SUPREME COURT, STATE OF COLORADO
Colorado State Judicial Building
2 East 14th Avenue, Fourth Floor
Denver, Colorado 80203

Colorado Court of Appeals, No. 05CA279

Jefferson County District Court, No. 04CV3513

Appellant(s):
WHEAT RIDGE URBAN RENEWAL AUTHORITY

v.

Appellee(s):
THE CORNERSTONE GROUP XXII, LLC

▲ COURT USE ONLY ▲

Case No. 06SC591

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BRIEF AMICUS CURIAE BY PACIFIC LEGAL FOUNDATION AND ARTHUR FAST IN SUPPORT OF APPELLANT WHEAT RIDGE URBAN RENEWAL AUTHORITY

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IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interest of Amici Curiae are set forth in the accompanying motion for leave to file this brief.

ISSUE ANNOUNCED BY THE COURT

Whether the court of appeals erred in determining that a condemning authority could be compelled by a redeveloper to exercise its power of eminent domain through principles of estoppel in a situation when the landowners do not want their property condemned.

SUMMARY OF ARGUMENT

The power of eminent domain is a matter of sovereign discretion within constitutional limits. Just as the government cannot make a binding promise to refrain from regulating a particular activity or to refrain from using eminent domain, so it cannot be forced to exercise its eminent domain power when it has determined that it ought to withdraw from a contemplated condemnation. *See Hsiung v. City & County of Honolulu*, 378 F. Supp. 2d 1258, 1266 (D. Haw. 2005); *Matsuda v. City & County of Honolulu*, 378 F. Supp. 2d 1249, 1257 (D. Haw. 2005). The decision below runs contrary to centuries-old precedent holding that the decision of whether to exercise a discretionary sovereign power cannot be contracted away and held against the government by a private party.

In addition, the decision below is contrary to public policy and the principles of equity. A party cannot seek an equitable remedy that will injure innocent third parties—including those parties whose property may be taken through the exercise of eminent domain pursuant to an urban renewal or economic development plan. The abuse of eminent domain for the benefit of private parties under the rubric of economic development has long concerned this Court, *see generally Rabinoff v. District Court in & for the City & County of Denver*, 360 P.2d 114 (Colo. 1961), and has recently been the subject of legislation enacted by the Colorado Legislature. *See* HB 06-1411 (codified at Colo. Rev. Stat. Ann. § 38-1-101 (2006)). Such concerns counsel against reaching the extreme conclusion that the government can be barred from withdrawing from a condemnation that will ultimately result in transferring property to private parties.

There are rare cases in which this Court has prohibited the government from abandoning a condemnation action, when such abandonment would inflict unjustified burdens on the property owner, including *Piz v. Hous. Auth. of the City & County of Denver*, 289 P.2d 905 (Colo. 1955) (*en banc*). But the equitable considerations involved in those cases—preventing the government's bad-faith actions from inflicting even greater losses on a condemnee—are not present here, and this Court has never held that a private party who seeks to *benefit* from a condemnation can

force the government to continue with the condemnation of *another party's* property. Indeed, one of the oldest principles of equity—that "he who seeks equity must do equity"—would be violated by a legal rule allowing private parties to enforce, against the government's will, development contracts that result in the taking of private property from A and the giving of that property to B. Monetary damages, if any, for breach of contract, are sufficient to protect Cornerstone's interests without bringing additional harm to third parties, infringing on government's sovereign discretion, or creating dangerous new precedent in a highly contentious area of the law.

ARGUMENT

I

GOVERNMENT CANNOT RELINQUISH ITS SOVEREIGN DISCRETION

A. Government May Not Abdicate Its Discretion to Exercise Sovereign Powers

Eminent domain is an attribute of sovereignty, like the police power or the taxing power. The government is incapable of "bargaining away" its discretion to use or not to use these powers. *See Matsuda*, 378 F. Supp. 2d at 1257 (rejecting lawsuit against government based on city's decision to refrain from exercising eminent domain); *Hsiung*, 378 F. Supp. 2d at 1266 (same).

The fact that state legislatures (and those cities deriving power from them) are incapable of making binding promises to refrain from using their essential powers was most clearly stated in *Stone v. Mississippi*, 101 U.S. 814 (1879), but *Stone* was actually the culmination of a long debate about the limits that the federal Constitution's Contracts Clause imposes on legislative discretion.

The debate began sixty years earlier, when the Marshall Court held in *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), that a state-issued grant of authority (such as a corporate charter) was a contract, and an irrevocable vested right, which legislatures could not afterwards alter. In *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), the Taney Court clarified that this rule did not prohibit legislatures from issuing new charters, even if the new charters would interfere with, or dilute the value of, those that had already been issued. Thus although Massachusetts had authorized a company to construct a toll bridge, the legislature could later authorize the construction of a new free bridge nearby, even if it would destroy the first bridge's profits.

The Court explained that states must not be blocked from addressing public needs as they arise. The purpose of government "is to promote the happiness and prosperity of the community by which it is established," the Court declared, "and it can never be assumed, that the government intended to diminish its power of

accomplishing the end for which it was created . . . . A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished." *Id.* at 547-48. Factors such as the increase of population, longer experience in legislation, or the changing business climate, "might well have induced a change in the policy of the state," *id.* at 544, and if the government were "disarmed of the powers necessary to accomplish the ends of its creation," and its discretion "transferred to the hands of privileged corporations," *id.* at 422, then the government would be unable to accomplish its purposes.

Stone continued this tradition by holding that the government lacks the authority to make a binding promise to refrain from exercising its police powers. In that case, the state issued a permit allowing a company to operate a lottery, but shortly afterwards, a newly ratified state constitution outlawed lotteries. 101 U.S. at 817. The company sued, arguing that the permit was a contract which the government could not revoke. The Court rejected this argument; a legislature is incapable, it said, of making a binding promise limiting its discretion with regard to its regulatory authority. *Id.* at 817-18. *Accord*, *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 753 (1884).

The same principles apply to the power of eminent domain. In *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848), the State of Vermont condemned a bridge which held a 100 year exclusive franchise. The owners of the bridge contended that because the state had promised not to disturb the franchise for a century, the taking violated the Contracts Clause. The Court ruled for the state, noting that if the state could give up its power to condemn, the result would allow "private persons" to "control and actually . . . prohibit the power and duty of the government to advance and protect the general good." *Id.* at 534. Justice McLean concurred, noting that the Constitution prohibits states from "legislation affecting contracts, but leaves the States free in their exercise of the eminent domain, which belongs to their sovereignties." *Id.* at 539 (McLean, J., concurring).

The Court relied on these cases when it held, in *Contributors to Pennsylvania Hospital v. City of Philadelphia*, 245 U.S. 20 (1917), that some powers are so essential to the nature of government that for the government to renounce such powers would be an unconstitutional abdication of its duties. *Id.* at 23-24. "[T]he right of government to exercise its power of eminent domain" is one of these powers, *id.*, so any attempt to waive this authority is unenforceable. *Accord*, *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 24 n.21 (1977).

Colorado courts have likewise held that the government may not make a binding contract waiving its sovereign discretion. *See City & County of Denver v. Mountain States Tel. & Tel. Co.*, 184 P. 604, 608 (Colo. 1919), *error dismissed*, 251 U.S. 545 (1920), *overruled on other grounds*, *People ex rel. Pub. Utilities Comm'n v. Mountain States Tel. & Tel. Co.*, 243 P.2d 397, 401 (Colo. 1952) ("The police power . . . . is one of the highest attributes of sovereignty . . . . [It] is continuing in its nature, and, if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent.").

In *Colburn v. Bd. of Comm'rs of El Paso County*, 61 P. 241 (Colo. Ct. App. 1900), a former property owner sued on the grounds that when he had sold his land to the county, it had only been for the purpose of allowing the county to build a courthouse. He later sought to enjoin the county from constructing a new courthouse in Colorado Springs, in violation of covenant. The court ruled for the county, concluding that government could not be deprived of the discretion to choose the most convenient location for a courthouse. Otherwise "a most anomalous condition of affairs would arise." *Id.* at 243. The county officials "had the discretionary power to select and purchase a site for a court house, and to erect the building thereon," but they had no authority "to bind the public to maintain the court house upon the site so selected for all time to come." *Id.*

The rule that government cannot bargain away the police power or the power of eminent domain is based on the common sense observation that government must retain the discretion to act as necessary to serve the changing needs of the public welfare. *See* Thomas M. Cooley, *Constitutional Limitations* 283 (Legal Classics Library 1987) (1868) ("[T]he state could not barter away, or in any manner abridge or weaken, any of those essential powers which are inherent in all governments, and the existence of which in full vigor is important to the well-being of organized society."). *Cf. Stone*, 101 U.S. at 820 ("[Government] agencies can govern according to their discretion, if within the scope of their general authority . . . but . . . cannot give away nor sell [their] discretion . . . in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances.'" (quoting *Trustees of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 628)).

The only exceptions to this rule are limited cases in which the government unambiguously promises to regulate a particular entity in a limited way—for example, in the setting of rates that may be charged by a public utility. *See*, *e.g.*, *Pub. Utilities Comm'n v. City of Durango*, 469 P.2d 131, 132 (Colo. 1970) ("[I]t must clearly and unmistakably appear that the contract by its terms suspends the power of the state to regulate and all doubts must be resolved in favor of the continuance of the power of the state to regulate."). This is because in these cases, private parties may

develop legitimate reliance expectations on the basis of the government's promise to withhold regulation. This exception, however, is limited to powers which are "incident to the exercise of the legitimate functions of government," such as taxation; it does not apply to powers which are of the *essence* to government, such as eminent domain. *See Stone*, 101 U.S. at 820. Thus, as the *Stone* Court put it, the government could not "bargain away its whole power of taxation, for that would be substantially abdication," but it might, "for a consideration . . . in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular." *Id.* Moreover, this exception is based on (1) the equitable claims of the regulated party, whose investment was based on good faith reliance on the government's promise, and imposed no detriment on a third party, and (2) the significant advantage to the general public that might result from economic development based on incentives which, again, harmed no innocent third party. *See*, *e.g.*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147-48 (1982) (describing the "unmistakability" doctrine applicable to contracts restraining government's taking authority); *cf. DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1862 (2006) (finding no cognizable injury to third party when government extended economic incentive to private industry). Even where these elements are present, however, government retains broad discretion to alter arrangements limiting taxation or regulation. *See*

Merrion, 455 U.S. at 147 ("Contractual arrangements remain subject to subsequent legislation by the presiding sovereign.").

None of these considerations are applicable to this case. This case involves government's intent to condemn the property of innocent third parties for transfer to a private entity. Cornerstone cannot appeal to equity to compel the transfer of property taken in such a manner. "We are not suggesting that the contract is illegal . . . [but] a party who has offered and succeeded in getting an agreement as tough as this one is, should not come to a chancellor and ask court help in the enforcement of its terms . . . . [E]quity does not enforce unconscionable bargains." *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3d Cir. 1949). *See also Salzman v. Bachrach*, 996 P.2d 1263, 1269 (Colo. 2000) ("Many different forms of improper conduct may bar a plaintiff's equitable claim, and the conduct need not be illegal."); *Bernhardt v. Hemphill*, 878 P.2d 107, 113 (Colo. Ct. App. 1994) ("[If] plaintiffs purchased the time-share contracts . . . at a time when they knew that the motel property would be lost to foreclosure as a result of non-payment under the purchase agreement, they are not entitled to an equitable remedy.").

B. Government May Not Be Estopped from *Refraining* from Condemnation

If the government cannot abandon its ability to *exercise* its sovereign powers, it follows logically that it cannot waive its authority to *refrain from* exercising its sovereign powers. Simply put, "[d]iscretion means choice on whether or not to act." *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 937 (9th Cir. 2006). Eminent domain, and the police power, are sovereign powers within government's discretion, and, except where it exceeds the constitution's limits, the government cannot be deprived of that discretion. *See*, *e.g.*, *Pennsylvania Hospital*, 245 U.S. at 24.

The Colorado Court of Appeals rejected reliance on *Pennsylvania Hospital* and similar cases, on the ground that those cases only applied when government agreed to *refrain* from exercising a discretionary power; it distinguished this case on the basis that here, the government agreed that it *would* exercise a discretionary power. *See Cornerstone Group XXII, L.L.C. v. Wheat Ridge Urban Renewal Auth.*, No. 05CA0279, 2006 WL 2291146, *5 (Colo. Ct. App. Aug. 10, 2006) ("[T]hese cases apply . . . in the context of agreements that preclude or otherwise restrict the exercise of eminent domain"). The fallacy, however, lies in overlooking the nature of *discretion*: *Stone*, *Pennsylvania Hospital*, and similar cases preserve the authority

of government to *choose* how it will act within constitutional limits; it cannot be deprived of that authority either by being prohibited from acting, or by being forced to act. *See also City of San Antonio v. Zogheib*, 70 S.W.2d 333, 334 (Tex. Civ. App. 1934), *rev'd on other grounds*, 101 S.W.2d 539, 543 (Tex. Comm'n App. 1937) ("A discretionary power involves an alternative power, *i.e.*, a power to do or refrain from doing a certain thing . . . . A power is discretionary, when it is not imperative . . . . Generally the courts will not compel the execution of discretionary powers." (internal quotations and citations omitted)).

Two related cases remarkably similar to the present case were recently decided by the federal district court in Hawaii. *Matsuda*, 378 F. Supp. 2d 1249; *Hsiung*, 378 F. Supp. 2d 1258. These cases arose out of Hawaii's residential conversion laws, which were the subject of the Supreme Court's decision in *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984). These laws allow residents of leased property, or of condominiums, to petition the government to exercise eminent domain and transfer the fee interest in the property from the landlord or owner to the tenant. *See Matsuda*, 378 F. Supp. 2d at 1251-52. Shortly after lessors of condominiums in Honolulu asked the city to condemn their buildings and transfer the fees to them, the city repealed its conversion ordinance, on the grounds that such condemnations were "no longer needed to assuage the social and economic problems mentioned in [the

conversion ordinance] and, therefore, no longer advance[] a public purpose for which the city should exercise its extraordinary powers of condemnation." *Id.* at 1252; *Hsiung*, 378 F. Supp. 2d at 1261. The residents filed suit, contending that the repeal was a breach of contract and a violation of the Contracts Clause.

The district court rejected these arguments, noting the government could not be bound "to a contract that purports to restrict its power of eminent domain." *Matsuda*, 378 F. Supp. 2d at 1255. Like the court below, the property owners in *Matsuda* and *Hsiung* argued that this rule does not apply to laws that require the government to exercise eminent domain, but the court rejected that argument as "illusory." *Matsuda*, 378 F. Supp. 2d at 1257; *Hsiung*, 378 F. Supp. 2d at 1266. "The sovereign right of eminent domain *necessarily consists of the discretion to exercise that power in the manner the sovereign deems to be in the public's best interest.* A contract requiring the sovereign to exercise the power is just as limiting as a contract prohibiting it from doing so." *Hsiung*, 378 F. Supp. 2d at 1266; *Matsuda*, 378 F. Supp. 2d at 1257 (emphasis added). *See also Joleewu, Ltd. v. City of Austin*, 916 F.2d 250, 255 (5th Cir. 1990) ("[A]ny contract between the City and Joleewu that purported to dictate when the City must initiate condemnation proceedings is unenforceable.").

The same principle applies to this case. Cornerstone's agreement with the city must be read, as all agreements with the government are read, as including a reservation in favor of constitutional government discretion. *West River Bridge Co.*, 47 U.S. (6 How.) at 532-33 ("[I]nto all contracts . . . there enter conditions which . . . are superinduced by the preexisting and higher authority of the laws of nature, of nations, or of the community to which the parties belong . . . . Such a condition is the right of eminent domain.").

While Cornerstone may have invested time and money in the redevelopment project, it cannot have done so without recognizing that the government has the sovereign discretion to withdraw from a contemplated condemnation, and that the use of eminent domain for economic development is a matter of increasing national concern. *Cf. Good v. United States*, 189 F.3d 1355, 1362 (Fed. Cir. 1999) (because landowner was "not oblivious" to the "rising environmental awareness" that "translated into ever-tightening land use regulations," he could not characterize land-use regulation as a taking).

Piz, on which the court of appeal relied, presented a very different case, which this Court acknowledged was "not the usual case." 289 P.2d at 908. The property owner in *Piz* had been forced to relocate his bakery, the equipment for which was unique, unmovable, and extremely expensive. *See id.* at 907. After the condemnation

had begun, he had built an entire new bakery, "solely because of the condemnation and the insistence of the Authority that [his] property was absolutely essential to the project." *Id.* at 908. Once the jury returned its verdict as to the amount of just compensation, however, the Authority was "unwilling to pay it," *id.*, and withdrew from the condemnation. This Court found that equitable estoppel would apply "to prevent fundamental injustice." *Id.* Recognizing that the government may withdraw from a taking "where the landowner has not changed his position" on the grounds of that taking, *id.* at 909, this Court concluded that "[t]he condemning authority may not frivolously chaffer with the property owner," only to withdraw once the price turns out to be too high. *Id.* at 909.

Piz was correctly decided because allowing the government to act in such bad faith would be essentially to place the property owner "at the mercy" of the condemnor's "whim and caprice." *Id.* at 909. Allowing the government to withdraw from a condemnation at such a moment would violate fundamental fairness, by enabling government to impose on a landowner the serious costs associated with litigating a condemnation case to the point of a jury determination, and then to withdraw, and leave the owner without compensation for these costs. In *Piz*, the Housing Authority essentially required Piz to acquire new property and then failed to compensate him for it. *See id.* at 913 (noting that Piz "had two bakeries on his

hands, only one of which he voluntarily acquired"). Equitable estoppel applies to prevent such injustice. Because condemnation is itself such a harsh imposition on a property owner, he is entitled to use estoppel as a shield to prevent further abuse by the government.

These considerations do not apply in this case, however. Here, a private developer sought to benefit from the use of the condemnation power in a manner that is highly controversial, widely abused, and about which this Court has expressed profound skepticism. *See Rabinoff*, 360 P.2d at 122 ("Serious harm could result from an arbitrary exercise of the urban renewal power."). Cornerstone is not in the same position as the innocent baker in *Piz*, but is a sophisticated development company that regularly engages in redevelopment, including redevelopment that includes condemning the property of third parties. For the court to rely on *Piz* to force the government to go through with a condemnation of a third party's property for Cornerstone's benefit would be a perverse reading of that case.

The other cases relied upon by the court of appeals are similarly off point. Although the court cited *State ex rel. Morrison v. Helm*, 345 P.2d 202 (Ariz. 1959), as recognizing that the authority to withdraw from a condemnation might be lost through waiver or estoppel, the *Helm* court went on to recognize that such cases are quite rare, and that "the general rule is that in the absence of a statute fixing the time

within which a discontinuance may be had, an eminent domain proceeding may be discontinued at any time before the rights of the parties have become reciprocally vested." *Id.* at 203. Indeed, *Helm* ran contrary to *Piz* by allowing the government to abandon its condemnation proceedings even though a trial court had already determined the just compensation value. *See id.* at 203. Likewise, *Epperson v. Johnson*, 119 P.2d 818 (Okla. 1941), which the court below also cited, allowed the government to withdraw from a condemnation because it was "unwilling[] to . . . pay the amount of compensation awarded by the jury." *Id.* at 819. Such a harsh conclusion is contrary to *Piz*, but, like *Helm*, it indicates how unusual it is for courts to bar the state from withdrawing from a condemnation.

The decision below deprives the government of its legitimate discretion to refrain from exercising eminent domain. Yet eminent domain is a "special" power, *Wassenich v. City & County of Denver*, 186 P. 533, 537 (Colo. 1920) (quoting *Colorado Fuel & Iron Co. v. Four Mile Ry. Co.*, 66 P. 902, 905 (Colo. 1901)), with harsh effects on the rights of property owners; Colorado courts therefore construe eminent domain statutes strictly to ensure the maximal protection for owners. *Platte River Power Auth. v. Nelson*, 775 P.2d 82, 83 (Colo. Ct. App. 1989). This suggests that courts should usually allow the legislature the same discretion to refrain from exercising eminent domain as it has to exercise that power in the first place. To

require government to proceed with a condemnation where officials have determined that it is unwise or unwarranted is precisely to deprive the government of discretion as this Court and other courts have refused to do.

II

MONETARY DAMAGES ALONE ARE APPROPRIATE IN THIS CASE

A. Specific Performance of Contracts Involving the Use of Eminent Domain for Economic Development Is Contrary to Public Policy

Specific performance is an equitable remedy that is limited by considerations of public policy. *See* Restatement (Second) of Contracts § 365 (1981) ("Specific performance or an injunction will not be granted if the . . . use of compulsion is contrary to public policy."). *See also Genth v. Gardner*, 273 P. 644, 645 (Colo. 1928) (courts will not grant specific performance of contract contrary to public policy); *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of America*, 461 U.S. 757, 769 n.13 (1983) ("Compensatory damages may be available to a plaintiff injured by a breach of contract even when specific performance of the contract would violate public policy.").

Judicial enforcement of the agreement here is contrary to public policy because local governments must be allowed the full power to refrain from the exercise of eminent domain, particularly in cases involving condemnation for transfer to private

parties. In *Kelo v. City of New London, Connecticut*, 545 U.S. 469 (2005), the United States Supreme Court allowed local governments to condemn property and transfer it to private developers to boost local economies, but that decision has been met with popular outcry across the nation. *See*, *e.g.*, H.R. Res. 340, 109th Cong. (2005) (expressing, by vote of 365 to 33, "the grave disapproval of the House of Representatives regarding the majority opinion of the Supreme Court" in *Kelo*). The *Kelo* decision recognized that states may protect property owners more than does the Fifth Amendment, 545 U.S. at 489-90, and courts in Ohio, Michigan, Arizona, Illinois, and Oklahoma, have recently chosen to construe the power of eminent domain narrowly to protect private property owners. *See City of Norwood v. Horney*, 853 N.E.2d 1115, 1140 (Ohio 2006); *County of Wayne v. Hathcock*, 684 N.W.2d 765, 786 (Mich. 2004); *Bailey v. Myers*, 76 P.3d 898, 902 (Ariz. Ct. App. 2003); *Bd. of County Comm'rs of Muskogee County v. Lowery*, 136 P.3d 639, 647 (Okla. 2006); *Southwestern Illinois Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1 (Ill. 2002).

Colorado courts have permitted local governments to use eminent domain to eliminate blighted areas, *Rabinoff*, 360 P.2d at 121, but have not extended this rationale to allow *Kelo*-style condemnations for economic development. *See*, *e.g.*, *Arvada Urban Renewal Auth. v. Columbine Prof'l Plaza Ass'n, Inc.*, 85 P.3d 1066, 1073 (Colo. 2004) ("Under our Urban Renewal Law, the only valid public purpose

for which an urban renewal plan may be adopted is to eliminate or prevent the spread of slum or blight."). Indeed, Colorado courts have long adhered to the rule that eminent domain is an extraordinary power which must be exercised only in strict conformity with the law. *See Platte River Power Auth.*, 775 P.2d at 83 ("[W]hile eminent domain statutes are strictly construed against the government, they must be liberally construed in favor of property owners."); *Rabinoff*, 360 P.2d at 122 (requiring "scrupulous adherence to legal requirements"); *Mack v. Town of Craig*, 191 P. 101, 101 (Colo. 1920) ("When the right to exercise the power [of eminent domain] can only be made out by argument and inference, it does not exist."). Therefore, recognizing that "[s]erious harm could result from an arbitrary exercise of the urban renewal power," *Rabinoff*, 360 P.2d at 122, Colorado courts have been reluctant to authorize overly broad powers of eminent domain.

Yet the use of eminent domain to benefit private parties has been a growing concern in this state. Between 1998 and 2002, Colorado's state and local governments condemned 23 properties for transfer to private developers. Dana Berliner, *Public Power, Private Gain* 38 (2003).[1] Shortly after the United States Supreme Court announced its decision in *Kelo*, the Colorado Legislature enacted

[1] *Available at* http://www.castlecoalition.org/pdf/report/states/colorado.pdf (last visited Mar. 1, 2007).

HB 06-1411 (codified at Colo. Rev. Stat. Ann. § 38-1-101(1)(b)(I) (2006)), by a vote of 35-0 in the Senate and 60-5 in the House, to forbid the government from taking property "for transfer to a private entity for the purpose of economic development or enhancement of tax revenue." This was in keeping with a national trend which has resulted in more than 30 states enacting legislation designed to restrict the use of eminent domain for the benefit of private development. *See generally* Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 Mich. St. L. Rev. 709.

The use of eminent domain to transfer property to private developers is therefore a highly contentious matter, subject to widespread abuse. While the use of eminent domain to develop blighted areas is permitted by Colorado law, that power cannot be treated lightly, and the eminent domain laws must be construed strictly against the government. *Platte River Power Auth.*, 775 P.2d at 83. The use of the court's equitable powers to compel the government to go through with a condemnation which it has chosen to abandon is therefore contrary to public policy.

B. The Cornerstone Group Is Not Entitled to Equity

As John Norton Pomeroy explained in his classic *Treatise on the Specific Performance of Contracts* (3d ed. 1926), specific performance is not a matter of legal right, but of "sound, judicial discretion, controlled by established principles of equity,

and exercised upon a consideration of all the circumstances of each particular case." *Id.* at 103. Because specific performance is an equitable remedy, it will not apply in cases where "the contract itself is unfair, one-sided, unconscionable, or affected by any other such inequitable feature, and where the specific enforcement would . . . in any other manner work injustice." *Id.* at 121. Equity will not operate "to the injury of innocent third parties." *Hood ex rel. N.C. Bank & Trust Co. v. N.C. Bank & Trust Co.*, 184 S.E. 51, 59 (N.C. 1936) (citation omitted); *see also Shiley, Inc. v. Bentley Labs., Inc.*, 601 F. Supp. 964, 969-70 (C.D. Cal. 1985) ("As a court of equity, the court must consider all of the circumstances, including the adequacy of the legal remedy, irreparable injury, whether the public interest would be served, and hardship on the parties and third parties."). *Cf. Metro. State Bank v. Wright*, 209 P. 804, 806 (Colo. 1922) ("[A]s between the mortgagee and a third party, where circumstances of doubt exist as to whether the mortgage is made, executed, and filed strictly within the statute, such doubts will be resolved in favor of such third party, unless there are countervailing equities."); *Hill v. Lofgren-Harris Mercantile Co.*, 129 P. 208, 210 (Colo. 1912) (A "court of equity" could not "wrest the property from the possession of Thompson . . . and turn [it] over to a third party who claimed rights therein under a contract with which Thompson had nothing to do. This seems so plain that it is not necessary to say anything more about it.").

In cases in which courts have prohibited government from abandoning a condemnation action, they have done so out of the equitable concern of protecting the *property owner* from government's capricious or bad-faith acts. *See*, *e.g.*, *Denver & N.O.R. Co. v. Lamborn*, 8 P. 582 (Colo. 1885); *Denver & R.G.R. Co. v. Mills*, 147 P. 681, 684 (Colo. 1915); *Piz*, 289 P.2d at 909; *cf. Johnson v. Climax Molybdenum Co.*, 124 P.2d 929, 931 (Colo. 1942) (recognizing that when condemnor abandons condemnation it may be forced to pay landowner for temporary occupation as a matter of equity). In no case has this Court or any other court allowed the *beneficiary of a condemnation* to use estoppel as a sword to force the government to go through with a condemnation of a third party's land, when it wishes to abandon that condemnation. As the Ninth Circuit Court of Appeals noted in *Marks v. Gates*, 154 F. 481, 482 (9th Cir. 1907),

> [t]he enforcement of a contract by a decree for its specific performance rests in the sound discretion of the court—a judicial discretion to be exercised in accordance with established principles of equity. A contract may be valid in law . . . and yet the terms thereof, the attendant circumstances, and in some cases the subsequent events, may be such as to require the court to deny its specific performance.

Nowhere are these words more applicable than in this case. Given the ready availability of monetary damages to Cornerstone, and the countervailing equitable

considerations in this case, the court of appeals erred in granting specific performance.

CONCLUSION

The decision of the court of appeals should be *reversed*.

Respectfully submitted this 6th day of March, 2007.

By _____

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CERTIFICATE OF COMPLIANCE

Pursuant to Colorado Rule of Appellate Court 32(a)(3), I hereby certify that the foregoing BRIEF AMICUS CURIAE BY PACIFIC LEGAL FOUNDATION AND ARTHUR FAST IN SUPPORT OF APPELLANT WHEAT RIDGE URBAN RENEWAL AUTHORITY is proportionately spaced, has a typeface of 14 points or more, and contains 5,456 words.

DATED: March 6, 2007.

_____

MEREDITH A. KAPUSHION

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 2007, a true and correct copy of the attached BRIEF AMICUS CURIAE BY PACIFIC LEGAL FOUNDATION AND ARTHUR FAST IN SUPPORT OF APPELLANT WHEAT RIDGE URBAN RENEWAL AUTHORITY was placed in the United States Mail, postage prepaid, addressed as follows:

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