

**CASE NOTE: PROPERTY—CITIES GONE WILD: THE
EXPANDING DEFINITION OF A TAKING UNDER URBAN
RENEWAL PROJECTS—*JOHNSON V. CITY OF
MINNEAPOLIS***

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I. INTRODUCTION

When the Minnesota Constitution was signed in 1857, there is little doubt that the creators anticipated the government would need the power of eminent domain¹ to further the public good.²

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1. “Eminent domain” is “[t]he inherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to

Today, many cities engage in urban renewal projects that require them to utilize the power of eminent domain to take³ properties and use them in a way that will revitalize communities.⁴ However, this is a long and arduous process that sometimes takes years and can ultimately be abandoned.⁵ The property owners who are told that their property would be taken can be left with reduced values due to the condemnation process.⁶ If the property is not then condemned, have they suffered a de facto taking?⁷

The courts have most often answered this question in the negative, with the notable exception of *Johnson v. City of Minneapolis*.⁸ Before *Johnson*, most courts were only willing to admit that a taking could be *possible* under those circumstances.⁹ *Johnson* marked the first case where the Minnesota Supreme Court found that a de facto taking occurred based on a city's actions prior to condemnation without actually condemning the property.¹⁰

This Case Note first describes the history of takings cases, most of which deal with urban renewal projects.¹¹ It then recounts the facts and decision in *Johnson v. City of Minneapolis*.¹² Next, it

reasonable compensation for the taking." BLACK'S LAW DICTIONARY 562 (8th ed. 2004).

2. MINN. CONST. art. I, § 13.

3. "A taking . . . is defined by statute to include every interference with the ownership, possession, enjoyment, or value of private property." 18 DUNNELL MINN. DIGEST, EMINENT DOMAIN, § 5.00 (5th ed. 2005). The statute is intended to "give effect to the constitutional requirement that private property shall not be taken, destroyed, or damaged for public use without just compensation being first paid or secured." *Id.*

4. Urban renewal projects have been consistently recognized as a proper excuse to use the power of eminent domain. 26 AM. JUR. 2D *Eminent Domain* § 78 (2006). Urban redevelopment is used to improve areas that are "deteriorated, deteriorating, substandard, or detrimental to the safety, health, morals or welfare of the community." *Id.* (citing *Aposporos v. Urban Redev. Comm'n of Stamford*, 790 A.2d 1167, 1172 (Conn. 2002)). This is an approved public use under the U.S. Constitution. *Id.*

5. 27 AM. JUR. 2D *Eminent Domain* § 505 (2005).

6. See *Johnson v. City of Minneapolis*, 667 N.W.2d 109, 110 (Minn. 2003).

7. A "De facto taking" is an "[i]nterference with the use or value or marketability of land in anticipation of condemnation, depriving the owner of reasonable use and thereby triggering the obligation to pay just compensation." BLACK'S LAW DICTIONARY 1493 (8th ed. 2004).

8. *Johnson*, 667 N.W.2d at 116.

9. See, e.g., *Foster v. Herley*, 330 F.2d 87, 91 (6th Cir. 1964); *Orfield v. Hous. & Redev. Auth. of St. Paul*, 305 Minn. 336, 341, 232 N.W.2d 923, 927 (1975); *City of Buffalo v. J. W. Clement Co.*, 269 N.E.2d 895, 902 (N.Y. 1971).

10. *Johnson*, 667 N.W.2d at 116.

11. See *infra* Part II.

12. See *infra* Part III.

analyzes the departure from previous law that the court demonstrated, balancing the rights of property owners with the power of eminent domain.¹³ Finally, it concludes that while the decision is limited, it shows that the Minnesota Supreme Court is unwilling to allow cities to abuse their power of eminent domain.¹⁴

II. HISTORY

The power of eminent domain is a right of the State under the Fifth Amendment of the U.S. Constitution.¹⁵ The government can effect a taking in three ways: straight condemnation, legislative taking, or inverse condemnation.¹⁶ Straight condemnation and legislative taking are different from inverse condemnation in that they are condemnation proceedings initiated by the government.¹⁷ Inverse condemnation is initiated by the affected property owners.¹⁸

A. *The Penn Central Analysis*

Penn Central Transportation Co. v. City of New York,¹⁹ cited in *Johnson*, is heavily relied on in cases concerning inverse condemnation because it sets out a standard to evaluate when a taking has actually occurred.²⁰ The property involved in *Penn Central* was Grand Central Terminal (“Terminal”) in New York City.²¹ New York City had afforded the Terminal landmark status in 1967.²² In an effort to increase income, Penn Central entered into a lease with UGP Properties, Inc., who planned to construct office

13. *See infra* Part IV.

14. *See infra* Part V.

15. U.S. CONST. amend. V.

16. *Kirby Forest Indus. v. United States*, 467 U.S. 1, 3-5 (1984).

17. *Id.* In a straight condemnation proceeding, an officer of the government initiates proceedings in order to purchase the property from the property owner. *Id.* at 3-4. Just compensation is determined by a jury, judge, or special commission. *Id.* at 4. A legislative taking occurs when Congress enacts a statute appropriating the land. *Id.* at 5. Just compensation is determined after the fact. *Id.*

18. “Inverse condemnation” is “[a]n action brought by a property owner for compensation from a governmental entity that has taken the owner’s property without bringing formal condemnation proceedings.” BLACK’S LAW DICTIONARY 310 (8th ed. 2004).

19. 438 U.S. 104 (1978).

20. *Id.* at 124.

21. *Id.* at 115.

22. *Id.* at 116.

space on the Terminal.²³

Two designs were drawn up and submitted to the Commission for approval.²⁴ One design proposed that the office space sit above the Terminal, while the other design had the office space next to and part of the Terminal.²⁵ Due to the Terminal's landmark status, neither design was approved.²⁶ Penn Central sued New York City on the theory that "the Landmarks Preservation Law had 'taken' their property without just compensation."²⁷

Penn Central advanced the notion that "the airspace above the Terminal is a valuable property interest," arguing that depriving the use of air rights is a taking.²⁸ The Supreme Court did not accept this argument because "the submission that . . . [Penn Central] may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."²⁹ The Court stated that it looks at the parcel as a whole, not as pieces of property rights.³⁰

Penn Central also advanced the theory that the Landmarks Law "significantly diminished the value of the Terminal site" and singled out owners of landmark property.³¹ However, the Court rejected "the proposition that diminution in property value, standing alone, can establish a 'taking.'"³² As to the Landmarks Law arbitrarily singling out properties, the Court pointed out that there were over 400 landmarks designated in New York City.³³ In addition, Penn Central had the opportunity to present the Commission's decision for judicial review to determine if the designation of landmark status was arbitrary.³⁴

23. *Id.*

24. *Id.* These designs were called Breuer I and Breuer II Revised because they were designed by architect Marcel Breuer. *Id.* at 116-17.

25. *Id.*

26. *Id.* at 117-18. Penn Central declined to submit any more designs, nor did it seek judicial review of the Commission's decision to deny the application for Breuer I and Breuer II Revised. *Id.* at 118. In fact, though opposed to it, Penn Central did not seek judicial review of the Terminal's designation as a landmark in the first place. *Id.* at 116.

27. *Id.* at 119.

28. *Id.* at 130.

29. *Id.*

30. *Id.*

31. *Id.* at 131.

32. *Id.*

33. *Id.* at 132.

34. *Id.* at 133. The Court pointed out, somewhat irritably, that "there is no

The Court next examined whether “interference” with the property was such that eminent domain proceedings, including compensation, were appropriate.³⁵ The Court observed that the Landmarks Law did not interfere with the Terminal’s present use.³⁶ In fact, it allowed the Terminal to continue to be used as it had been for sixty-five years and operate with a “reasonable return.”³⁷ Also, the Court observed that the Landmarks Law did not expressly prohibit the use of the airspace above the Terminal, only that it not be used for fifty-story office buildings.³⁸ Based on these findings, the Court concluded that the Landmarks Law did not effect a taking of Penn Central’s property.³⁹ Instead, the loss of property rights was minimal.⁴⁰

B. Other Persuasive Development of Eminent Domain Law

1. Foster Decision

The Sixth Circuit Court of Appeals in *Foster v. Herley*⁴¹ started the trend toward recognizing that a taking could exist in situations where the condemnation process had not been completed.⁴² The City of Detroit called the affected property owners to City Hall to inform them that their property would be taken.⁴³ They also instructed the property owners that they should not make any improvements.⁴⁴ In addition, the City of Detroit placed a notice of

basis whatsoever for a conclusion that courts will have any greater difficulty identifying arbitrary or discriminatory action in the context of landmark regulation than in the context of classic zoning or indeed in any other context.”
Id.

35. *Id.* at 136.

36. *Id.*

37. *Id.*

38. *Id.* at 136-37. The original structure included columns to support a twenty-story office tower that could be located above the terminal. *Id.* at 115 n.15. The Commission did not deny that it would approve the originally planned twenty-story office building, but again, Penn Central declined to submit any more designs utilizing the air space above the terminal. *Id.* at 137 n.34.

39. *Id.* at 138. “The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.” *Id.*

40. *Id.* at 136-37.

41. 330 F.2d 87 (6th Cir. 1964).

42. *Id.* at 89-91.

43. *Id.* at 88.

44. *Id.*

*lis pendens*⁴⁵ on the property and passed a resolution stating that no new buildings could be erected or improvements made on the property.⁴⁶

These restrictions remained on the property for ten years until the City of Detroit finally decided to abandon the condemnation proceedings and lift them.⁴⁷ At that point, the property had fallen into grave disrepair.⁴⁸ To add insult to injury, the City of Detroit then required that the property owner demolish the buildings at his own expense because they were in such a state of deterioration.⁴⁹

Shortly thereafter, the City of Detroit reinstated the condemnation proceedings and proposed to compensate the property owner at the value of the property in its demolished condition instead of the value before the condemnation proceedings began.⁵⁰ It was then that the property owner instituted an action against the City of Detroit.⁵¹

The property owner made a Due Process claim under the Fourteenth Amendment of the U.S. Constitution, but the Michigan District Court dismissed the case for lack of jurisdiction.⁵² The Sixth Circuit Court of Appeals reversed the Michigan District Court and ruled that federal jurisdiction existed based on the assumption that the lower court *could* rule that a taking occurred.⁵³ While the court of appeals declined to rule on whether the situation actually qualified as a de facto taking,⁵⁴ *Foster* opened the door to the

45. A notice of *lis pendens* is a "notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome." BLACK'S LAW DICTIONARY 950 (8th ed. 2004).

46. *Foster*, 330 F.2d at 88.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 88-89.

51. *Id.*

52. *Id.* at 89.

53. *Id.* at 91 (emphasis added).

At the present time it appears to be settled that it is not enough that the plaintiff seeks to enforce a right which has its origin in the Constitution or a law of the United States, but that it must be shown by the complaint that the right will be supported if the Constitution or law is given one construction and will be defeated if given a different construction.

Id.

54. *Id.* at 90.

possibility that a landowner could claim a taking based on a city's actions during condemnation proceedings without actually passing title of the property to the government.⁵⁵

2. Clement *Decision*

Following the *Foster* decision, in *City of Buffalo v. J. W. Clement Co.*,⁵⁶ the New York Court of Appeals dealt with the issue of whether a taking could occur absent a physical invasion of the property.⁵⁷ In *Clement*, the plaintiff J. W. Clement Co. ("Clement"), a printing company, was forced to relocate to a new facility because of condemnation proceedings against its property.⁵⁸ The condemnation process took many years, leaving the property worth much less than when the company was first informed of the planned condemnation.⁵⁹

Ultimately, the court decided against finding a de facto taking.⁶⁰ The court reasoned that it was necessary to have "an assertion of dominion and control" to constitute a taking.⁶¹ Aside from delay, there was only "a manifestation of an intent to condemn," which is not enough to prove a taking.⁶² However, it did not discount the possibility that precondemnation activities could rise to the level of exercising control over the property.⁶³

A strong policy decision also existed for not granting a taking based on these facts.⁶⁴ Due to growth, Clement planned to relocate to a new facility within the next four or five years.⁶⁵ While it is true that the condemnation proceedings caused Clement to relocate earlier than planned, the court could not ignore the fact that condemnation was not the only reason Clement relocated to a new facility.⁶⁶

55. See *Sayre v. City of Cleveland*, 493 F.2d 64, 69 (6th Cir. 1974).

56. 269 N.E.2d 895 (N.Y. 1971).

57. *Id.* at 899.

58. *Id.*

59. *Id.* at 900.

60. *Id.* at 904.

61. *Id.* at 903.

62. *Id.* "It is important to note that the city never, by its statements or actions, directly or indirectly, interfered or sought to exercise any control over the property, thus inferentially depriving the claimant of its possession, enjoyment, or use." *Id.* at 905.

63. *Id.* at 904.

64. *Id.* at 901.

65. *Id.* at 900.

66. *Id.* at 901. "[T]o expand the current concept of De facto taking on the

C. *Minnesota Cases*

1. *Orfield Decision*

When *Orfield v. Housing & Redevelopment Authority of St. Paul*,⁶⁷ a case heavily relied upon in the *Johnson* decision, was decided, Minnesota courts had not yet addressed the specific issue of whether precondemnation activity could be considered a taking under the Minnesota Constitution.⁶⁸ The City of St. Paul applied for federal funds to initiate a redevelopment project in the Summit-University Urban Renewal Area.⁶⁹ The City of St. Paul surveyed the area and determined the properties that were most in need of funds.⁷⁰

The City of St. Paul classified Orfield's property as substandard, but it was not at the top of the list for condemnation.⁷¹ They repeatedly urged Orfield to keep his property in good condition and never told him it would be condemned.⁷² Orfield argued that the property declined as a result of the condemnation proceedings around his property,⁷³ but the record clearly showed that the renewal project was borne out of the area's decline, not the other way around.⁷⁴

The Minnesota Supreme Court followed the rulings from other jurisdictions in holding that there was not a taking.⁷⁵ However, the reasoning was slightly different. Instead of the assertion of control test, the court held that "economic loss caused by the altered character of a neighborhood due to normal activities in connection with an urban renewal project, without more, does

facts herein may well be to allow all property owners to seek refuge under the broader umbrella of De facto appropriation as soon as the proposed condemnation is announced, irrespective of their underlying motivation." *Id.*

67. 305 Minn. 336, 232 N.W.2d 923 (1975).

68. See *Fitger Brewing Co. v. State*, 416 N.W.2d 200, 205-06 (Minn. Ct. App. 1987).

69. *Orfield*, 305 Minn. at 337, 232 N.W.2d at 925.

70. *Id.* at 337, 232 N.W.2d at 924.

71. *Id.* at 337, 232 N.W.2d at 925.

72. *Id.* at 338-39, 232 N.W.2d at 925.

73. *Id.* at 339, 232 N.W.2d at 926.

74. *Id.* at 341, 232 N.W.2d at 927.

75. *Id.* at 341, 232 N.W.2d at 927 (citing *Sayre v. City of Cleveland*, 493 F.2d 64, 69 (6th Cir. 1974); *City of Buffalo v. J. W. Clement Co.*, 269 N.E.2d 895, 902 (N.Y. 1971)) (reinforcing the rule that properties adjacent to those slated for condemnation do not have a cause of action against the condemning authority because of decline in market values).

not constitute a de facto taking of the property in a constitutional sense.”⁷⁶ To have a de facto taking, the court required an abuse of eminent domain power that is “specifically directed against a particular parcel.”⁷⁷ While the court did not find that to be the case in *Orfield*,⁷⁸ the ruling ultimately prepared the way for the court to decide *Johnson*.

2. *Fitger Decision*

Where *Orfield* was a clearer case against the property owners, *Fitger Brewing Co. v. State*⁷⁹ was less so. Over several years, the City of Duluth contemplated an expansion of Interstate 35 and, in 1969, the new planned route included the land where the Fitger Brewing Company (“Fitger”) was located.⁸⁰ Around the same time, the Minnesota Pollution Control Agency (“MPCA”) notified Fitger that it would need to install new pollution control devices in order to stay in operation.⁸¹

Over the next couple years, Fitger went back and forth with the MPCA and the City of Duluth in deciding whether to close the plant or make the improvements required by the MPCA.⁸² With the help of the City of Duluth, Fitger received extensions on the deadline to complete the improvements, but the MPCA set its final deadline at September 30, 1972.⁸³

At that time, the City of Duluth still had not yet made a decision about which plan would be used for the Interstate 35 expansion project, however, Fitger was informed that all the plans under consideration included the use of its land.⁸⁴ Fitger requested and received a letter stating that fact as well as a statement that “it would be impractical . . . to install pollution abatement facilities in view of the planning currently in process.”⁸⁵

Unfortunately for Fitger, the letter also included a statement that there was a possibility the Fitger property would not be taken, which was an important part of the Minnesota Court of Appeals’

76. *Id.* at 341, 232 N.W.2d at 927.

77. *Id.*

78. *Id.*

79. 416 N.W.2d 200 (Minn. Ct. App. 1987).

80. *Fitger*, 416 N.W.2d at 201-02.

81. *Id.* at 202.

82. *Id.* at 202-03.

83. *Id.* at 203.

84. *Id.*

85. *Id.*

decision to rule against the brewery.⁸⁶ Comparing the letter received in *Orfield* to the letter received in *Fitger*, the court concluded that the *Fitger* letter, like the *Orfield* letter, made it clear to *Fitger* that its property might not be taken.⁸⁷ The court of appeals saw no reason to find the de facto taking that the *Orfield* court had suggested was possible.⁸⁸

The court also argued that there was no abuse of eminent domain power because *Fitger*'s "choice of action was not controlled or restrained by the state."⁸⁹ This assessment seemed to focus more on the significant control test suggested in earlier cases than the new *Orfield* standard that indicated a court may find abuse when actions are taken against a specific parcel of land.⁹⁰ *Fitger* petitioned for a writ of certiorari from the U.S. Supreme Court, but the Supreme Court denied the request.⁹¹

III. THE *JOHNSON* DECISION

A. *Facts and Procedural History*

In 1983, the City of Minneapolis approved a redevelopment plan for the southern portion of Nicollet Mall that targeted an area spanning three-and-one-half blocks.⁹² The winning bid for the project was submitted by a French development corporation, La Societe Generale Immobiliere ("LSGI"), with whom the City of Minneapolis executed a contract in 1986 which required LSGI to acquire anchor tenants and the City of Minneapolis to acquire the

86. *Id.* The letter stated:

In addition, we must advise you that there is a possibility that I-35 may not be extended beyond Mesaba Avenue; the possibility of some other alignment of which we are unaware of at this time, other proposals from our consultants or other consultants, or the public, which may eliminate the necessity of taking the *Fitger* Brewing Company property.

Id. at 203-04.

87. *Id.* at 208.

88. *Id.*

89. *Id.*

90. *See* *City of Buffalo v. J. W. Clement Co.*, 269 N.E.2d 895, 904 (N.Y. 1971) (holding that the mere announcement of impending condemnation without a corresponding substantial impairment of the claimant's right to use or enjoy the property does not constitute a compensable taking).

91. *Fitger Brewing Co. v. Minnesota*, 416 N.W.2d 200 (1987), *cert. denied*, 488 U.S. 819 (1988).

92. *Johnson v. City of Minneapolis*, 667 N.W.2d 109, 111 (Minn. 2003).

property through eminent domain.⁹³ LSGI was also required to submit confidential progress reports to the City of Minneapolis, and the City of Minneapolis reserved the right to approve designs submitted by LSGI.⁹⁴

The City of Minneapolis rejected LSGI's first design, which proposed a dome over the street for pedestrians and a tunnel underneath for traffic.⁹⁵ At that time, LSGI had begun negotiating with department stores Nordstrom and Neiman Marcus as potential anchor tenants.⁹⁶ The City of Minneapolis entered into a post-closing agreement with LSGI that allowed LSGI to continue negotiating with potential anchor tenants and begin work on a new design.⁹⁷ The agreement also included the City of Minneapolis' obligation to acquire the property once a design had been approved and to lease that property to LSGI for ninety-nine years.⁹⁸

Shortly thereafter, the mayor of Minneapolis, who was against the redevelopment plan, wrote to Nordstrom and Neiman Marcus and urged them not to go through with the deal.⁹⁹ These letters damaged LSGI's ability to secure Nordstrom and Neiman Marcus as anchor tenants.¹⁰⁰

Despite this setback in the development project, the City of Minneapolis sent letters to the owners of the properties that were slated for redevelopment ("Owners") informing them that the City of Minneapolis was planning to go through with the project.¹⁰¹ The properties would need to be appraised because they "would be acquired if the development takes place."¹⁰² The City of Minneapolis included in the letters that appraising the property was not a definite commitment to buy it; however, it did not inform the tenants at any point thereafter that their properties would not

93. *Id.*

94. *Id.*

95. *Id.* at 111-12.

96. *Id.* at 112.

97. *Id.*

98. *Id.*

99. *Id.* The mayor was opposed to the redevelopment plan from the start. *Id.* at 111. The original contract with LSGI was over the mayor's veto. *Id.* When the mayor wrote to the two proposed anchor tenants, Nordstrom and Neiman Marcus, he "suggested that LSGI had not been honest with" them. *Id.* at 112.

100. *Id.* According to the district court's findings, the letters "had a detrimental effect on LSGI's ability to secure the prospective anchor tenants." *Id.*

101. *Id.*

102. *Id.*

be taken.¹⁰³ This made it very difficult for the Owners to make full use of their property because existing and potential tenants were wary of moving into property that was going to be condemned.¹⁰⁴

At this point, despite LSGI's continued attempts to secure Neiman Marcus as an anchor tenant for this project, the City of Minneapolis started talking to Neiman Marcus about getting involved in another project at the north end of Nicollet Mall.¹⁰⁵ In addition, LSGI submitted another design, which was vetoed by the mayor.¹⁰⁶ The City of Minneapolis issued a public notice of default because LSGI had not yet secured any anchor tenants, even though its failure was due in part to the City of Minneapolis's actions.¹⁰⁷

A third design proposal was submitted and approved by the Minneapolis Community Development Agency ("MCDA").¹⁰⁸ The Mayor vetoed the design, but the MCDA overrode his veto.¹⁰⁹ However, in order to get the approval of the City Council, the City of Minneapolis required LSGI to make substantial changes to the design.¹¹⁰ Ultimately, the relationship deteriorated to the point where the City of Minneapolis terminated its contract with LSGI and reallocated the funds meant for this project to the project on the north end of Nicollet Mall with Neiman Marcus.¹¹¹

LSGI sued the City of Minneapolis for specific performance in June 1989¹¹² and filed a notice of *lis pendens* on all the properties slated for redevelopment.¹¹³ The Minnesota Federal District Court found for LSGI, but the Eighth Circuit Court of Appeals overturned the ruling.¹¹⁴ The notice of *lis pendens* was not removed until after the trial was over in 1993.¹¹⁵

The Owners sued the City of Minneapolis under a cause of action for inverse condemnation, claiming a de facto taking under

103. *Id.*

104. *Id.* at 113.

105. *Johnson v. City of Minneapolis*, 649 N.W.2d 873, 877 (Minn. Ct. App. 2002).

106. *Johnson*, 667 N.W.2d at 113.

107. *Id.*

108. *Johnson*, 649 N.W.2d at 877.

109. *Id.*

110. *Johnson*, 667 N.W.2d at 113.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

both the U.S. Constitution and Minnesota Constitution.¹¹⁶ The district court ruled that the Owners had suffered a taking under both constitutions.¹¹⁷ It made several findings¹¹⁸ that led it to conclude that “the City’s activities . . . created a ‘cloud of condemnation’ over the properties,” reduced fair market values, and impaired property use “for an unreasonable period of time.”¹¹⁹ Also, the court found that “the City had abused its eminent domain power and acted in bad faith with respect to [the Owners].”¹²⁰

The court of appeals reversed the district court decision.¹²¹ Relying on *Kirby Forest Industries v. United States*,¹²² the court of appeals applied the “significant control” test.¹²³ “It is not enough

116. *Id.*

117. *Id.*

118. *Id.*

The district court and the advisory jury found that the City had: (1) identified a specific geographic footprint that included [the Owner’s] properties; (2) in honoring the commitment to confidentiality, refused to provide information about the project to property owners; (3) not clearly communicated to [the Owners] that acquisition of their properties might not occur and that they should maintain their properties to avoid loss of value in case their properties were not acquired; and (4) not informed [the Owners] that the City had terminated the contract and negotiations with LSGI.

Id.

119. *Id.* at 113-14.

120. *Id.* at 114.

121. *Johnson v. City of Minneapolis*, 649 N.W.2d 873, 875 (Minn. Ct. App. 2002).

122. 467 U.S. 1 (1984).

123. *Johnson*, 649 N.W.2d at 884. *Kirby Forest* concerned Congressional legislation that created a large national park that included land owned by Kirby Forest. *Kirby Forest Indus.*, 467 U.S. at 7. Kirby Forest argued for compensation from the time condemnation proceedings began instead of when the government tendered payment for the property. *Id.* at 13. They claimed that they were “deprived of all of the significant interests associated with ownership” because the condemnation proceedings had the “effect of preventing the owner of unimproved land thereafter from making any profitable use of it, or of selling it to another private party.” *Id.* While conceding that type of control was severe enough to warrant a taking, the Supreme Court did not find the argument to be representative of the situation. *Id.* at 14-15. “Until title passed to the United States, [Kirby Forest] was free to make whatever use it pleased of its property.” *Id.* at 15. The Government “never forbade [Kirby Forest] to cut the trees on the land or to develop the tract in some other way.” *Id.* “Indeed, [Kirby Forest] is unable to point to any statutory provision that would have authorized the Government to restrict [Kirby Forest’s] usage of the property prior to payment of the award.” *Id.* Also interesting to note is a footnote in which the court mentioned testimony offered at trial suggesting that Kirby Forest would not have acted any differently toward the parcel of land had there not been any condemnation proceedings because it was used as a reserve logging area. *Id.* at 6 n.8. The Court stated that

under either *Penn Central* or *Orfield* for property owners to show that the government's actions substantially impaired the value of their properties—those actions must also exert significant control over the owners' use of their properties."¹²⁴ The court conceded that the City of Minneapolis acted in bad faith, however, it concluded that because the property owners knew their property might not be taken and were allowed to continue using their property, the City of Minneapolis did not have significant control over the properties.¹²⁵

B. The Minnesota Supreme Court's Decision

The Minnesota Supreme Court first approached the issue of whether there was a taking under the U.S. Constitution.¹²⁶ It examined the analysis of the court of appeals and found that the court of appeals had applied an incorrect test; it should have applied the *Penn Central* analysis.¹²⁷ However, the supreme court declined to remand the case to the court of appeals or apply the correct standard itself because it found the analysis irrelevant.¹²⁸ Specifically, the supreme court found the actions by the City of Minneapolis violated the Minnesota Constitution.¹²⁹

The Minnesota Constitution requires "just compensation" whenever private property is taken for public use.¹³⁰ Under Minnesota law, "[a] taking include[s] every interference, under the right of eminent domain, with the possession, enjoyment, or value of private property."¹³¹ The *Johnson* court emphasized that a physical invasion of the property was not necessary to have a taking of the property, but that economic loss due to normal activities taken by a city to implement redevelopment plans was not usually

this testimony would not be given weight in the decision, but like other cases dealing with condemnation proceedings, little facts such as this appear to sway the courts in one direction or another. See, e.g., *Johnson*, 667 N.W.2d at 116.

124. *Johnson*, 649 N.W.2d at 884.

125. *Id.* at 885.

126. *Johnson*, 667 N.W.2d at 114-15.

127. *Id.* at 115. "This test requires the court to consider: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government regulation." *Id.* at 114-15 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

128. *Id.* at 115.

129. *Id.*

130. MINN. CONST. art. I, § 13.

131. MINN. STAT. § 117.025, subd. 2 (2004).

compensable.¹³² However, an abuse of the power of eminent domain may be tantamount to regulatory control, constituting a de facto taking “when that abuse is specifically directed at a particular parcel.”¹³³

The court compared the facts of *Johnson* to *Orfield* and found *Johnson* factually distinct in three ways.¹³⁴ First, in *Orfield* the City of St. Paul kept the property owner aware of the situation.¹³⁵ The Owners in *Johnson* were not informed at any point that their properties might not be acquired.¹³⁶ Second, the property in *Orfield* was not specifically targeted.¹³⁷ In *Johnson*, the City of Minneapolis targeted a specific stretch of property along Nicollet Avenue.¹³⁸ Third, in *Orfield*, the City of St. Paul did not act in bad faith.¹³⁹ The City of Minneapolis in *Johnson* did not use its best efforts to keep the Owners informed or work with LSGI, resulting in a bad faith effort.¹⁴⁰

The court concluded that the City of Minneapolis had abused its power, leaving the Owners in limbo with unmarketable property.¹⁴¹ This was a de facto taking. However, the court qualified its ruling by stating that this was a “narrow and rare instance,” and cautioned that this ruling would not apply to all owners who become subject to precondemnation activity.¹⁴²

IV. ANALYSIS OF THE *JOHNSON* DECISION

Johnson was the first case in which the Minnesota courts ruled that precondemnation activity constituted a de facto taking.¹⁴³ It

132. *Johnson*, 667 N.W.2d at 115.

133. *Id.* (quoting *Orfield v. Hous. & Redev. Auth. of St. Paul*, 305 Minn. 336, 341, 232 N.W.2d 923, 927 (1975)).

134. *Id.*

135. *Orfield*, 305 Minn. at 338-39, 232 N.W.2d at 925.

136. *Johnson*, 667 N.W.2d at 116.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* The court qualified its finding of bad faith by stating, “[w]hile each action taken by the City, analyzed separately, could be viewed as normal condemnation activity, the cumulative effect of the actions rendered [the Owners’] properties unmarketable for years while the development was being negotiated and, later, in litigation.” *Id.*

141. *Id.*

142. *Id.* Any one particular action taken by the City in *Johnson* would not necessarily be cause for a de facto taking under a different situation. *Id.* It was the combination of factors that compelled the court to rule in favor of the Owners. *Id.*

143. See *Orfield v. Hous. & Redev. Auth. of St. Paul*, 305 Minn. 336, 341, 232

marks a distinct departure from previous case law.¹⁴⁴ Significantly, the court refused to give the decision too much weight when it refused to examine the merits under the U.S. Constitution and limited the decision to its facts.¹⁴⁵ Instead, the court interpreted the Minnesota Constitution¹⁴⁶ and possibly opened the door to similar litigation despite its clearly limited scope.¹⁴⁷

A. *Courts Wary of Expanding the Definition of a "Taking"*

The general rule is that "mere plotting or planning in anticipation of a public improvement does not constitute a taking or damaging of the property affected."¹⁴⁸ The courts have compelling reasons for being wary of expanding the definition of a taking to include situations where condemnation was abandoned.¹⁴⁹ Planning to condemn does not necessarily mean that there is an invasion of property or an infringement on the use and enjoyment of property.¹⁵⁰ In many cases, a plan to condemn property that is abandoned will leave the property completely undisturbed.¹⁵¹

Also, the courts operate under the assumption that every property has a threat of condemnation because the government can take property for public use at any time.¹⁵² The courts are likely loath to undermine that basic principle of property ownership. On a more practical side, the courts believe that condemnation proceedings should not be hindered because they "aid [in] the growth and expansion of municipalities" and any hindrance to that

N.W.2d 923, 927 (1975); *see also* Foster v. Herley, 330 F.2d 87, 91 (6th Cir. 1964) (recognizing subject matter jurisdiction for federal court to hear a precondemnation activity claim); City of Buffalo v. J. W. Clement Co., 269 N.E.2d 895, 902 (N.Y. 1971) (reversing trial court's finding of a de facto taking).

144. *Compare Johnson*, 667 N.W.2d at 116 (holding that the property owners were entitled to compensation for the time their properties were under the threat of condemnation), *with* Fitger Brewing Co. v. State, 416 N.W.2d 200, 208 (Minn. Ct. App. 1987) (concluding that "the landowner's freedom of choice on improvements [was] not substantially destroyed by state action").

145. *Johnson*, 667 N.W.2d at 116.

146. *Id.* at 115-16.

147. *See* Roy Whitehead, Jr. & Lu Hardin, *Government Theft: The Taking of Private Property to Benefit the Favored Few*, 15 GEO. MASON U. CIV. RTS. L.J. 81, 102 (2004).

148. J. R. Kemper, Annotation, *Plotting or Planning in Anticipation of Improvement as Taking or Damaging of Property Affected*, 37 A.L.R. 3d 127, § 3 (2004).

149. *Id.* § 4.

150. *Id.*

151. *Id.*

152. *Id.*

power may slow progress.¹⁵³ However, there is a point where a city's actions go too far, invading the property and infringing on its use and enjoyment.¹⁵⁴

B. *Fitger Versus Johnson*

In *Orfield*, the supreme court suggested that an abuse of the power of eminent domain directed at a particular parcel of land would be cause for finding a de facto taking.¹⁵⁵ However, it did not find an abuse in that case,¹⁵⁶ nor did the court of appeals in the subsequent case of *Fitger*.¹⁵⁷ But *Johnson* conclusively demonstrated a situation in which there was an abuse of power, serving to balance the rights of property owners with the right of cities to exercise the power of eminent domain.¹⁵⁸

The hesitancy to open up this issue was clear when the U.S. Supreme Court declined review of *Fitger* after the court of appeals seemed to misapply the *Orfield* standard.¹⁵⁹ The Supreme Court was likely apprehensive about applying the *Orfield* standard for all the reasons mentioned above. While there was a hardship there, and *Fitger* was forced to close down, *Fitger* was still able to operate its business normally up until the point of closing and was able to sell the land to a developer.¹⁶⁰ Also, the City of Duluth made efforts to

153. *Id.*

154. *See Johnson v. City of Minneapolis*, 667 N.W.2d 109, 116 (Minn. 2003).

155. *Orfield v. Hous. & Redev. Auth. of St. Paul*, 305 Minn. 336, 342, 232 N.W.2d 923, 927 (1975).

156. *Id.*

157. *Fitger Brewing Co. v. State*, 416 N.W.2d 200, 208 (Minn. Ct. App. 1987).

158. Gideon Kanner, *Developments in Eminent Domain Law 2003-2004*, in PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION 179 (ALL-ABA Course of Study, Aug. 26-28, 2004).

159. "We know from *Orfield* that there is no such abuse if the state makes it clear to the owners there may be no taking, does not abuse its discretion by abandoning a plan to take, and urges the owners to make necessary property improvements." *Fitger*, 416 N.W.2d at 208. In a letter from the State Highway Commissioner, the State recognized the impracticality of making improvements to the brewery given that it was likely to be condemned, although the State maintained that it did not promise to take the property. *Id.* at 203-04. The City of Duluth knew that *Fitger* was counting on this letter to make a decision to close the plant and was even promised the letter on the condition that he not make a big fuss about the proceedings to the media. *Id.* at 203. In addition, the City of Duluth encouraged *Fitger* to oppose landmark status for the brewery because it needed the land for the highway. *Id.* at 204. Despite these facts, the court of appeals insisted that the City of Duluth did not abuse its discretion. *Id.* at 208.

160. *Id.* at 204. The action against the State was instituted in January 1978, and the property was sold to a private developer in 1983 for \$700,000. *Id.*

work with Fitger and the MPCA.¹⁶¹ In the end, the City of Duluth did not work fast enough to have a final decision when Fitger needed it.¹⁶²

In contrast, the Owners in *Johnson* suffered a much greater hardship in terms of the effect of the City of Minneapolis's actions on their property and the treatment they endured.¹⁶³ The City of Minneapolis "identified a specific geographic footprint . . . refused to provide information about the project, [had] not clearly communicated to [the Owners] that acquisition of their properties might not occur and that they should maintain their properties," and did not inform the Owners that it had terminated the contract with LSGI.¹⁶⁴

The District Court of Minnesota that originally heard the case listed findings that supported the conclusion that the City of Minneapolis had "abused its eminent domain power and acted in bad faith with respect to [the Owners]."¹⁶⁵ The condemnation process was dragged out over years, with the Owners losing tenants and declining property values making it nearly impossible to keep the property running.¹⁶⁶ This was the same abuse described in *Orfield*, making it impossible for the court to ignore.¹⁶⁷ The court could not have ruled in any other way given the rule set out in *Orfield*.¹⁶⁸ However, the ruling was limited.¹⁶⁹

161. *Id.* at 202-03.

162. *Id.* at 204.

163. *See Johnson v. City of Minneapolis*, 667 N.W.2d 109, 111-13 (Minn. 2003).

164. *Id.* at 113.

165. *Id.* at 114.

From its findings, the district court concluded that: (1) the City's activities in connection with the LSGI project created a 'cloud of condemnation' over the properties from at least November 23, 1987 until the LSGI suit was resolved in February 1995; (2) the City's actions significantly reduced the fair market value of [the Owners'] properties and caused a loss of rental income, thereby causing a substantial and adverse economic impact on the properties and rendering [the Owners'] businesses commercially impracticable; (3) the City uniquely burdened [the Owners] by impairing their existing and prospective uses of the properties for an unreasonable period of time; and (4) the City interfered with [the Owners'] investment-backed expectations by disturbing their longstanding and existing uses of the properties.

Id. at 113-14.

166. *Id.* at 114.

167. *Id.* at 116.

168. *Id.*

While each action taken by the City, analyzed separately, could be viewed as normal condemnation activity, the cumulative effect of the actions rendered [the Owners'] properties unmarketable for years

C. *Limitations of Johnson*

First, the court declined to rule on whether the City of Minneapolis's actions constituted a violation of the U.S. Constitution.¹⁷⁰ It made its findings strictly on the text of the Minnesota Constitution stating, “[t]aking . . . include[s] every interference, under the right of eminent domain, with the possession, enjoyment, or value of private property.”¹⁷¹ This case only extends as far as the State of Minnesota and possibly as persuasive authority for other states that have similar wording in their constitutions.

The decision states that the reason why the Minnesota Supreme Court declined to look at the U.S. Constitution was because it was irrelevant based on the fact that the Owners are entitled to compensation under the Minnesota Constitution.¹⁷² However, Gideon Kanner suggests that an application of the analysis found in *Penn Central* would have been incorrect.¹⁷³ The *Penn Central* analysis is appropriate where a legitimate regulation goes too far.¹⁷⁴

Nothing of the sort is true in precondemnation blight cases. There the government is not regulating. It is then not promoting the public good, nor engaging in any kind of legitimate police power regulation (whose objectives are the promotion of public health, safety, welfare or morals). Rather, it is then engaging in a self-serving illegitimate activity whose purpose is not to further the public condition, but rather to interfere in the real estate market untainted by government manipulation, in order

while development was being negotiated and, later, in litigation. Because of the unique circumstances of this case, we find no basis for reversing the district court's findings and conclusions of law that the City specifically targeted [the Owners'] properties and acted in bad faith and conclude that this case presents a narrow and rare instance in which precondemnation activity constituted a taking under the Minnesota Constitution.

Id.

169. *See id.*

170. *Id.* at 115.

171. *Id.* (citing MINN. STAT. § 117.025, subd. 2 (2004)). This is in contrast to the Fifth Amendment of the U.S. Constitution, which only promises that no person shall “be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

172. *Johnson*, 667 N.W.2d at 115.

173. Kanner, *supra* note 158, at 179.

174. *Id.*

to lower the value of the subject properties and save itself money when it finally gets around to acquiring the affected properties by eminent domain ‘on the cheap.’ That is not a legitimate government activity.¹⁷⁵

While the facts in *Johnson* do not support a contention that the City of Minneapolis was attempting to lower the property values in order to take advantage of the decline later, it was definitely a situation in which the City of Minneapolis was interfering with the market by misleading the Owners and essentially thwarting its own project.¹⁷⁶

Second, the court explicitly states, “our decision is limited to the particular facts presented.”¹⁷⁷ While the case may have finally demonstrated a situation in which the abuse of power was severe enough to justify a de facto taking, the court was sure to communicate that this was not a “sweeping” decision.¹⁷⁸ A collection of factors convinced the court to rule in favor of the Owners, factors that, when taken alone, would not have been persuasive.¹⁷⁹

The court limited its holding to the facts of this decision for the same reasons that courts are wary of looking at this issue in the first place.¹⁸⁰ As mentioned above, the courts do not want to hinder government’s fundamental right of eminent domain, or more importantly, its right to abandon condemnation proceedings.¹⁸¹ It is an essential power to continue the growth and progress of cities.¹⁸²

If cities were forced to compensate everyone they considered for condemnation, they would not be able to afford the utilization of one of their basic functions, taking property for public use.¹⁸³ Despite this danger, the Minnesota Supreme Court still decided to rule against the City of Minneapolis.¹⁸⁴ This speaks to the contention that even though this ruling could prove to be a disturbance to eminent domain law, the court will not allow cities

175. *Id.*

176. *Johnson*, 667 N.W.2d at 111-13.

177. *Id.* at 116.

178. *Id.*

179. *Id.*

180. *See* Kemper, *supra* note 148, § 4.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Johnson*, 667 N.W.2d at 115.

to outright abuse their power.¹⁸⁵

D. The Effect of the Minnesota Constitution

These concerns beg the question of why the Minnesota Supreme Court opened this can of worms in its decision in *Orfield*, and why it eventually found a taking in *Johnson*. The answer can most likely be found in the Minnesota Constitution. Where the general rule is that plotting and planning cannot be considered a taking, the court recognized a distinction in the Minnesota Constitution that may include exceptions to that rule.¹⁸⁶

The language of the Minnesota Constitution is broader than the language of the U.S. Constitution.¹⁸⁷ The U.S. Constitution states that “no person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.”¹⁸⁸ However, the Minnesota Constitution takes it a step further, stating that “[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation.”¹⁸⁹

The *Johnson* court examined the language from the Minnesota Constitution and other statutory provisions to conclude that “[t]he clear intent of Minnesota law is to fully compensate its citizens for losses related to property rights incurred because of state actions.”¹⁹⁰ Minnesota law provides more protection to property owners from the State than federal law does, which is why the *Orfield* court expanded the definition of a taking under Minnesota law.¹⁹¹

E. The Future of Eminent Domain

The effect of the *Johnson* decision is still largely unknown. It

185. *See id.*

186. *Id.*

187. Compare MINN. CONST. art. I, § 13, with U.S. CONST. amend. V.

188. U.S. CONST. amend. V.

189. MINN. CONST. art. I, § 13.

190. *Johnson*, 667 N.W.2d at 115 (citing *State by Humphrey v. Strom*, 493 N.W.2d 554, 558 (Minn. 1992)). The court also cited a Minnesota statute stating that “a taking ‘include[s] every interference, under the right of eminent domain, with the possession, enjoyment, or value of private property.’” *Id.* (citing MINN. STAT. § 117.025, subd. 2 (2002)).

191. *See Orfield v. Hous. & Redev. Auth. of St. Paul*, 305 Minn. 336, 340, 232 N.W.2d 923, 926 (1975).

has only been cited in one case of any significance.¹⁹² In *Concept Properties v. Minnetrista*, the Minnesota Court of Appeals distinguished the facts in *Johnson* from the facts at hand.¹⁹³ *Concept Properties* dealt with a land-use policy, not an abuse of the condemnation proceedings.¹⁹⁴

The plaintiff in *Concept Properties* urged the court to apply the *Johnson* standard, which is more lenient than the arbitration test called for by governing case law on regulatory takings.¹⁹⁵ However, the court refused to apply the *Johnson* standard and emphasized that the facts in *Johnson* were “unique.”¹⁹⁶ *Concept Properties* is not very factually similar to *Johnson*, so it is unsurprising that the court refused to adopt the *Johnson* standard.¹⁹⁷

Nonetheless, the *Johnson* decision serves as a possible movement from the long-held tradition to give legislative bodies “great judicial deference” when it comes to eminent domain proceedings.¹⁹⁸ It could have implications for other issues that arise as a result of eminent domain,¹⁹⁹ though it did not in *Concept Properties*.²⁰⁰ Many jurisdictions are currently dealing with whether

192. See *Concept Props., LLP v. Minnetrista*, 694 N.W.2d 804, 823-24 (Minn. Ct. App. 2005).

193. *Id.*

194. *Id.* The plaintiff, *Concept Properties*, owned a parcel of land that was included in the Metropolitan Urban Services Area (“MUSA”), or “the designated portion of the metropolitan area in which governmental agencies support urban development by providing necessary public facilities and services, including sewer service.” *Id.* at 810-11. In 1998, the property was no longer considered to be included in the MUSA. *Id.* at 811. The property owners purchased the property in the midst of the city’s revisions of MUSA property and under the impression that it was included in the MUSA. *Id.* at 812. Subsequently, *Concept Properties* sued the city based on a claim of a regulatory taking because they were no longer able to develop the land in the way they had planned. *Id.* at 813. However, while the property cannot connect to the sewer system, a septic system can be built to serve the property. *Id.* at 823. Thus, development is possible, just more difficult. *Id.*

195. *Id.* (“In applying the arbitration standard, we consider whether the regulation deprives the property of all reasonable uses If an alternative use is available, even if it is not the most profitable use, the regulation has not denied the property all economically beneficial use.”)

196. *Id.*

197. Compare *Johnson v. City of Minneapolis*, 667 N.W.2d 109, 111-13 (Minn. 2003) (deciding whether precondemnation proceedings rise to the level of a de facto taking), with *Concept Props.*, 694 N.W.2d at 810-13 (determining whether a regulatory action was arbitrary or capricious).

198. *Whitehead & Hardin*, *supra* note 147, at 102.

199. See *id.*

200. *Concept Props.*, 694 N.W.2d at 823-24.

state and local governments have a legitimate public use for property they propose to condemn.²⁰¹ While *Johnson* does not address that particular issue, it provides foundation for case law opposing overreaching use of eminent domain by the government.²⁰²

However, the encompassing message of all the cases that decided whether precondemnation activities rose to the level of a compensable taking seems to depend on the unique facts of each case.²⁰³ The court granted relief in *Johnson* because the facts were particularly egregious.²⁰⁴ There was a real showing of bad faith on the part of the City of Minneapolis and, as a result, the Owners suffered significant damage.²⁰⁵ In *Fitger*, there seemed to be some bad faith on the part of the City of Duluth, but the loss sustained, while unfortunate, was minimal.²⁰⁶

It will take another particularly egregious set of facts to repeat the ruling in *Johnson*.²⁰⁷ The most likely outcome of this case is that cities will keep property owners informed of the status of condemnation proceedings and continually remind them that there are no guarantees their property will be taken because, if they do not, the courts may make them answer for it.²⁰⁸

201. Whitehead & Hardin, *supra* note 147, at 81.

202. *Id.* at 102.

203. *Cf.* Foster v. Herley, 330 F.2d 87, 88 (6th Cir. 1964) (allowing jurisdiction under the federal Constitution because a taking could be found where (1) the city initiated condemnation proceedings, refusing to allow property owners to build on their land for ten years; (2) then abandoned the condemnation; and (3) later reinstated the proceedings and took the property at its severely deteriorated state because of the city's actions); Orfield v. Hous. & Redev. Auth. of St. Paul, 305 Minn. 336, 340, 232 N.W.2d 923, 926 (1975) (denying compensation when the city failed to condemn property when the condemnation proceedings were not the cause of the deterioration of the property and the city kept the property owner well-informed that his property may not be taken); Fitger Brewing Co. v. State, 416 N.W.2d 200, 208 (Minn. Ct. App. 1987) (ruling against the property owner's claim for compensation for the closing of the brewery when the brewery owner was able to sell the land to a developer); Buffalo v. J. W. Clement Co., 269 N.E.2d 895, 900 (N.Y. 1971) (refusing to grant compensation for precondemnation activities when the property owner planned to relocate to a new facility in a few years).

204. *Johnson v. City of Minneapolis*, 667 N.W.2d 109, 116 (Minn. 2003).

205. *Id.*

206. *Fitger*, 416 N.W.2d at 208.

207. *See Johnson*, 667 N.W.2d at 116.

208. *See id.* "In making the judgment, courts will no doubt consider the good faith of the condemning authority, the circumstances under which various announcements or communications were made, and the value of giving the condemnee as much advance notice as possible." 4-12B JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 12B.17 (revised 3d. ed. 2002).

V. CONCLUSION

Courts have been reluctant to expand the definition of a taking under the U.S. and Minnesota Constitutions.²⁰⁹ However, as demonstrated by *Johnson*, some situations go too far, requiring the courts to step in. *Johnson* serves to warn cities that while they have a lot of leeway to implement or abandon urban renewal projects, they may not abuse their privilege.²¹⁰ When cities target specific properties, they have some responsibility to the owners of those properties to keep them informed such that their properties will not be ruined in the process of condemnation.²¹¹

Eminent domain proceedings have, some feel, grown out of hand in many respects.²¹² This ruling hints at a trend for courts to take a harder line with cities who abuse their privilege.²¹³ However, the Minnesota Supreme Court was careful to base its decision solely on the Minnesota Constitution and to limit its holding to the unique facts.²¹⁴ It is the egregiousness of the facts and ultimate outcomes for the plaintiffs in each case that seem to drive the individual decisions.²¹⁵ Nonetheless, cities beware: Property owners have rights under the Minnesota Constitution as well.

209. See Kemper, *supra* note 148, at 127.

210. See *Johnson*, 667 N.W.2d at 116.

211. See *id.*

212. Whitehead & Hardin, *supra* note 147, at 81.

One of the most contentious issues facing local and state governments is the taking of private property to convey it to another private entity for the development of a shopping center, baseball park, industrial site, or some other use deemed advantageous to the well-being of the community. Often the reason advanced is that the public will benefit from the proposed taking by an increased tax base or the removal of a blighted part of town. This is said to be a public use. Sadly, the definition of public use has grown to include almost any use that meets a developer's or local politician's political and social agenda.

Id.

213. *Id.* at 102. "Recently, to the astonishment of local governments, courts are actually questioning the broad definition of public use." *Id.* at 81.

214. *Johnson*, 667 N.W.2d at 116.

215. See *supra* note 203 and accompanying text.