area under the Act, and adopt tax increment allocation financing in the area, C. 208. The City Council followed the Commission's recommendations in ordinances enacted on January 10, 2001. C. 132-36; C. 214-17; C. 222-24.

The Blommer Industrial Campus Project. When Blommer expressed its opposition to its inclusion on the edge of the proposed PMD-5 at the Plan Commission hearing on March 16, 2000, it suggested two solutions: either extending PMD-5 further south to provide a buffer between Blommer and new residential development or not including Blommer within PMD-5 to allow it to sell its property more easily if conflicts with the residents forced it to relocate. C. 720-20(r). Blommer also expressed concern about conflicts with nearby residents created by its "seven days a week, 24 hours a day" operations. C. 721. At the time, Blommer employed approximately 125 full-time employees at its Chicago plant and had plans to expand its operations. C. 800. The alderman representing the area immediately stated his desire that Blommer remain and suggested finding a zoning solution that would create "a sufficient corridor" to prevent Blommer's being "surrounded by residential development." C. 722(r). The Chairman suggested that the Plan Commission could help Blommer through its approval process for the proposed residential development. C. 724(r). The Plan Commission deferred its vote on the proposed PMD to allow time for the City, Blommer, and the residential developer to discuss a solution. C. 766-67.

Representatives of Blommer and the Department met on March 27, 2000. C. 891-91(r). Blommer requested the City's assistance in creating a "larger industrial "campus' for truck staging by acquiring several neighboring lots and vacating streets along its plant. C. 891. Blommer also suggested that it would "wall[] off' its expanded campus from the residential development to the south to enclose its operations and "further reduce off-site noise impacts." *Id.* The Department suggested that the City could use TIF funds "to help Blommer[] acquire the property they want and for public infrastructure improvements to better manage the flow of traffic in the area." C. 891(r). Blommer also communicated with the residential developer, who agreed to cooperate in creating the expanded industrial campus. C. 775-76. Blommer believed that the proposed campus expansion "would significantly mitigate the most important complaint voiced by residents surrounding the boundaries of the proposed PMD – traffic." C. 955.

At a second hearing before the Plan Commission on August 17, 2000, a Department representative testified about the plan to aid Blommer "to internalize their operations and minimize impacts on adjacent streets." C. 784. This plan included an agreement by the residential developer "to dedicate a twenty-five foot easement on the south side of Kinzie which will create a landscape boulevard and a significant open space buffer immediately south of the factory building." *Id.* A Blommer representative testified that Blommer had always supported the concept of PMDs but had objected to its inclusion in this particular PMD because it was "right on the edge of' it with a residential development planned to the immediate south. C. 797(r)-98. Blommer withdrew its opposition to the proposed PMD because of the commitments by the City and the residential

developer "to help [Blommer] create a buffer so that [it] can really continue operations in the manner that would not conflict with the other development around the site." C. 798(r).

In May 2001, Blommer submitted to the City a redevelopment proposal to create an industrial campus that would alleviate traffic congestion using a new truck staging area on four acres of vacant and under-utilized property to the north and east of Blommer's facility. C. 978-90. At this time, Blommer employed approximately 150 employees in Chicago, including 115 employees in manufacturing jobs. C. 981(r). Blommer's proposed industrial campus would benefit the City through "job retention and creation," "redevelopment of the Site," and "long-term expansion of the real estate tax base." C. 981. The project would also ensure PMD-5's goal of "retention/expansion of the City's industrial base" while simultaneously serving "as a 'buffer zone' between the existing industrial area and residential development." C. 982. Blommer requested the City's commitment of TIF revenue to assist in the project's costs, and requested the City enter a Redevelopment Agreement that designated Blommer as the redeveloper of the project site pursuant to the Act. C. 980.

On February 21, 2002, Blommer offered to purchase Eychaner's vacant lot for S824,980. C. 1015. After Eychaner rejected that offer, the Department sought authority to acquire the lot. C. 1019. On May 14, 2002, the Commission held a public meeting to discuss the Department's request for authority to acquire three parcels of property surrounding Blommer's plant, including Eychaner's lot. C. 1024(r). Following the meeting, the Commission recommended authorizing the acquisitions, C. 230, and the City Council subsequently enacted

an ordinance implementing that recommendation, C. 230-31. On June 19, 2002, the City Council found that the acquisition of the properties was necessary "for a redevelopment project in order to achieve the objectives of the Plan," C. 230, and for the "public purpose of improving a commercially blighted area," C. 231.

On August 4, 2005, the City filed suit seeking to acquire Eychaner's lot through eminent domain. C. 2-8. On February 8, 2006, the City Council enacted an ordinance appointing Blommer as project developer for the acquired property and authorizing the execution of a Redevelopment Agreement between Blommer and the City. C. 1041-42. The Redevelopment Agreement recognized that the redevelopment project would "encourage private development," "enhance local tax base," "create employment opportunities," and "eradicate blighted conditions." C. 1042(r). It also recognized that Blommer would use the acquired property to eliminate "obsolete land-use and building layout" at its current facility and to alleviate "truck traffic volume and congestion around the Existing Site." C. 1043. It required Blommer to carry out the project in accordance with the terms of the Redevelopment Agreement and the Plan, C. 1043, and to provide the Department with written quarterly construction progress reports and, upon request at completion of the project, an updated survey of the improvements made to the site, C. 1045(r). The Redevelopment Agreement further required Blommer to covenant to maintain no fewer than 100 full-time jobs at its facility for five years from completion of the first phase of the project and to retain no fewer than 150 full-time jobs thereafter. C. 1054. Blommer also covenanted to maintain its business within the City at the project

site for five years after the completion of the first phase of the project. *Id.*

The Litigation. Eychaner filed a traverse in the City's condemnation suit, asserting that the City's taking of his property to give it to Blommer for private redevelopment was not a taking for a constitutionally valid public purpose. C. 39-41. The circuit court denied the traverse, C. 313-26; A. 16-29, and certified the question of the constitutionality of the taking for interlocutory appeal to this court, C. 571-72; A. 30-31. This court denied Eychaner's petition for interlocutory review, C. 590, and the case proceeded to a jury trial on the issue of just compensation.

Before trial, the circuit court denied Eychaner's motion in limine to bar evidence related to the PMD-5 zoning of the property. C. 1123; A. 32. The court granted the City's motion in limine to bar evidence relating the purpose of the taking to the City's transferring the property to Blommer. Tr. 20 at 221. As the witness schedule was finalized for trial, Eychaner announced his intention to abandon and not call two of his three expert appraisers. In response, the City served supplemental Rule 213(f) disclosures identifying those abandoned experts as trial witnesses, and the court denied Eychaner's motion to strike those supplemental disclosures as untimely. Tr. 20 at 64. The court subsequently granted the City's motion in limine to bar Eychaner from cross-examining those abandoned witnesses on opinions not elicited by the City on direct examination, Tr. 21 at 125, and granted Eychaner's motion in limine to bar evidence of the abandoned experts' former employment by Eychaner, Tr. 21 at 58-59.

During a five-day trial, the jury visited the property and heard from two controlled expert appraisers,

Kathy Dart and James Gibbons, during the City's case-in-chief. Dart and Gibbons testified that there was not a reasonable probability of rezoning the property to residential use, Tr. 23 at 117; Tr. 24 at 25, and that the highest and best use of the property was industrial or commercial use consistent with the PMD-5 zoning, Tr. 23 at 118; Tr. 24 at 26. Dart appraised the fair market value of the property at $1,530,000, Tr. 23 at 118; and Gibbons appraised the property at $1,400,000, Tr. 24 at 26.

The City also called Michael MaRous, one of Eychaner's abandoned expert appraisers, who testified that, assuming there was no reasonable probability of rezoning, the highest and best use of the property was for commercial purposes consistent with the PMD-5 zoning and that, under such conditions, the property's fair market value was $2,550,000. Tr. 22 at 29. Before calling MaRous to the stand, the City's counsel, with Eychaner's counsel present, informed MaRous of the court's ruling barring disclosure of his prior employment, Tr. 22 at 40, and, at a sidebar during MaRous's testimony, the court also instructed him to be careful to limit his answers to the narrowly tailored questions asked by the City's counsel to avoid violating the pre-trial ruling, Tr. 22 at 43-44. Despite these warnings, on redirect examination, MaRous stated that one of Eychaner's corporations may have retained him to appraise the property. Tr. 22 at 83-84. As a remedy for this violation of the pre-trial ruling, Eychaner's counsel suggested that the court either strike MaRous's testimony in its entirety or allow Eychaner's counsel to ask MaRous about other opinions that had not been addressed on direct examination. Tr. 22 at 89-90. The court denied those requests and instead offered a cautionary instruction that the jury should not concern itself with the question who had retained

MaRous. Tr. 22 at 92-93. Eychaner's counsel agreed with that instruction. Tr. 22 at 95.

Eychaner then called an expert land planner, Allen Kracower, who testified that there was a reasonable probability of rezoning the subject property to residential use. Tr. 22 at 196. Eychaner called a single expert appraiser, Dale Kleszynski, who agreed with Kracower's opinion regarding the reasonable probability of rezoning to allow a highest and best use of multi-family residential and opined that the property was worth $5,100,000. Tr. 24 at 171; Tr. 24 at 209-10. On rebuttal, the City called Eychaner's other abandoned expert appraiser, Joseph Thouvenell, who testified that there was a reasonable probability of rezoning the property for residential use and that the fair market value was $3,600,000. Tr. 25 at 3-4. The City also called a rebuttal expert land planner, Lawrence Okrent, who testified that there was no reasonable probability of rezoning the subject property based on the long history of manufacturing zoning and uses of the subject property and surrounding area. Tr. 25 at 89. At the end of this testimony, the jury returned a just compensation award within the range of the expert testimony in the amount of $2,500,000. C. 3502; A. 33. Eychaner appeals. C. 4120-22.

ARGUMENT

The City condemned Eychaner's vacant lot for important, constitutionally permissible public purposes, and the jury's verdict was within the range of expert appraisals. As we explain below, Eychaner has offered no reason to upset that verdict. The taking was for the valid public purposes of economic redevelopment, retention of industrial employment and tax bases, reduction of land use conflicts, and prevention of blight.

Additionally, none of the circuit court's evidentiary rulings was an abuse of discretion, either. The court properly allowed the jury to consider the PMD-5 zoning of the property because that zoning designation was not the project for which the property was taken nor was there evidence that the City changed the property's previous manufacturing zoning to PMD-5 to lower the costs of acquiring the property. And the court properly barred evidence relating the purpose of the taking to the transfer of the property to Blommer because the inherent prejudice outweighed the minimal probative value to the sole question before the jury – the just compensation for the taking. Likewise, the rulings involving MaRous's and Thouvenell's testimony were within the court's discretion. All of the issues involving those experts, of which Eychaner now complains, were self-inflicted by his voluntary decision to abandon MaRous and Thouvenell as trial strategy. Because Eychaner had himself disclosed those experts and their opinions, there was no unfair surprise or prejudice to Eychaner when the City disclosed them as well. As for limiting Eychaner's cross-examination of MaRous to opinions elicited by the City on direct, that was a proper exercise of discretion because Eychaner had abandoned MaRous's other opinions and cross-examination on them would have exceeded the scope of direct. Nor was there any basis to strike MaRous's testimony in its entirety following his testimony regarding his prior employment. As the court recognized, the jury had heard sufficient, permissible testimony regarding the origins of MaRous's appraisal report to infer his prior employment, and the court issued a cautionary instruction.

Finally, the verdict was within the range of expert valuations and was not the result of mistake because the jury heard from multiple experts on both sides of

the reasonable probability of rezoning issue and, thus, had ample support for its verdict.

I. THE CITY'S TAKING OF EYCHANER'S PROPERTY IS FOR CONSTITUTIONALLY PROPER PUBLIC PURPOSES.

The United States and Illinois Constitutions allow the City to take private property for public use if the City pays the owner just compensation. U.S. Const. amend. V; Ill. Const., art. I, § 15. The taking of Eychaner's vacant lot was for the public purposes of economic redevelopment, retention of industrial employment and tax bases, reduction of land use conflicts, and prevention of blight. This court reviews the constitutionality of a taking de novo. *E.g., Southwestern Illinois Development Authority v. Al-Muhajirum,* 318 Ill. App. 3d 1005, 1008 (5th Dist. 2001).

The taking of Eychaner's property is part of a larger effort to maintain and encourage manufacturing within the City through the River West TIF Plan and Project and PMD-5. The City created PMD-5 "to foster the growth of the City's manufacturing and commercial base to maintain a diversified economy," C. 885(r), to retain "existing manufacturing and commercial firms," *id.,* and, to encourage "the development of modern facilities in the City for these firms," C. 885(r)-86. The City recognized the inherent land use conflicts between traditionally manufacturing areas and new residential developments near them. C. 783. To reduce these conflicts and ensure industry remains in the City, the City enacted PMD-5 zoning to create "a stable and predictable land-use environment." C. 886. PMD-5 was the result of a lengthy process of planning and consideration. After the Department developed the proposed PMD-5, it submitted the proposal to a community meeting, C. 666-711, to two special hearings

of the Plan Commission, C. 717-67; C. 781-818, and finally to the City Council, who ultimately enacted the PMD-5 zoning ordinance, C. 885-89.

To provide industrial users within the PMD with TIF Act financial support for expansion and improvements and to eliminate blighting factors in the deteriorated area, the City also created the River West Redevelopment Project Area pursuant to the Act. C. 132-36; C. 214-17; C. 222-24. Before enacting the River West TIF project, the Department commissioned an eligibility study that determined the area qualified as a "conservation area" under the Act because five blighting factors were present and at least fifty percent of the buildings were more than thirty-five years old. C. 174-85. The Department also commissioned the creation of the Plan, which proposed the use of TIF revenue for "strengthening of the economic vitality of the community, arising from the preservation of a cohesive district which supports the service, business, employment and other needs of the Loop" and "replacement of inappropriate uses, blight and vacated properties with viable, high-quality developments." C. 145. Like the PMD-5 proposal, the Plan was subjected to a lengthy review process, including, a public meeting, C. 133, two joint review board meetings, C. 134, a Commission hearing, *id.*, and ultimately consideration and passage by the City Council, C. 132-36; C. 214-17; C. 222-24. To achieve the Plan's goals, the City Council authorized the use of eminent domain to acquire parcels contained within the project area. C. 136.

When Blommer objected that its location at the edge of PMD-5 across from a proposed residential development would not afford it sufficient protection from the land use conflicts the PMD intended to eliminate and

would potentially force Blommer to leave the City, the City worked with Blommer and the residential developer to address those problems and ensure that the goals of PMD-5 would be achieved for Blommer and that it would not relocate its industrial jobs and tax base. C. 783(r)-84. The plan for addressing these issues included the residential developer's commitment to creating a setback buffer between its residents and Blommer's plant and the City's cooperation with Blommer in creating an expanded industrial campus to internalize its truck staging and other operations to reduce truck traffic problems and noise. *Id.* In addition to eliminating these land use conflicts, the plan resulted in Blommer's agreement to maintain its operations with a minimum of 100 jobs in the City and to expand its operations to create additional jobs. C. 1054. In exchange, the City agreed to assist Blommer in acquiring three parcels necessary for its industrial campus expansion. C. 1043. In authorizing those acquisitions, including Eychaner's vacant lot, the City Council found their acquisitions "necessary for a redevelopment project in order to achieve the objectives of the Plan," C. 230, and "for the home rule public purpose of improving a commercially blighted area," C. 231.

Takings pursuant to a redevelopment plan and aimed "to eliminate blight and promote economic redevelopment of the area" easily pass constitutional muster. *City of Chicago v. Midland Smelting Co.,* 385 Ill. App. 3d 945, 973 (1st Dist. 2008). As this court has recognized, "[t]here is no dispute that these are valid public purposes under which property may be acquired by the use of eminent domain, regardless of the use which may be made of the property after the redevelopment has been achieved." *Id.*; *accord, e.g., Kelo v. City of New London,* 545 U.S. 469, 484 (2005) ("Promoting economic development is a traditional

and long-accepted function of government."); *People ex rel. Gutknecht v. City of Chicago,* 3 Ill. 2d 539, 545 (1954) ("the redevelopment of slum and blight areas . . . constitutes a public use and a public purpose, regardless of the use which may be made of the property after the redevelopment") (internal quotation omitted). The City's taking of Eychaner's vacant lot falls squarely within these permissible public purposes by achieving the retention of industrial employment and tax bases, the reduction of land use conflicts, and the prevention of blight in a conservation area under the Act.

In arguing the contrary, Eychaner misplaces reliance on *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.* ("SWIDA"), 199 Ill. 2d 225 (2002). In *SWIDA,* the Illinois Supreme Court held that a taking for the sole purpose of giving land to a privately owned raceway to increase its parking capacity was not for a constitutionally permissible public purpose. *Id.* at 235. *SWIDA* is inapposite for a number of reasons. To begin, the case is entirely factually distinguishable from the taking of Eychaner's lot. The claimed public benefits in *SWIDA* were the reduction of lines to enter the parking lots on race days and an increased ability to cross safely from parking areas to the track. *Id.* at 239. The supreme court held that it was "unconvinced that these facts alone are sufficient to satisfy the public use requirement" and that the taking amounted "to a private venture designed to result not in a public use, but in private profits." *Id.* at 238-39. By contrast, the taking of Eychaner's lot for use in expanding Blommer's industrial campus serves multiple, public uses, including economic redevelopment of a conservation area, maintenance and expansion of industrial employment and uses within PMD-5, reduction of land use conflicts,

and prevention of blight. In addition, SWIDA exercised its quick take powers at the race track's request solely to make the race track's acquisition of the property easier, cheaper, and quicker. *Id.* at 241. "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." *Id.* at 240. Unlike the taking in *SWIDA,* the City's taking occurred pursuant to the carefully planned and legislatively approved PMD-5 and TIF plans and under a redevelopment agreement pursuant to the Act. Indeed, the General Assembly has expressly authorized takings in redevelopment project areas under the Act, 65 ILCS 5/11-74.4-4(c), and Eychaner has cited no authority, including *SWIDA,* that has ever invalidated such a legislatively authorized taking under the Act.

Moreover, Eychaner misreads *SWIDA* in asserting that the City may not take his property to give it to another private party for economic redevelopment if his property is itself not blighted and will not be available for public use. Eychaner Br. 11, 14-16. But it is well established that the City may dispose of taken property as it wishes, including conveying it to a private party, so long as the taking was for a constitutionally permissible public purpose. *E.g., Gutknecht,* 3 Ill. 2d at 544-45; *Midland Smelting,* 385 Ill. App. 3d at 973; *Kelo,* 545 U.S. at 482; *Berman v. Parker,* 348 U.S. 26, 34 (1954). Indeed, *SWIDA* itself states, "Clearly, private persons may ultimately acquire ownership of property arising out of a taking and the subsequent transfer of private ownership does not by itself defeat the public purpose." 199 Ill. 2d at 236. And *SWIDA* nowhere held that elimination of blight is the only permissible public purpose for taking property that is transferred to another private party. Rather, *SWIDA*

recognized that takings to eliminate blight are one type of "[c]learly" permissible takings and that this permissible purpose was not at issue in *SWIDA* because the court was "not dealing with a taking for the purpose of eliminating slums or blight." *Id.* at 238.

Nor does *SWIDA* limit takings to property that is itself blighted. The requirements for a proper taking to prevent or eliminate blight were even not before the *SWIDA* court. 199 Ill. 2d at 238. Moreover, a long line of precedent holds that property may be taken if it is located within a blighted area. *E.g., City of Chicago v. Barnes,* 30 Ill. 2d 255, 257 (1964); *Berman,* 348 U.S. at 35; *City of DeKalb v. Anderson,* 43 Ill. App. 3d 915, 917 (2d Dist. 1976). As the Illinois Supreme Court has explained, "Property may be taken which, standing by itself, is unoffending, for the test is based on the condition of the area as a whole." *Barnes,* 30 Ill. 2d at 257.

Nor must the government wait until the area in which the property is located becomes blighted. Instead, it may intervene if the area is deteriorating in a manner that threatens to become blighted if conservation efforts are not taken. *Gutknecht,* 3 Ill. 2d at 545. In *Gutknecht,* the supreme court held the taking of property within a "conservation area" was permissible to prevent future blight, specifically rejecting an argument like Eychaner's, Eychaner Br. 12-13, that eminent domain may be used only for "the elimination rather than the prevention of' blight, 3 Ill. 2d at 545 (internal quotation omitted). The court stated, "we are aware of no constitutional principle which paralyzes the power of government to deal with an evil until it has reached its maximum development." *Id.*

Eychaner also makes much of the distinction purportedly drawn by the *SWIDA* court between public purpose and public use, arguing that for a taking to be

for public use it must allow the public access to the property. Eychaner Br. 14-16. But, as this court has expressly recognized, *SWIDA* stands for no such distinction. *Midland Smelting,* 385 Ill. App. 3d at 971-73. In rejecting an argument virtually identical to Eychaner's, this court stated, "Contrary to Midland's argument, we do not believe that the focus of the court's decision in *SWIDA* was on the quantitative measure of the degree to which the public would be entitled to use the property." *Id.* at 971. "For example, the *[SWIDA]* court noted that '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.'" *Id.* at 972 (quoting *SWIDA,* 199 Ill. 2d at 235-36). This court rejected the notion that *SWIDA* intended to establish a bright-line test for public use dependent on public access and instead had recognized that permissible public use "could vary from case to case." *Id.* at 972-73. Eychaner attempts to distinguish *Midland Smelting* as a case involving a "substitute condemnation," Eychaner Br. 14, but this court's rejection of Eychaner's reading of *SWIDA* did not turn on the "substitute condemnation" at issue but rather on its careful consideration of the *SWIDA* decision.

And this court is not alone in rejecting the reading of *SWIDA* that Eychaner offers. In holding a taking for economic redevelopment constitutionally permissible, the Connecticut Supreme Court likewise refused to read *SWIDA* as holding that transferring land for private redevelopment cannot satisfy the public use requirement. *Kelo v. City of New London,* 843 A.2d 500, 535 (Conn. 2004). The Connecticut court explained, "In our view, the facts of *[SWIDA]* merely demonstrate the far outer limit of the use of the eminent domain power for economic development." *Id.* Moreover, the

dissent in *SWIDA* pointed out that the United States Supreme Court decisions cited by the majority in discussing "public use" had expressly rejected a requirement that taken property be put into use for the general public. 199 Ill. 2d at 254 (Freeman, J., dissenting) (citing *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 243-44 (1984); *Berman,* 348 U.S. at 34). And in affirming the Connecticut court's decision in *Kelo,* the United States Supreme Court reexamined *Midkiff* and *Berman* and reiterated that it "'long ago rejected any literal requirement that condemned property be put into use for the . . . public.'" *Kelo,* 545 U.S. at 479 (quoting *Midkiff,* 467 U.S. at 244).[2]

Indeed, Eychaner virtually ignores the United States Supreme Court's post-SWIDA decision in *Kelo,* citing it only for the truism that States remain free to address the issue of economic redevelopment takings differently under state law. Eychaner Br. 17. But this sells *Kelo's* effect on post-SWIDA takings law dramatically short. *Kelo* not only rejected the use-by-the-general-public rule advanced by Eychaner, but it also held that the taking of non-blighted property within a planned redevelopment project area and transferring it to a private party for purposes of promoting economic development is constitutionally permissible. 545 U.S. at 477-85. This is critical to the

[2] Eychaner asserts that "the Appellate Court's other post-*SWIDA* cases have not overturned the rule dictated by the *SWIDA* majority." Eychaner Br. 13-14 (citing *Village of Round Lake v. Amann,* 311 Ill. App. 3d 705 (2d Dist. 2000); *Midland Smelting,* 385 Ill. App. 3d at 974). This makes little sense because the appellate court could not "overturn" the supreme court's decision even if it wanted to do so. In addition, *Amann* pre-dates the supreme court's decision in *SWIDA,* and, as we explain, this court expressly rejected Eychaner's reading of *SWIDA* in *Midland Smelting.*

analysis because, in its pre-Kelo decision, the *SWIDA* court relied on the United States Supreme Court's past takings decisions to reach the conclusion that a taking for economic redevelopment by a private party was unconstitutional; 199 Ill. 2d at 235-38 (citing *Midkiff* and *Berman);* yet, three years later, the United States Supreme Court relied on the same precedents to reach the opposite conclusion, *Kelo,* 545 U.S. at 477-85. In addition, Illinois generally follows a "lockstep approach" to constitutional interpretation in which courts "follow[] the decisions of the United States Supreme Court in cases where the Federal and State constitutional provisions and issues are similar." *E.g., Van Harken v. City of Chicago,* 305 Ill. App. 3d 972, 982 (1st Dist. 1999).[3] Thus, this court should credit the United States Supreme Court's post-SWIDA decision in *Kelo,* to the extent it believes that *SWIDA* otherwise applies.

In the face of these post-SWIDA developments, Eychaner cites decisions by Michigan and Ohio courts as evidence of an "emerging trend" of state court cases recognizing the public use versus public purpose distinction that he reads into *SWIDA*. Eychaner Br. 17 (citing *County of Wayne v. Hathcock,* 684 N.W.2d 765 (Mich. 2004); *City of Norwood v. Homey,* 853 N.E.2d 1115 (Ohio 2006)). Despite Eychaner's characterization, two state court decisions can hardly be called an

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[3] The Fifth Amendment, which applies to the States through the Fourteenth Amendment, provides, "nor shall private property be taken for public use, without just compensation," and Article I, § 15 of the Illinois Constitution provides, "Private property shall not be taken or damaged for public use without just compensation as provided by law." The only material difference between the two provisions is the addition of the "or damaged" clause in the Illinois constitution, and that clause is not at issue here.

"emerging trend," particularly where they contradict this court's subsequent decision in *Midland Smelting* and the United States Supreme Court's decision in *Kelo.* Indeed, *Hathcock* pre-dates the Supreme Court's *Kelo* decision and does not even mention *SWIDA.* As for *Homey,* it does not rely extensively on *SWIDA,* but cites it only for a passing quotation and as an example of a taking that was "deemed not for public purpose," 853 N.E.2d at 1137, 1140; nor does it anywhere expressly adopt the public-use versus public-purpose rule as Eychaner suggests. More important, these out-of-state decisions should not detract from this court's decision in *Midland Smelting* or the Supreme Court's decision in *Kelo.*

Eychaner also cites the General Assembly's post-SWIDA enactment of the Eminent Domain Act ("EDA"), 735 ILCS 30/1-1-1 et seq. (2012), as evidence of the General Assembly's intent "to prohibit the use of eminent domain for economic development, except where the property being condemned is itself blighted or a slum.". Eychaner Br. 15-16. But Eychaner's reliance on the EDA is both irrelevant and misguided. To begin, Eychaner concedes – as he must – that the EDA "is prospective only, and does not apply to the present case," *id.* at 16, because the EDA became effective on January 1, 2007, 735 ILCS 30/99-5-5, and the City filed its condemnation suit on August 4, 2005. In any event, the EDA says nothing about the constitutional standard governing takings but imposes additional statutory protections, which do not apply to this 2005 taking. In addition, contrary to Eychaner's assertion, Eychaner Br. 16, the EDA does not limit takings for economic redevelopment to property that is itself blighted but instead, consistent with prior case law, looks to whether the area as a whole has been designated blighted or a conservation area. The EDA

provides that "[i]f the exercise of eminent domain authority is to acquire property for private ownership or control and if the primary basis for the acquisition is the elimination of blight," the condemning agency must prove "that the property to be acquired is located *in an area* that is currently designated as a blighted or conservation area under an applicable statute." 735 ILCS 30/5-5-5(d) (emphasis added). Moreover, in heightening the statutory standards for new takings for economic redevelopment, the General Assembly expressly recognized the continuing legitimacy and validity of such takings under the Act. To this end, the EDA specifically provides that its new requirements "do not apply to the acquisition or damaging of property in furtherance of the goals and objectives of an existing tax increment allocation redevelopment plan." 735 ILCS 30/5-5-5(a-10). That section continues, "A condemning authority may exercise the power of eminent domain for the acquisition of property in furtherance of an existing tax increment allocation redevelopment plan as provided for by law in effect prior to the effective date of this Act." *Id.*

For these reasons, the City's taking of Eychaner's property was for constitutionally permissible public use, and the circuit court did not err by denying Eychaner's traverse challenging that taking.

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Sections II to V Omitted

SUPPLEMENTAL APPENDIX F

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

No. 13-1833

CITY OF CHICAGO, a municipal corporation,

Plaintiff-Appellee,

v.

FRED J. EYCHANER and UNKNOWN OWNERS,

Defendant-Appellant.

Appeal from the Circuit Court of
Cook County, Illinois;
No. 05 L 050792;
Hon. Rita M. Novak and
Hon. Margaret A. Brennan,
Judges Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

Thomas F. Geselbracht
DLA PIPER LLP (US)
203 No. LaSalle Street
Suite 1900
Chicago, Illinois 60601
(312) 369-4094

Counsel for Defendant-Appellant Fred Eychaner

ORAL ARGUMENT REQUESTED

ARGUMENT

From its very beginning, the City's brief has it wrong. The City's Nature of the Case (*see* City Br. 1) is incorrect, because there clearly is a question on the pleadings here: the constitutional authority of the City to take private property in the name of economic development to give the land to another private party, when the land is neither blighted nor in a blighted area. This Court should focus on that issue, and the issues that fatally flawed the trial on just compensation, rather than on the City's mischaracterizations, straw men or irrelevant arguments.

Eychaner's opening brief recited the undisputed facts that frame the legal issues in this case (Eychaner Br. 3), and even the City does not deny that these facts are undisputed. The City is taking the Eychaner property in order to sell it to Blommer Chocolate Company; the City is using eminent domain to acquire the Eychaner property; and the City has never found the Eychaner property to be blighted, or a slum. These simple facts set the context for the legal issues this Court will decide in this appeal.

The City's Statement of Facts is argumentative, and several of its misstatements should be corrected to keep the focus on the proper context. First, the City misleads by discussing the statutory power "to combat blighting factors" in conservation areas. (City Br. 7) Conservation areas are by definition not blighted, as even the City concedes. *Id.* The "blighting factors" are simply a list of conditions compiled in the statute which, by virtue of a statutory definition, create what the statute calls a blighted area if enough are present. Here, not enough are present to make the subject property, or the area in which it lays, a blighted area even under the statute.

This statutory definition should be contrasted with judicial construction of the meaning of the term "blight" in the context of the use of eminent domain. *Southwestern Illinois Development Authority v. Al-Muhajirum*, 318 Ill. App. 3d 1005, 744 N.E.2d 308 (5th Dist. 2001), came after the Appellate Court's decision but before the Supreme Court's decision in *Southwestern Illinois Development Authority v. National City Environmental, LLC*, 199 ll1.2d 225, 768 N.E.2d 1 (2002) ("SWIDA"). In *Al-Muhajirum*, the Court associated "blight" with slum-like conditions, and characterized such "derelict" properties as "unoccupied," "unattended," "virtually uninhabitable," no doubt rat-infested" and "strewn with rusted junk, discarded cans, bottles and garbage bags." 318 Ill. App. 3d at 1009, 744 N.E.2d at 311. "The basic character of the locale is still one of ruin and urban decay. The area is blighted." *Id.* at 1009, 311-312. It is this constitutional construction of the term "blight" on which this Court should focus, not the statutory definition which the City urges.

Second, the City emphasizes that the River West TIF Redevelopment Plan documented "the deteriorated condition of the area and the need for redevelopment." (City Br. 8) Deteriorated is not blighted. The redevelopment plan here concluded that the area could only qualify as a conservation area, and that implementation of the plan might "eliminate conditions that could become blighted conditions." (City Br. 9) The redevelopment plan did not conclude that the area was blighted.

Based on the undisputed fact of no blight, and the City's motive and purpose to take the Eychaner property to give it to a favored private party, this eminent domain case never should have been allowed to proceed.

I. THE CITY OF CHICAGO MAY NOT USE THE POWER OF EMINENT DOMAIN TO TAKE FRED EYCHANER'S NON-BLIGHTED PROPERTY TO GIVE IT TO BLOMMER CHOCOLATE COMPANY IN THE NAME OF ECONOMIC REDEVELOPMENT.

Continuing the misdirection in its Statement of Facts, the City notes that the ordinance authorizing the acquisition here identified the "public purpose of improving a commercially blighted area." (*See* City Br. 22, *citing* C. 231) The authorizing ordinance did not, however, refer to any determination by the City that the Eychaner property, or any locale containing the Eychaner property, was blighted. The only support for the authorizing ordinance was the River West TIF Redevelopment Plan, which, as the City admits (City Br. 9, 20), did not find the Eychaner property to be within a blighted area – but only within a conservation area, which by statutory definition is not blighted. 65 ILCS 5/11-74.4-3(b) (2000).

In any event, the City consistently conflates the concepts of "public purpose" and "public use" (*see, e.g*., City Br. 17, 19, 23, 25-26), despite the clear admonition of the Illinois Supreme Court not to do so. According to the City, "*SWIDA* stands for no such distinction [between public purpose and public use]." (City Br. 25-26) According to the majority in *SWIDA*:

> SWIDA contends that any distinction between the terms "public purpose" and "public use" has long since evaporated and that the proper test is simply to ask whether a "public purpose" is served by the taking. While the difference between a public purpose and a public use may appear to be purely semantic, and the line between the two terms

> has blurred somewhat in recent years, *a distinction still exists and is essential to this case.*

199 Ill.2d at 237, 768 N.E.2d at 8 (emphasis added). Whatever public purpose might support public financing here, there must be a public use to support the exercise of eminent domain. Taking the Eychaner property to give it to Blommer Chocolate Company is not a proper public use.

Nor is taking the Eychaner property to give it to Blommer Chocolate Company to prevent the mere possibility of blight in the area at some undetermined point in the future. The *SWIDA* exception is for the elimination of blight, not the prevention of blight. *SWIDA* at 238, 9 (defining an exception for "a taking for the purposes of *eliminating* slums or blight") (emphasis added). The City's repeated references to the prevention of blight (*see, e.g*., City Br. 17, 23, 25) thus miss the mark.

The City cites two cases as its principal authorities, one from before *SWIDA*, and one from after. Like the agency itself and Justice Freeman in dissent in *SWIDA*, the City here relies on *People ex rel. Gutknecht v. City of Chicago*, 3 Ill.2d 539, 121 N.E.2d 791 (1954), to authorize a taking to prevent rather than to eliminate blight. (City Br. 22, 24-25) In defining the exception allowing the clearance and redevelopment of slums and blighted areas in *SWIDA*, the Supreme Court majority did not include prevention of blight, or rely on *Gutknecht.* (*See SWIDA* at 238, 9) Economic development and prevention of blight are the opposite sides of the same coin. Improving the economy is the same as preventing its decline. 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. *See, e.g., 99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d 1123 (C.D. Cal. 2001) (rejecting the prevention of "future blight" as a proper public use or 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").

The City also relies on *City of Chicago v. Midland Smelting Co.*, 385 Ill. App. 3d 945, 896 N.E.2d 364 (1st Dist. 2008), but the very language employed by the City here betrays its own argument. (*See* City Br. 22) Takings aimed "to eliminate blight" may indeed easily pass constitutional muster, *Midland Smelting* at 973, 389, but there is no slum or blight here to be eliminated. *Midland Smelting* construed *SWIDA* as focusing "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, 388. Here, the City admits the motive – to give Eychaner's property to Blommer Chocolate Company for Blommer's private benefit. *Midland Smelting* said the issue in *SWIDA* was "whether SWIDA exceeded the boundaries of constitutional principles and its authority by transferring the property to a private party for a profit when the property is not put to a public use." *Id.* at 972, 389. Just like *Midland Smelting* noted was the case in *SWIDA*, here the court is "not dealing with a taking for the purposes of eliminating slums or blight." *Id., citing SWIDA*, 199 Ill.2d at 238, 768 N.E.2d at 9. Eychaner's property is being given to Blommer Chocolate Company for

Blommer's private profit. *Midland Smelting* cannot justify departure from the holding of *SWIDA*.[1]

The City points to 65 ILCS 5/11-74.4-4(c) as its statutory authority for an economic development taking in a conservation area (City Br. 24), but the statute cannot authorize what the Illinois constitution forbids. The basic taking here — from Eychaner to give to Blommer Chocolate Company — violates *SWIDA*, and the City cannot fit the taking of non-blighted property into the "slum or blighted" exception allowed in *SWIDA*.

For misdirection, the City argues that the property being taken need not itself be blighted if it lies in a larger area that is blighted overall. In *City of Chicago v. Barnes*, 30 Ill.2d 255, 257, 195 N.E.2d 629, 631 (1964), on which the City relies, the property being taken was within an area designated by the City as "slum and blighted," and the test was the condition of the area as a whole. (*See* City Br. 24-25) True enough – but the City has never determined that the Eychaner property is part of a blighted area. The River West TIF Redevelopment Plan only found the area

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[1] The City also belittles the argument in Eychaner's opening brief that *Midland Smelting* is not applicable here because it was a special case involving the unique concept of "substitute condemnation." (City Br. 26) However, the City ignores the very arguments it made itself in *Midland Smelting,* which noted in that case: "The City, on the other hand, claims that the present case is a proper use of substitute condemnation." *Midland Smelting* at 967, 385. Those arguments convinced this Court in *Midland Smelting* that *SWIDA* was not at issue in that case: "*SWIDA* did not involve substitute condemnation and therefore the court did not have occasion to consider the unique issue before this court." *Midland Smelting* at 974, 391.

containing the Eychaner property to be a conservation area. *Barnes* is therefore not on point.

The City's last few desperate arguments fail the most basic principles of legal reasoning. First, the City would have this Court follow the gloss placed on *SWIDA* by the Connecticut Supreme Court in *Kelo v. City of New London*, 268 Conn. 1, 843 A.2d 500, 535 (2004) (City Br. 27), instead of the dictates of the Illinois Supreme Court in *SWIDA* itself. Illinois courts are bound by the decisions of the Illinois Supreme Court, not by the courts of other states.[2] *Mekertichian v. Mercedes-Benz U.S.A., L.L.C.*, 347 Ill. App. 3d 828, 836, 807 N.E.2d 1165, 1171 (1st Dist. 2004) ("After our supreme court has declared the law with respect to an issue, this court must follow that law, as only the supreme court has authority to overrule or modify its own decisions."). Second, the City would have this Court follow the *SWIDA* dissent (City Br. 27), instead of the holding of the court majority in that case. "[T]he law makes the opinion of the majority the opinion of the court . . ." *Ellguth v. Blackstone Hotel, Inc.*, 408 Ill. 343, 347, 97 N.E.2d 290, 292 (1951).

Finally, the City urges this Court to follow the United States Supreme Court decision in *Kelo v. City of New London*, 545 U.S. 469, 162 L.Ed.2d 439, 125 S.Ct. 2655 (2005), which allows the use of eminent domain for mere economic development, rather than

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[2] The Connecticut Supreme Court formulated a test far different from that of *SWIDA,* requiring only "public economic benefit in order for the use of eminent domain for economic development to pass constitutional muster." 268 Conn. at 54, 843 A.2d at 536. Even the Connecticut high court acknowledged that the law of Illinois imposes "a more restrictive public use standard than the purely purposive formulation followed by" Connecticut. 268 Conn. at 52, 843 A.2d at 535. Illinois law must control here.

SWIDA, which forbids it. (City Br. 27-28) The City argues that Illinois is in "lockstep" with the United States Supreme Court, even though *Kelo* itself acknowledged that states are free to chart a narrower path in this area and "impose 'public use' requirements that are stricter than the federal baseline" (*Kelo* at 489, 457, 2668) – as *SWIDA* clearly has. However, the very case on which the City relies – *Van Harken v. City of Chicago*, 305 Ill. App. 3d 972, 982, 713 N.E.2d 754, 762 (1st Dist. 1999) – refused to follow the "lockstep approach" because "[t]he Illinois Constitution provides broader rights of due process than the United States Constitution." *SWIDA* remains the controlling law of Illinois.

The taking of Eychaner's property here because some aldermen did not want Blommer Chocolate Company to leave the City is not a proper public use. No exception to the clear rule of *SWIDA* applies here. The Traverse should have been granted, and this eminent domain case dismissed. This Court should reverse the judgment of the Circuit Court.

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Sections II to V Omitted