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IN THE SUPREME COURT OF ILLINOIS

SOUTHWESTERN ILLINOIS DEVELOPMENT AUTHORITY, Appellant, v. NATIONAL CITY ENVIRONMENTAL, L.L.C., and ST. LOUIS AUTO SHREDDING COMPANY, Appellees.	)	Appeal from the Appellate Court of Illinois, Fifth District Appellate Court No. 5-98-0263

PETITION FOR REHEARING OF NATIONAL CITY ENVIRONMENTAL, L.L.C., AND ST. LOUIS AUTO SHREDDING COMPANY

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To the Honorable Justices of the Supreme Court:

Pursuant to Illinois Supreme Court Rule 367, appellees National City Environmental, L.L.C., and St. Louis Auto Shredding Company (collectively "NCE") respectfully petition this Court for rehearing of this case.[1/] The Majority Opinion misapprehended and over-looked certain key points of law and fact, which materially affected this Court's decision:

- The Majority Opinion addressed whether "a taking for a public use is . . . transformed into a private taking through a subsequent transfer to a private party." (Ex. 1 at 15.) That is not the issue framed by this case. The issue framed here is whether the Southwestern Illinois Development Authority ("SWIDA") constitutionally may delegate its eminent domain power to a "private developer" by contract so that the "private developer" can take nonblighted private property from a private citizen for what SWIDA calls that developer's own "private use," i.e., to enhance its profits, in exchange for a five-figure fee plus a promise by the private developer to pay all of the fees and expenses SWIDA incurs in the taking.

- The Majority Opinion also addressed the facial constitutionality of the SWIDA Act, 70 ILCS 520/1, et seq., including the legislative findings therein. (Ex. 1 at 12-20.) Again, this case did not put that issue before this Court. This Court should have addressed the issue of whether *this taking* passed constitutional muster, particularly in light of SWIDA's contractual delegation to a "private developer" of control over this taking, including the power: to decide what

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1/ A copy of this Court's April 19, 2001 decision is attached to this Petition as Exhibit 1.

property to take; to set the offering price; and to instruct SWIDA during the taking proceedings.

- Having misapprehended the specific constitutional questions raised here, the Majority Opinion overlooked long established precedent of this Court that applies the public use doctrine to block takings, like this one, of nonblighted land for the sole purpose of giving the land to a private business to be put to a use for the business's profit that either excludes the public or requires the public to pay a fee to the private owner to use the land. See Limits Industrial Railroad v. American Spiral Pipe Works, 321 Ill. 101, 151 N.E. 567 (1926); Gaylord v. Sanitary Dist. of Chicago, 204 Ill. 576, 68 N.E. 522 (1903); Sholl v. German Coal Co., 118 Ill. 427, 10 N.E. 199 (1887). The Majority Opinion did not cite or distinguish any of these decisions.

- The Majority Opinion overlooked the distinction between the "public *use*" doctrine, Ill. Const. art. I, § 15 (1970), and the more elastic "public *purpose*" doctrine, Ill. Const. art. VIII, § 1(a) (1970). By doing so, the Majority Opinion impermissibly relaxed the constitutional protections afforded to Illinois landowners.

- The Majority Opinion declined to address whether the receipt of large monetary fees and other perks by SWIDA and its officials in exchange for the use of SWIDA's eminent domain power violates the Illinois and United States Constitutions. (Ex. 1 at 23.) The Majority Opinion held that NCE did not address this issue on appeal, but in fact NCE did attack the constitutionality of SWIDA's

sale of its eminent domain power to Gateway in this Court and in the courts below.

The Majority Opinion misapprehends the scope and import of this case. This case does not represent a broadside volley against eminent domain power. This case does not challenge the authority of the State (or its agencies) to condemn blighted property and later transfer the property to a private owner for development. Indeed, the Illinois Appellate Court for the Fifth District, operating within the precedent it had established through its decision in this case, recently *affirmed* a SWIDA taking of blighted land for cleanup and transfer to a private developer. See SWIDA v. Masjid Al-Muhajirum, 318 Ill. App. 3d 1005, 744 N.E. 2d 308 (5th Dist. 2001). The Fifth District's application of its precedent illustrates that the Fifth District decision this Court should have affirmed here would not obstruct legitimate takings, *even when they are followed by transfers to private developers.*

This case presents a different scenario completely: a private company deciding that it would like to own its neighbor's nonblighted land to enhance its own profits and executing a contract with a government agency by which – for a fee – it pays for and conducts an eminent domain proceeding. The Majority Opinion approves this standardless and unbridled exercise of eminent domain power to benefit private interests.

Gateway owned a successful racetrack next to NCE's property, in an area that was already enjoying a substantial economic revival. Gateway wanted to become more successful, but to do so it needed more parking. It had (at least) two legitimate options: it could build a multilevel garage on property it already owned, or it could go to the real estate market and buy property at market rates, i.e., what an uncoerced seller will accept to part with his land (which were on the rise because of the area's renewal). Gateway did

neither. Instead, it entertained SWIDA officials at its raceway, paid fees of $62,500 (thus far) to SWIDA, and caused SWIDA to commence this taking (for which Gateway is paying all SWIDA's expenses, including attorneys' fees), which both parties characterized as being by a "private developer" for a "private use." NCE's property was not blighted, so after-the-fact rationales were invented: traffic congestion and public safety. (Ex. 1 at 38-43.) The problem was that no traffic/safety study was ever done and – worse yet – any traffic congestion and public safety risks *were caused by Gateway's business.*

In the end, the Majority Opinion's approval of this taking destroys the "public use" protections of the Illinois and United States Constitutions for the citizens of this State. The notion that a private corporation can create public problems and then use those problems to justify condemning a neighbor's property puts every landowner in the State at risk. Likewise, the notion that mere "economic development" can justify taking one person's nonblighted property and giving it directly to another transforms State Government into a reverse Robin Hood, taking from the poor to give to the rich or politically influential.

The Majority Opinion leaves the "public use" doctrine with no discernable standard. Before this decision, the "public use" doctrine protected the ownership rights of Illinois citizens who paid their taxes and maintained their land from losing that land to another private party. Now, anyone with enough money to pay a government fee and enough clout to persuade local authorities to act can take his neighbor's land, even if the neighbor pays his taxes regularly and maintains his property spotlessly. This cannot be the law, for it is, as Chief Justice Harrison echoed, "akin to the tyranny our forefathers fled." (Ex. 1 at 25.) We implore this Court to rehear this matter and to restore a constitutional outer boundary on eminent domain power: a "public use" requirement that

protects the property rights of citizens who properly maintain their properties against takings for the sole purpose of fulfilling a private party's desire to own certain land.

STATEMENT OF FACTS

The Targeting And Taking Of NCE's Land

Gateway International Motorsports Corporation ("Gateway"), a highly successful for-profit corporation, runs a profitable motorsports racetrack in the East St. Louis area. (NCE Br. 4, 14-16.)[2/] NCE operates a metal recycling center on land adjacent to Gateway's racetrack, employing more than eighty people on a full-time basis and eliminating most of the abandoned cars, refrigerators, and washing machines that would otherwise be rusting on the roadsides of Southern Illinois. (NCE Br. 3.)

Gateway had a plan to enhance its profits by adding more races to its schedule. To do so, Gateway decided it had to add more parking spaces around its racetrack. (NCE Br. 7-9.) Gateway had available options to solve this problem, including building a multi-tier parking garage on its own land or purchasing land from nearby owners for a parking lot. (NCE Br. 7 & n.3.) Gateway certainly is not short the funds to accomplish capital improvements or acquisitions; during the second half of 2000 alone, Dover Downs, Gateway's parent, spent over $55 million for capital improvements on its holdings across the country (including Gateway), and Dover Downs "has a $125,000,000 long-term, revolving line of credit from several banks to provide seasonal funding needs,

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2/ In November 1994, Gateway was acquired by Grand Prix Association of Long Beach, Inc., a private sector California corporation. (NCE Br. 4.) This corporation and Gateway are referred to herein collectively as "Gateway." In July 1998, Dover Downs Entertainment, Inc. ("Dover Downs") acquired Gateway. See Ex. 2 at 15 (Dover Downs 2/27/01 Annual Report (Securities & Exchange Commission Form 10-K)). NCE requests this Court take judicial notice of this SEC Form 10-K. People v. Davis, 65 Ill. 2d 157, 165, 357 N.E.2d 792, 796 (1983) (court may take judicial notice of evidence where facts are capable of immediate and accurate demonstration by resort to easily acceptable sources of indisputable accuracy).

Next, under this new policy, SWIDA took for Gateway the farm of an older farmer, Mr. Lukas, who passed away during the condemnation proceedings. (NCE Br. 5-6.)

Gateway then initiated the taking of NCE's land by filing with SWIDA a quick-take application, representing that it sought NCE's land for use as a private paid parking lot to *"further increas[e] the value of [its] racetrack."* (NCE Br. 8, App. 23.) SWIDA's Executive Director Alan Ortbals admitted under oath at trial that SWIDA and Gateway treated this as a taking requested by a "private developer" for a "private use." (NCE Br. 6.) *SWIDA also admitted that the idea to take NCE's land was Gateway's, not SWIDA's.* (NCE Br. 8.) Indeed, in response to the question whether Gateway wanted NCE's land for profit, Gateway's CEO answered: "Absolutely." (NCE Br. 9.)

Next, Gateway and SWIDA entered into a contract whereby SWIDA specifically agreed to "utilize its eminent domain and quick-take authority" to condemn whatever land "may be desired . . . by Gateway," and to convey that land to Gateway within five days of SWIDA's acquisition of title; Gateway, in exchange, pays for everything, including SWIDA's attorneys' fees. (NCE Br. 12, App. 44, 47.) The Agreement does not limit Gateway's use of the property as long as Gateway uses it generally for the development of the racetrack. (NCE Br. 12-13, App. 47.) In accordance with this

Agreement, on March 31, 1998, SWIDA filed a quick-take condemnation action against NCE. (NCE Br. 13.)

The Proceedings Below

On April 23, 1998, the Circuit Court countenanced the seizure of NCE's land, ruling that SWIDA had properly exercised its authority to take NCE's land. (NCE Br. 18.) The Illinois Appellate Court reversed, however, holding that SWIDA had "exceeded its constitutional authority" by seizing NCE's property. (NCE Br. App 9.) The Appellate Court correctly observed that no court in Illinois history has ever defined public use in so "broad, flexible, and expansive" a manner "that where a private enterprise admits it can use its own resources to develop its property (in this case by building a parking garage), a condemning authority is justified in using its power of eminent domain to take private property from an unwilling seller and to transfer it to another private enterprise to increase the profits of that private enterprise." (NCE Br. 20, App. 8.) The Majority Opinion identifies no such prior Illinois decision. None exists.

This Court's Decision

On April 19, 2001, this Court reversed the decision of the Appellate Court, addressing three issues. First, this Court upheld the constitutionality of the SWIDA Act itself, accepting the legislature's findings that the exercise of the eminent domain power would serve to "alleviate certain economic, housing and other conditions in the southwestern part of this state." (Ex. 1 at 20.) Second, this Court held that "[j]udicial intervention is not warranted" here because SWIDA met its prima facie case by showing that "the taking of [NCE's] Property would further economic development, promote safety, and lead to the elimination of blight in the area." (Ex. 1 at 22.) Finally, this Court declined to consider whether "the process used by [SWIDA] in condemning the Property

violates due process by creating impermissible financial bias in favor of condemnation," instead stating that this issue was not raised by NCE. (Ex. 1 at 23.)

Three Justices of this Court dissented from the Majority Opinion. Chief Justice Harrison, in whose District this taking occurred, joined by Justices Thomas and Kilbride, accurately observed that "[t]he only reason that [NCE's land] is now owned by Gateway rather than NCE is that it provided the cheapest solution to the parking and traffic problems created by Gateway's expansion of its race track." (Ex. 1 at 24.) Justice Kilbride also wrote separately, similarly finding that "SWIDA's actions are simply a ruse to cloak private enterprise in the garb of a public project." (Ex. 1 at 31.) In light of this fact and the Majority Opinion's truncated analysis of this Court's own prior precedent, Justice Kilbride correctly concluded that the Majority Opinion "overlook[ed] established precedent and allow[ed] an unconstitutional taking of private property." (Ex. 1 at 25.)

ARGUMENT

Chief Justice Harrison recognized that "SWIDA's action in taking NCE's property and transferring it to Gateway for Gateway's private use presents fundamental constitutional issues" that "should have been addressed by the majority." (Ex. 1 at 24.) Those issues are (1) the constitutionality of *this* taking, as opposed to the constitutionality of the SWIDA Act itself (Section I); (2) the applicability of this Court's prior precedents, which flatly reject takings almost identical to the taking here of NCE's land (Section II); (3) the distinction between the public *use* doctrine, which applies here and in all other takings cases, and the public *purpose* doctrine, which does not (Section III); and (4) whether SWIDA's financial stake in the taking of NCE's land violates the State and Federal Constitutions (Section IV).

I. This Court Misapprehended The Precise Constitutional Issue Raised By SWIDA's Taking, And Should Now Address The Uniquely Egregious Manner In Which SWIDA Here Sold Its Condemnation Power To Gateway.

The central issue in this case is the constitutionality of a taking – in SWIDA's own words – by a "private developer" for its own "private use." (NCE Br. 5-6, App. 6.) This taking was *not* initiated by the condemning authority, i.e., SWIDA, to address any perceived public need. This taking was the idea of a private party, i.e., Gateway, for the expressed purpose of "further increas[ing] the value of its racetrack." (NCE Br. 8, App. 23.) Indeed, in exchange for a payment of $62,500 (thus far) as well as the promise that Gateway would pay all of SWIDA's expenses – including legal fees – SWIDA contracted with Gateway to:

- use its eminent domain powers "to acquire title or such lesser interest as may be desired or agreed to by Gateway" in NCE's land;
- follow Gateway's instructions concerning the condemnation;
- allow its offer price to be set by Gateway; and
- deliver title to Gateway within five days of the taking.

(NCE Br. 7, 12-13, App. 15, 43-47.)

As the SWIDA-Gateway contract establishes, the issue before this Court is whether SWIDA can sell its condemnation power to a "private developer" for the developer's own "private use" of "further increas[ing] the value of its [business]." Two subsidiary issues arise as well. First, can Gateway justify this taking by pointing to problems *it* has created – problems *it* could readily solve using *its own* abundant resources? Second, can economic development justify taking one citizen's nonblighted property and giving it to a new owner that claims it can make a better, albeit private, profit?

To date, these questions have been answered only by implication, as this Court did not address the egregious nature of *this taking* in its April 19 Opinion. Instead, this

Court addressed questions not at issue here. First, this Court was not asked to address whether "a taking for a public use is . . . transformed into a private taking through a subsequent transfer to a private party." (Ex. 1 at 15.) That question, and the case law that speaks to it, simply is not implicated by this case, because the question presupposes that there *was* in the beginning a proper public use to justify the taking. In other words, this line of case law addresses instances where a governmental entity determined in the first place that there was a "public use" that was served by a particular taking and, incidental to addressing this "public use," the governmental entity transferred title to a private developer.

That is not this case. Here, SWIDA did not begin the process of taking NCE's land; Gateway did. Gateway determined that it had a "private use" – in this case, the need for parking to allow it to expand its own racing operations – that could be met most profitably by grabbing its neighbor's land. (NCE Br. 7-9.) SWIDA abrogated any role in the condemnation process when it sold its eminent domain power for a $2,500 application fee plus a sliding scale fee that would run into the tens of thousands of dollars, and then contracted to transfer control of the condemnation process to Gateway. Gateway then determined the price it was willing to pay to take NCE's land, and directed SWIDA to offer just that amount to NCE to purchase that land. (NCE Br. 12-13.) This case does not involve the question of whether an after-the-fact transfer of title to a private developer voids a taking that was in the first instance for a valid public use; this case involves a *before-the-fact* surrender of the eminent domain power to a private party. Put another way, as Justice Kilbride noted, "this case smacks of nothing more than the misuse of governmental power for the purely private purposes of expanding a thriving racing facility, saving money for Gateway on the purchase of the property, and increasing Gateway's profits." (Ex. 1 at 27.)

Second, this Court addressed the constitutionality of the SWIDA Act, 70 ILCS 520/1, et seq., and the legislative findings therein at length. (Ex. 1 at 12-20.) But that issue was not raised by the parties in this case, as no party has yet asked this Court whether SWIDA could *ever* conduct a constitutional taking under the structure of the SWIDA Act. Under established law, this issue is not even ripe for review at the interlocutory appeal stage in the quick-take proceedings. See, e.g., Southwestern Illinois Development Authority v. Vollman, 235 Ill. App. 3d 32, 37, 600 N.E.2d 926, 929 (5th Dist. 1992) (appellant cannot challenge constitutionality of enabling statute during interlocutory appeal of quick-take proceeding). The analysis required here was not whether the SWIDA Act is facially constitutional; it is whether SWIDA acted in a constitutional manner given the facts peculiar to this taking.

This distinct analysis recently was illustrated by the same Appellate Court that held SWIDA's taking of NCE's land unconstitutional. In SWIDA v. Masjid Al-Muhajirum, 318 Ill. App. 3d 1005, 744 N.E.2d 308 (5th Dist. 2001), the Illinois Appellate Court for the Fifth District upheld a recent condemnation *initiated by SWIDA*. Specifically, in furtherance of "an ambitious development project," SWIDA sought to condemn property in "a run-down area of East St. Louis, Illinois, an area that the city has designated as blighted." Id. at __, 744 N.E.2d at 309. The property was then to be transferred to a private developer "to build a multimillion dollar, mixed income residential complex." Id. The landowner challenged the constitutionality of the taking, relying heavily on the Fifth District's prior ruling in the NCE case. Id. at __, 744 N.E.2d at 310.

The Fifth District affirmed, however, holding that the landowner's reliance on the NCE case was "misplaced." Id. Writing for the unanimous Court, Justice Kuehn – who

drafted the special concurrence in NCE – stated that "[t]he singular facts of that case were essential to the constitutional analysis." Id. Specifically, the Court wrote:

> [In NCE], SWIDA used its eminent-domain power to convey its favor upon a racetrack developer [i.e., Gateway] who needed someone else's land in order to build a cheaper parking lot. The developer had more expensive ways to provide for additional parking, but it utilized governmental power to hold down its costs by taking land that it could not otherwise have obtained. SWIDA took a valuable piece of private property, located in a boom area already teeming with economic prospect and potential for private development, and conveyed it to a third party. The taking benefitted that party at the previous landowner's expense. The key to the case lies in the fact that SWIDA exercised its eminent-domain power purely in the name of further economic development of the area.

Id. at __, 744 N.E.2d at 311. By contrast, "the questioned presented [in Masjid Al-Muhajirum] would be far different." Id. As the Fifth District held, the property in that case "is located in the heart of a blighted area." Id. Noting that the condemned property was "virtually uninhabitable" and littered with "unoccupied and unattended slums," the Court reasoned that the condemnation of that property "has a much sounder footing" than is found in NCE. Id.

As SWIDA v. Masjid Al-Muhajirum also demonstrates, the case at bar is far different from any case in which a taking is reviewed under this or some other state's blight or tax increment financing statute. See, e.g., Berman v. Parker, 348 U.S. 26 (1954) (upholding constitutionality of District of Columbia blighted areas redevelopment statute); People ex rel. City of Canton v. Crouch, 79 Ill. 2d 356, 403 N.E.2d 242 (1980) (TIF case); People ex rel. City of Urbana v. Paley, 68 Ill. 2d 62, 368 N.E.2d 915 (1977) (blight case); City of Chicago v. Walker, 50 Ill. 2d 69, 277 N.E.2d 129 (1971) (blight case); City of Chicago v. Barnes, 30 Ill. 2d 255, 195 N.E.2d 629 (1964) (blight case); People ex rel. Gutknecht v. City of Chicago, 3 Ill. 2d 539 (1954) (blight case); Chicago Land Clearance Comm'n v. White, 2 Ill. 2d 216, 117 N.E.2d 764 (1954) (taking pursuant

to Blighted Areas Redevelopment Act); Zurn v. City of Chicago, 389 Ill. 114, 59 N.E.2d 844 (1945) (slum and blight case).

The Majority Opinion overlooked that crucial distinction, however, and cited to these slum and blight cases without noting that each one stems from a formal determination by the appropriate governing agency that *the land targeted for condemnation* met the statutory definition of a slum and blighted area. See, e.g., Walker, 50 Ill. 2d at 70, 277 N.E.2d at 129-30 (1971) (condemned land designated as a "slum and blighted area" under Urban Renewal Consolidation Act); White, 411 Ill. at 311, 104 N.E.2d at 237 (1952) ("territory lying on the south side of Chicago" designated by the Chicago Land Clearance Commission as "a slum and blight area" pursuant to the Blighted Areas Redevelopment Act).[3/] By contrast, NCE's property has never been designated as "blighted," and there is not a slum to be found anywhere on it. (NCE Br. 50-57.)

An affirmance in this case will not limit the power of any government body, such as the City of Chicago, to use the eminent domain power to address true slum and blight concerns, even if eventual transfer to a private developer is contemplated. This reversal, however, will destroy the "public use" doctrine if left to stand. Before the Majority Opinion, the "public use" doctrine authorized the taking of blighted property for the "public use" of clearing the blight. This makes sense, as blighted property endangers all who live, work, and even travel by it. If a landowner will not or cannot clear the blight,

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3/ To condemn land under the Blighted Areas Redevelopment Act, the Department of Commerce first must issue a "certificate" finding that a "slum or blighted area exists." 315 ILCS 5/4. Moreover, the appropriate governing body then must pass a resolution "specifically designat[ing]" the project as a "Slum and Blighted Area Redevelopment Project" or a "Blighted Vacant Area Redevelopment Project." 315 ILCS 5/13. Similarly strict prerequisites must be met before slum and blighted land can be taken under the Tax Increment Allocation Redevelopment Act. See 65 ILCS 5/11-74.4-3(a).

the only way to protect the public is to take the land from the irresponsible landowner and clear it.

The Majority Opinion goes a frightening step further, declaring constitutional the taking of property to enhance government revenues so that government can clear blight *elsewhere*. This is unprecedented, and it exposes *any* private property in that governmental unit's jurisdiction to taking for delivery to a new private owner, with the only constitutional standard being that the new owner claims to be able to use the property more profitably. This also opens the door wide to political favoritism, as keeping one's property clear of blight is no longer any protection against the greed of the politically connected.

Thus, reversal in this case will give a green light to private developers to exploit eminent domain powers for private profit and, sadly, will inform other governmental entities in this State that they too can charge a handsome fee to help "private developers" take – for their own "private use" – other citizens' private property. It will declare "open season" on farmland, as fast food restaurants and strip malls will always be potentially more profitable. The same rationale also would support the condemnation of single family homes for apartment blocks or businesses, and even the condemnation of homes belonging to the less-well-to-do or to retirees, so that the government can resell those homes to people who will generate more taxable income. (See NCE Br. 21, 49-50.)

This result cannot be squared with the public use protections afforded to all private citizens by both the United States and Illinois Constitutions. The public use limitation on the sovereign's exercise of the eminent domain power was intended to prevent the government-sanctioned reallocation of property. Originally, this was "the King's use of property to convey favor upon a privileged nobility." (Ex. 1 at 25.) In this case, the local government conveyed its favor – and NCE's property – upon Gateway,

perhaps only because SWIDA's executive director thought it more glamorous to have cars being raced than recycled. In any event, this Court cannot bypass the public use doctrine by substituting consideration of an enabling statute for analysis of the particular taking itself: the issue at hand is whether *this* taking was constitutional, and whether *this* landowner was afforded the constitutional public use protections he is due. Because the application of the constitutional public use protections to *this* particular case was not considered by the Majority Opinion, this Court should grant rehearing to correct that oversight.

II. Because This Court Misapprehended The Constitutional Issues Raised Here, This Court Overlooked Its Own Prior Precedent.

This Court previously has addressed the precise question raised in this case, i.e., the constitutionality of the taking itself under similar facts. In fact, this Court previously has refused to countenance the taking of land from one business and transferring it to another simply because the transferee either (1) needed the land to make money, or (2) is alleged to be capable of contributing more than the current owner to the local economy. In such circumstances, this Court wisely has held that, even though a successful business might benefit the public indirectly, such a benefit does *not* support the exercise of the eminent domain power as "incidentally, *every* lawful business does this." Gaylord v. Sanitary Dist. of Chicago, 204 Ill. 576, 586, 68 N.E. 522, 525 (1903) (emphasis added); see also Sholl v. German Coal Co., 118 Ill. 427, 433, 10 N.E. 199, 201 (1887) (taking declared unconstitutional on the ground that when the taking produces no benefits "other than such as pertain to all strictly private enterprises, it may safely be concluded the use is private, and not public"). This line of cases applies directly to the case at bar, but the Majority Opinion overlooked it. These cases should be considered on rehearing.

In Gaylord, for example, the condemnor sought to take land owned by a Sanitary District for purposes of constructing a gristmill and related machinery. The statute under

which the condemner acted authorized takings for construction or repair of "any public grist mill, saw mill, or other public mill or machinery." Gaylord, 204 Ill. at 580, 68 N.E. at 523. The circuit court held that the statute was unconstitutional because it authorized takings for private uses. This Court affirmed, explaining that if the petitioner were to prevail in obtaining the land he sought under the guise of building a gristmill, he then could "undoubtedly establish and operate . . . every species of machinery . . . or he may transmit and sell the [water] power wherever he can find a market for it." Id. at 585, 588, 68 N.E. at 525-26. According to this Court, "[t]his would certainly be carrying the right of eminent domain to an alarming and dangerous extent." Id. This Court held that it is "the settled doctrine of this court that to constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement." Id. at 584, 68 N.E. at 524. A public, as opposed to a private, use means that "[t]he public *must be* to some extent *entitled to use or enjoy the property*, not as a mere favor or by permission of the owner, *but by right*." Id. (emphasis added). To allow a taking in such situations "would be mocking the citizen, who would thus be despoiled of his land to enrich another." Id. at 587, 68 N.E. at 526.

This same point was re-emphasized by this Court a quarter of a century after its Gaylord decision in Limits Industrial Railroad v. American Spiral Pipe Works, 321 Ill. 101, 109-10, 151 N.E. 567, 570 (1926). In Limits Industrial, a railroad company, working with the Illinois Commerce Commission, sought to take 17 acres of land belonging to American Spiral Pipe Works, purportedly for the purpose of building a public freight-receiving station. Although the taking was allowed by the circuit court, this Court reversed. Id. at 117, 151 N.E. at 573. This Court re-confirmed that "it is only for a public use that the Legislature can authorize private property to be taken, and any attempt to grant the right to take private property for a use not public is unconstitutional

and void." Id. at 105-06, 151 N.E. at 569. This Court recognized that the true beneficiaries of the taking were the railroad and a limited number of nearby businesses. The suggestion that the freight-house would serve the public, this Court held, was nothing more than "*a subterfuge to give color of right* to the attempt to condemn" the land for the private benefit of a select few. Id. at 110, 151 N.E. at 570 (emphasis added).

SWIDA's taking here is the very antithesis of this Court's directives in Gaylord and Limits Industrial. For that reason, the Majority Opinion threatens the vitality of the constitutional public use standards as set forth in Gaylord and Limits Industrial, which have, for almost a century, remained an irreducible constitutional minimum in takings cases in this State. The Majority Opinion has overlooked both Gaylord and Limit Industrial, and thus the bedrock constitutional principles explained by this Court in those cases; now is the time to correct that oversight. See Berg v. Allied Security, Inc., 193 Ill. 2d 186, 191, 737 N.E.2d 160, 163 (2000) (rehearing allows this Court to correct errors "into which the court may have inadvertently fallen in deciding the case as originally presented") (Freeman, J., specially concurring) (quoting Matthews v. Granger, 196 Ill. 164, 170, 93 N.E. 658, 661 (1902)).

III. This Court Misapprehended The Distinction Between Two Very Different Constitutional Doctrines: The Public *Use* Doctrine, Which Is Applicable Here, And The More Elastic Public *Purpose* Doctrine, Which Is Not.

Although the Majority Opinion overlooked both Gaylord and Limits Industrial in judging the constitutionality of this taking, it did cite prior precedent purportedly in support of its holding that economic development can justify a taking such as the one considered here. (See Ex. 1 at 17-19.) But most of the cases cited by this Court do not involve *takings* for public *use*; they instead involve the issuance of public bonds or the expenditure of public funds for some public *purpose*. See, e.g., People ex rel. City of Canton v. Crouch, 79 Ill. 2d 356, 359, 403 N.E.2d 242, 243-44 (1980); People ex rel.

City of Urbana v. Paley, 68 Ill. 2d 62, 65, 368 N.E.2d 915, 916 (1977); People ex rel. City of Salem v. McMackin, 53 Ill. 2d 347, 350, 291 N.E.2d 807, 810 (1972); Cremer v. Peoria Housing Auth., 399 Ill. 579, 589, 78 N.E.2d 276, 282 (1948). "None of those cases are, however, eminent domain cases and they provide no authority for the taking of private property for the specific purpose of economic development." (Ex. 1 at 30.) This distinction, overlooked by the Majority Opinion, makes a difference. (NCE Br. 28-33.)

The term "public purpose" has a broader scope than the term "public use." As this Court held in Gaylord, 204 Ill. at 584, 68 N.E. at 524, public use entails some "use" of the property taken, whether by building a road or park on it – or by using the property to clear the blight off of it. But taking properly maintained property from one citizen and giving it directly to another to enhance tax revenues or economic development does not qualify as allowing the public to use the property. This distinction recently was recognized by the Supreme Court of Washington in Manufactured Housing Communities of Washington v. State, 13 P.3d 183, 195 (Wash. 2000) (en banc), where that Court chastised the State for "assuming 'public purpose' and 'public use' are always the same thing." In striking a taking as unconstitutional, the Court distinguished between the two terms in a manner akin to Gaylord, holding that a "beneficial use is not necessarily a public use." Id. Specifically, the Court held that "the use under consideration must be either a use by the public, or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the state." Id. at 196.

Even if some courts occasionally have used the terms "public use" and "public purpose" interchangeably, our State's Constitution uses the two terms quite distinctly: Article VIII, §1(a), which governs the use of public money and credit, provides that "[p]ublic funds, property or credit shall be used only for public *purposes*." Ill. Const. art.

VIII, § 1(a) (1970) (emphasis added). This language differs markedly from the takings clause, which mandates that "[p]rivate property shall not be taken or damaged for public *use* without just compensation." Ill. Const. art. I, § 15 (1970) (emphasis added). Thus, in Illinois, a "public purpose" cannot justify taking private property for a "private use."[4/]

As discussed in NCE's Brief before this Court, the distinction that our State Constitution draws between "public use" and "public purpose" makes a material difference in this case. (NCE Br. 28-33.) The more stringent "public use" standard applies to takings for two significant reasons. *First*, eminent domain takings involve the condemnation of privately owned real property, and real property rights always have held a special status in the Anglo-American legal tradition and in Illinois jurisprudence. (NCE Br. 30-31.) *Second*, excesses in the spending of public funds, which affect large groups of the public all at once, are much more readily corrected through the democratic political process than are abuses of the eminent domain power, which are exercised to the detriment of citizens one at a time or in small groups. Indeed, takings often happen far faster than elections come around, and can have the effect of forcing the dispossessed to leave the affected area, so that they never get a chance to vote against the responsible officials. (NCE Br. 31-32.)

The Majority Opinion has overlooked the distinction between these two constitutional doctrines. The Majority Opinion effectively blended the two doctrines into one, repeatedly citing public *purpose* cases in support of its holding that the SWIDA Act was tailored to meet a proper public *use*. (Ex. 1 at 1, 19-20.) This Court should rehear this case to correct that oversight.

4/ For the same reason, Illinois decisions addressing our State's "public purpose" doctrine should not be applied to narrow impermissibly the "public use" protections guaranteed not only by our State Constitution, but also by the United States Constitution. See U.S. Const. amend. V ("nor shall private property be taken for public *use*, without just compensation") (emphasis added).

IV. This Court Should Have Addressed NCE's Argument That SWIDA's For-Profit Taking Of NCE's Property Violated The State And Federal Constitutions.

In addition, the Majority Opinion erred in refusing to address NCE's argument that SWIDA's quick-take procedure creates constitutionally impermissible financial bias in favor of condemnation. (Ex. 1 at 23.)

A. The Takings Clause Prohibits The Sale Of The Eminent Domain Power Or Creating Financial Incentives To Exercise That Power.

Although NCE did raise the due process issue the Majority Opinion mistakenly deemed waived (see IV.B, infra), the sale of the eminent domain power to private parties is barred first and foremost by the State and Federal "Takings Clauses," see Ill. Const. art I, § 15 (1970) ("Private property shall not be taken or damaged for public use without just compensation as provided by law"); U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation"), which are the bulwark of the constitutional protection of our private property rights.

This Court in both Gaylord and Limits Industrial, discussed above, made clear that, under this State's Takings Clause, a private company cannot take another private citizen's land by using a government agency as a strawman. Following this constitutional principle, courts around this Nation have again and again rejected takings – applying the public use doctrine of the Takings Clause – where a private developer pays a government agency to exercise its eminent domain power for the private developer's own benefit. See, e.g., Mayor of Vicksburg v. Thomas, 645 So. 2d 940, 943 (Miss. 1994) (taking rejected where private company paid City over $4 million to acquire property); Brannen v. Bulloch County, 387 S.E.2d 395, 396 (Ga. Ct. App. 1989) (taking rejected where county official testified that county "would not have condemned appellants' property had it not been for [the private developer] paying for the matter"); City of Center Line v. Chmelko, 416 N.W.2d 401, 403, 407 (Mich. Ct. App. 1987) (rejecting taking where

private party "offer[ed] to financially underwrite all of the expenses incurred in acquiring the property, including court costs, attorney fees, appraisal and survey costs").

The fact that SWIDA did not have to pay a penny to accomplish this taking further undermines the protections of the public use doctrine. When the bill for a taking – both the costs and the just compensation – is paid by the taxpayers, politicians must be able to justify the expenditure or they will pay at the next election. When private interests pay the full bill for the taking, that important restraint is gone.

A private party's purchase of the eminent domain power, to then be exercised for the benefit of that private party, is an obvious indication that the true nature of the taking is private, not public. Here, SWIDA's sale of its eminent domain power to Gateway unquestionably was raised by NCE in its brief (see, e.g., NCE Br. 27), and this Court therefore should have addressed it under the Takings Clauses.

B. NCE Adequately Argued That SWIDA's Quick-Take Procedure Violates Due Process.

The Majority Opinion's refusal to tackle this question under due process analysis also was error. NCE's brief properly raised the argument that SWIDA's quick-take process violates due process by creating financial incentives for takings. This Court has held that a party's citation, in the argument section of his brief, to supporting authority for a particular proposition suffices to raise that issue. See Collins v. Westlake Community Hosp., 57 Ill. 2d 388, 392-93, 312 N.E.2d 614, 616-17 (1974).

In urging this Court to affirm the Appellate Court's decision to invalidate the taking in this case, NCE raised its financial incentive argument:

> No published court opinion in the history of this State has condoned such rank *government for sale*. Condoning it here would enthrone SWIDA as the ultimate arbiter of how, and by whom, private property is used in SWIDA's two-county jurisdiction. Every small business, every farm, and every home would be subject to the depredations of wealthy corporations in favor with the local political establishment.

(NCE Br. 21 (emphasis added).) On the very next page, NCE explicitly quoted the Fourteenth Amendment's Due Process Clause along with the Takings Clauses. (NCE Br. 22.) NCE then noted that the protections for its property were "[i]mplicit in *each* of these constitutional provisions" and that "due process" must be observed in every taking. (NCE Br. 23 (emphasis added).)

Later in the brief, NCE argued that "[a] quick-take hearing, with its expedited timetable and limited scope, is certainly *not designed to ferret out any improper motives*, or even corruption, *that may be motivating a local condemning authority to exercise its eminent domain power*." (NCE Br. 60-61 (citation omitted and emphasis added).) Furthermore, NCE pointed out that approval of the taking in this case could encourage the use of eminent domain to "reward political supporters and donors." (NCE Br. 61.) Thus, NCE plainly argued that NCE's quick-take procedure violated due process because it creates improper incentives in favor of condemnation.

Moreover, NCE cited numerous instances in which SWIDA received financial benefits in the course of its relationship with Gateway. NCE pointed out that SWIDA obtains significant financial benefits from condemning NCE's land at Gateway's request; SWIDA receives a "non-refundable" fee of $2,500 (NCE Br. 6, App. 15), and a "sliding scale fee" set at a percentage of the value of the land SWIDA is asked to take – as the value in question increases, the percentage level of the fee decreases – thus far resulting in a profit of $62,500 for SWIDA in this case. (NCE Br. 6, 20, App. 15, 44-47.) In its brief, NCE criticized SWIDA as offering "its eminent domain powers *for sale* to 'private developers' to obtain property for their own 'private use.'" (NCE Br. 27 (emphasis added).)

Even more troubling, NCE showed that Gateway bestowed material benefits on SWIDA *officials*. For example, while SWIDA was pursuing condemnation proceedings

against Charles Lukas's farm on behalf of Gateway, the latter treated Alan Ortbals, SWIDA's executive director, to free tickets to every major Gateway racing event in 1997 and invited him to visit Gateway's Hospitality Suite. (NCE Br. 5-6 (citing Def. Exs. 9, 10, 11; V1. 132-35).)

Under Collins, 57 Ill. 2d at 392-93, 312 N.E.2d at 616-17, this plainly suffices to raise the due process issue that the Majority Opinion mistakenly deemed waived.

C. Even Assuming That NCE Failed Properly To Raise Its Argument That SWIDA's For-Profit Taking Of Its Property Violated Due Process, This Court Still Should Have Considered This Issue.

Even assuming *arguendo* that only *amici* raised the argument that SWIDA's for-profit taking of NCE's property violates due process by creating impermissible financial bias in favor of condemnation, this Court should have considered it. This Court has addressed arguments raised only by *amici* where they are dispositive of the questions at bar. See In re P.S., 169 Ill. 2d 260, 273-74, 661 N.E.2d 329, 336 (1996) (addressing issue raised only by *amicus* regarding whether civil forfeitures and criminal prosecutions are punishment for the same offense). Moreover, "the responsibility of a reviewing court for a just result and for the maintenance of a sound and uniform body of precedent may sometimes override the considerations of waiver that stem from the adversary character of our system." Hux v. Raben, 38 Ill. 2d 223, 225, 230 N.E.2d 831, 832 (1967).

In Teague v. Lane, 489 U.S. 288, 300 (1989), the United States Supreme Court addressed the issue of whether the rule that a criminal defendant must be tried by a jury representative of the community applies retroactively, even though that issue had been raised only in an *amicus* brief. Similarly, the watershed holding of Mapp v. Ohio, 367 U.S. 643, 646 n.3 (1961) – that the Fourth Amendment applies to the states – was raised only by *amicus*. Michael K. Lowman, The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?, 41 Am. U. L. Rev. 1243, 1299 n.93 (1992).

Finally, SWIDA addressed the due process issue thoroughly (if unconvincingly) in its reply brief. (SWIDA Reply at 23-25.) See Batson v. Kentucky, 476 U.S. 79, 108-11 (1986). (Stevens, J., concurring) (Court decided case on basis argued only by *amici* because respondent had addressed issue in its brief). In light of the egregious nature of this taking and the critical importance of this case to the future exercise of the eminent domain power in the State of Illinois, this Court should not elevate form over substance by declining to address NCE's due process argument.

CONCLUSION

Chief Justice Harrison, quoting Justice Kuehn's special concurrence below, stated: "Our heritage stems in part from the aversion to the King's use of property to convey favor upon a privileged nobility. It betrays that heritage to rekindle the practice." (Ex. 1 at 25.) These distinguished jurists know their history well. Rallying his troops before the Battle of Long Island, George Washington said: "The time is now near at hand which must probably determine whether Americans are to be freemen or slaves; *whether they are to have any property they can call their own. . . .*" John Bartlett, Familiar Quotations 336 (Justin Kaplan ed., 16th ed. 1992). Some years later, writing in support of the ratification of the Constitution, James Madison stated that "[g]overnment is instituted no less for protection of the property than of the persons of individuals." The Federalist No. 54, at 333 (Isaac Kramnick ed., 1987). Indeed, the writings of our Nation's Founding Fathers are filled with references to the importance of private property rights. (NCE Br. 58-59.) The Founders of our State shared this view, and incorporated it in our first Constitution:

> That the general, great and essential principles of liberty and free government may be recognized and unalterably established, WE DECLARE:
>
> That all men are born equally free and independent, and have certain inherent and indefeasible rights; among which are those of enjoying and

> defending life and liberty, and *of acquiring, possessing and protecting property* and reputation, and of pursuing their own happiness.

Ill. Const. art. VIII, § 1 (1818) (emphasis added).

The concept of taking property from private citizens as a means of enhancing the economic development of the community may sound good, but it is an evil – an evil all the more insidious because it seems like so many people will benefit from just one person's loss. The problem is that it is not just one person's loss – *everyone loses* because everyone's ownership rights are diminished. This concept, in fact, has been tried elsewhere in the world and has failed abysmally. As Karl Marx and Friedrich Engels noted, "the theory of the Communists may be summed up in the single sentence: Abolition of private property." Karl Marx & Friedrich Engels, The Communist Manifesto 67 (Samuel Moore trans., Signet Classic 1998) (1848).

There is absolutely no hyperbole in the dissent's observation that upholding this taking "represents a fundamental and destructive shift in basic principles of property ownership." (Ex. 1 at 24.) Before authorizing condemning authorities around the State to adopt Quick-Take Application Packets and fee schedules for "private developers" wanting to condemn property for "private use," this Court should assure that every constitutional objection to *this taking* has been answered.

For all of the reasons stated above, NCE respectfully requests that this Court grant this Petition for Rehearing. Because a majority of the Justices on this Court were not yet members of this Court when counsel presented oral argument in this case, counsel for NCE would be pleased to reargue it, should the Court deem that beneficial. In either

event, upon rehearing, this Court should affirm the decision of the Illinois Appellate Court.

Respectfully submitted,

NATIONAL CITY ENVIRONMENTAL, L.L.C.

and

ST. LOUIS AUTO SHREDDING COMPANY

By: _____

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