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09/12/2005

HONORABLE KENNETH L. FIELDS

CLERK OF THE COURT
D. Whitford
Deputy

FILED: 09/13/2005

TEMPE CITY

CLIFFORD L MATTICE

v.

TROY L VALENTINE, et al.

STEVEN A HIRSCH

CLARE H ABEL
DOUGLAS H ALLSWORTH
GARY L BIRNBAUM
JAMES T BRASELTON
ERIC M JACKSON
CHARLES I KELHOFFER
STANLEY LUTZ
THEODORE MATZ
JOHN W PAULSEN
JEFFREY M PROPER
JANET W SELL
JAMES L TANNER
BART WILHOIT

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DALE S ZEITLIN
SCOTT H ZWILLINGER
BARRY R SANDERS
JOHN REA
JACOB L SHERRARD
JUDGE ARMSTRONG
JUDGE BACA
JUDGE BARTON
JUDGE GAINES
JUDGE GAMA
JUDGE HILLIARD
JUDGE HOLT
JUDGE KATZ
JUDGE O'MELIA
JUDGE PETER REINSTEIN
JUDGE SCHNEIDER
JUDGE SWANN
ALLAN LEYBECK
CANYON STATE METAL
PO BOX 30547
MESA AZ 85275
PETE COLANTONI
B&B WRECKER SERVICE
PO BOX 62554
PHX AZ 85082
ANTHONY OZINGA
137 MCCLINTOCK

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TEMPE AZ 85281
DAVID RICHARDSON
1118 S UNA
TEMPE AZ 85281
JAMES CROFT
121 N MCCLINTOCK
TEMPE AZ 85281
JACK MOUSA
133 N MCCLINTOCK
TEMPE AZ 85281
TIM BURNS
137 N MCCLINTOCK
TEMPE AZ 85281

RULINGS

In March 2005, the Plaintiff City of Tempe (City) filed nineteen (19) Complaints in Condemnation, Applications for Immediate Possession, and Requests for Hearing. By Minute Order dated March 3, 2005, the Civil Presiding

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Judge consolidated the actions for purposes of a hearing on the issues of immediate possession and bond amounts (pursuant to A.R.S. § 12-1116), and for the purpose of facilitating resolution of any challenge to the City's assertion of "public use" and "necessity." In furtherance of this Order, by Minute Order dated March 22, 2005, this Court scheduled an evidentiary hearing on the following issues:

- Public Use and Necessity; and
- Value of Property (for purposes of establishing the amount of the possession bond).

On August 8, 2005, the Court issued a Minute Order setting forth its rulings on numerous motions pending as of that date. Several of the rulings impacted the issues to be addressed, and the evidence to be presented, at the immediate possession hearing. The rulings set forth in the Court's August 8, 2005 Minute

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Order (and any subsequent clarifications or modifications entered by the Court) are incorporated herein by this reference.

The evidentiary hearing on the City's Application for Immediate Possession commenced on August 16, 2005 and continued thereafter pursuant to a schedule established by the Court. Closing arguments were presented on August 24, 2005. Having considered the evidence presented and the arguments of counsel, the Court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

On September 13, 2001, the Tempe City Council approved Resolution No. 2001.44 establishing the McClintock/Rio Salado Parkway Redevelopment Area and determining that the area was in need of redevelopment under the provisions of A.R.S. §§ 36-1471, *et seq.* Resolution No. 2001.44 was expressly adopted in

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compliance with A.R.S. §§ 36-1471, *et seq.*, then in effect. The City Council made the legislative determination that all criteria for establishment of a “redevelopment area” were satisfied.

The Redevelopment Area originally fell under the jurisdiction of Maricopa County, and was zoned county I-3, heavy industrial. County I-3 zoning conforms to City of Tempe I-3 zoning. At the time of annexation in 1999, the Defendant property owners were promised zoning “commensurate” with that they had in the County. However, at the time the Redevelopment Area was annexed, the City of Tempe did not provide the property owners with City of Tempe I-3 zoning. Rather, existing industrial uses in the Redevelopment Area were allowed to continue operation as grandfathered, legally non-conforming uses.

Had the properties in the Redevelopment Area been zoned I-3 upon annexation there would have been no need for Plaintiff to recognize the properties

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as “non-conforming uses” or otherwise “grandfather” the uses the properties were being put to while under the jurisdiction of Maricopa County.

Plaintiff made a decision to not enforce building, fire and other municipal codes within the Redevelopment Area after the area was annexed into Plaintiff’s territorial boundaries. For example, Mr. Christ, as Plaintiff’s Senior Code Inspector, was directed not to take proactive enforcement action and to not take complaint-driven enforcement action for code complaints without discussing such action directly with his supervisor. Mr. Williams, as the Deputy Development Services Manager for Plaintiff responsible for the activities of the Building Safety, Planning and Permits Division, asserted that since the time the Redevelopment Area was annexed to the present his Department has been directed not to proactively inspect or enforce building and fire codes within the Redevelopment Area.

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Pursuant to Resolution No. 2002.51, dated January 9, 2003, the City Council amended a previously established redevelopment area to include the McClintock/Rio Salado Parkway Redevelopment Area as “Area 5” of the University/Hayden Butte Redevelopment Area. A portion of Area 5 (approximately 120 of 200 total acres) has been designated as “Phase One” and is the portion of the redevelopment area that is the subject of these proceedings (hereinafter, the “Redevelopment Area”). Resolution No. 2002.51 includes the legislative determination that redevelopment of the Redevelopment Area was “necessary and in the interest of public health, safety, morals or welfare of the residents of the City.” Resolution No. 2002.51 also includes the legislative determination and authorization that “as a matter of public necessity... where the objectives of the Redevelopment Plan cannot be achieved through rehabilitation of the portions of the redevelopment area complying with the program, the power of eminent domain may be used.”

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The City solicited proposals from qualified prospective redevelopers to undertake redevelopment of the area via a Request for Proposals (“RFP”) that was issued on December 13, 2001. Landowners in the Redevelopment Area were given priority status in the selection of a master redeveloper. Of the area landowners, only Miravista Holdings, LLC responded to the RFP.

The annexation and redevelopment of the Redevelopment Area was initiated prior to any action by Plaintiff and is controlled by the private redeveloper (Miravista), not Plaintiff.

On April 25, 2002, after receiving and reviewing responses to the RFP described in paragraph 3, above, the Mayor and City Council of the City of Tempe approved the selection of Miravista Holdings, LLC as master redeveloper (the “Master Redeveloper”) for the Redevelopment Area. Ownership of the Redevelopment Area will not be by Plaintiff but rather by the private redeveloper

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(Miravista), which will construct a multi-million dollar retail facility that will generate several million dollars in annual operating income.

Plaintiff will not expend any “cash” in furtherance of the Redevelopment Project, rather Plaintiff’s only contribution to the Redevelopment Project will come from the \$1,000,000.00 grant Plaintiff received from HUD and a \$6,000,000.00 loan, which will be repaid from the sales tax generated by the privately held and operated mall.

The evidence submitted at trial establishes that the private developer (Miravista) is solely responsible for all condemnation expenses, all relocation costs, all costs of environmental remediation, all maintenance costs to the property and all development costs attendant to the Redevelopment Project, and will be the sole owner/operator of both the property being condemned and the improvements constructed thereon.

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On November 12, 2002, the City's Planning and Zoning Commission recommended approval of a redevelopment plan (the "Redevelopment Plan"). On January 9, 2003 pursuant to Resolution No. 2002.51, the Tempe City Council approved the Redevelopment Plan. The Redevelopment Plan provided a planning guideline for redevelopment and other activities within the Redevelopment Area.

On September 25, 2003, the Tempe City Council approved a Redevelopment Agreement with Miravista Holdings, LLC. Miravista has entered into a contractual/partnership arrangement with Vestar to construct and operate the Phase One Redevelopment Project.

On December 4, 2003, the Tempe City Council passed Resolution No. 2003.74 authorizing acquisition, including by condemnation, of certain property within the Redevelopment Area.

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On April 29, 2004, the Tempe City Council passed Resolution No. 2004.28 also authorizing acquisition of property within the Redevelopment Area, by condemnation or otherwise.

On May 6, 2004, the Tempe City Council approved a Development Parcel Agreement with Miravista/Vestar TM Landco, LLC. In part, the Phase One Redevelopment Agreement provides that the City may exercise its power of eminent domain once the City Council passes a resolution authorizing the use of such power in order to enable the City to acquire property necessary for redevelopment within the Redevelopment Area.

Prior to filing the pending condemnation actions, the City and the Master Redeveloper made an effort to negotiate the purchase of all properties needed for the redevelopment of the Redevelopment Area in conformity with the Redevelopment Plan and the City's redevelopment agreements. As a result of these negotiations, certain properties were acquired, but approximately 20 remain

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to be acquired. Approximately 65 of 85 properties have been acquired by consensual purchase.

Pursuant to Resolution No. 2005.03 dated January 6, 2005, the Tempe City Council concluded that it could not acquire the remaining properties without the use of its condemnation powers. The City determined, pursuant to the Slum Clearance and Redevelopment Act, ARS 36-1471 et seq., that the acquisition of the remaining properties by exercise of the power of eminent domain was necessary and essential to the public interest of the City and facilitated the public uses of the property including: (1) characterization and remediation of an identified “brownfield” area within the City of Tempe, (2) elimination of risks to public health and safety attributable to existing contamination within the Redevelopment Area, (3) the abrogation of additional environmental risks and hazards associated with ongoing uses of the property, and (4) prevention of further environmental degradation and blight or slum conditions within the Redevelopment Area, all in

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furtherance of the City's efforts to reclaim and redevelop the area in a manner consistent with the City's General Plan, the Redevelopment Plan, and the redevelopment-related agreements entered into by the City. Resolution No. 2005.03 passed by a vote of more than two-thirds of the members of the Tempe City Council, after notice to affected property owners.

The first phase of the redevelopment project contemplated by the City's agreement with the designated Master Redeveloper will be known as "Tempe Marketplace" and will include 1.3 million square feet of retail development (the "Redevelopment Project").

A "brownfield" area is one in which development is hindered by the presence of environmental contamination or the perception of environmental contamination. Neither Plaintiff nor the master developer has ever undertaken an assessment of the risks to human life or property from the environmental conditions Plaintiff alleges exist within the Redevelopment Area.

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The only assessment of risk associated with environmental conditions in the Redevelopment Area was conducted by an independent agency of the State of Arizona, the Arizona Department of Health Services, acting on behalf of the United States Department of Health Services. That assessment, entitled “Health Consultation – South Indian Bend Wash Landfill Area, Tempe, Maricopa County, Arizona, CERCLIS No. AZD980695969” (“Health Consultation”), was conducted after the U.S. Environmental Protection Agency (EPA) had delisted the Redevelopment Area from the South Indian Bend Wash Superfund site and after Plaintiff had decided to condemn the remaining property in the Redevelopment Area.

The Health Consultation focused on the only contaminants of concern found by EPA following an investigation of conditions in the Redevelopment Area that could possibly pose a threat to human health, welfare and the environment. Those contaminants were Volatile Organic Compounds and methane. The Health

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Consultation concluded that “...under the current conditions at the site, the SIBW Landfill Area poses no public health hazard.” Ex. 280, p.7

Philip Lagas, a Registered Geologist and Vice President of Brown and Caldwell, has been investigating the history and environmental condition of the Redevelopment Area since at least 2000. Brown and Caldwell have created a database that includes all available data from both public (*e.g.*, EPA, ADEQ, City) and private sources. Mr. Lagas gave a detailed presentation of environmental conditions in the Redevelopment Area to the Tempe City Council on January 6, 2005. Mr. Lagas identified the historic sand and gravel pit operations, salvage yards, and the location of solid waste landfills in the area. Documentation of the landfills is incomplete. Landfill remediation issues include unacceptable cap maintenance; leachate production; soil subsidence; structural damage and unsafe building conditions due to settlement; and methane generation.

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Methane is a flammable and explosive gas. Methane concentrations on site in the past exceeded the lower explosive limit (“LEL”) in some areas. In terms of environmental concerns, the City may benefit from the Redevelopment project in the following respects:

- § Soil Contamination will be Identified and Remediated;
- § Hazardous and “Nuisance” Materials will be Removed;
- § Landfill Issues will be Addressed Including Methane Gas, Subsidence, and Stormwater Infiltration;
- § Septic Systems and Dry Wells will be Removed and Remediated;
- § Stormwater Run-Off will be Collected, Treated, and Discharged using Best Management Practices; and

A geotechnical evaluation of the Redevelopment Area was also conducted and is continuing. Test procedures have included soil borings, test pits, auger holes, and cone penetration. High methane levels were encountered during the test

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procedures resulting in work stoppages under applicable OSHA regulations. Preliminary evaluation concluded that construction on-site is feasible but that conditions requiring special construction techniques are present.

From a geotechnical perspective, three public health and safety concerns associated with construction of any kind in the Redevelopment Area have been identified:

- (1) Damaging settlement (to existing or future buildings) due to subsidence in landfill and possibly other areas;
- (2) Bearing capacity failure of building foundations (including those of existing buildings) constructed on weak and/or decomposing materials which might result in a structural deficiency; and
- (3) The presence of methane gas.

The master redeveloper admitted that the majority of problems in the

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Redevelopment Area were not environmental, but geotechnical. Geotechnical concerns, i.e. subsidence and soil compaction, do not qualify as environmental contamination and relate solely to the construction of improvements and pose no threat to human safety if the property within the Redevelopment Area is allowed to remain in its current state.

The evidence adduced at the hearing also demonstrated that the normal operation of private industry could easily deal with any methane hot-spots actually existing in the Redevelopment Area. The extent and scope of any current methane problem in the Redevelopment Area is unknown. The data upon which Plaintiff claims methane exceeds the lower explosive limit in areas of the Maricopa County landfill and the Old Tempe landfill is between 15 and 20 years old.

Given the natural degradation of organic compounds over time, reduced levels of methane are to be expected in the Redevelopment Area. To the extent any methane hot-spots remain in the Redevelopment Area, such areas of concern can be dealt with through non-invasive means on a parcel by parcel basis.

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Specifically, small active or passive systems involving a small well and possibly a blower unit and flaring unit could be installed to address methane hot spots. Such units would stop the migration of methane, and if configured properly, actually shrink any existing methane concentrations.

Mr. Robert Livermore, Defendants' environmental expert, reviewed various written materials available to him and expressed an opinion that no public health risk exists in the Redevelopment Area. Mr. Livermore, however, did not disagree with the testimony of the City's experts regarding the presence of contaminated soil, subsidence, methane generation, inadequate infrastructure, or the need for remediation generally.

The City previously committed \$900,000 to the development of certain infrastructure improvements within the Redevelopment Area. City staff has estimated, however, that infrastructure development would cost at least \$1.6 million

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Philip Rohe testified as a representative of the City of Tempe Fire Department. He confirmed ingress/egress issues exist which translates into extended response times for the Fire Department. Similarly, the lack of access to fire hydrants and the lack of internal area waterlines is a fire-safety concern.

Mr. Rohe summarized the Fire Department's concerns as: (1) absence of clear access to fight fires and (2) lack of adequate water supply in the area. Both of these issues result in extended response times and create a danger to human life and to property within the Redevelopment Area and to the firefighters responding to emergency situations.

The Redevelopment Project will provide retail services. The Project (the Tempe Marketplace "retail/entertainment power center") is currently 70% pre-leased. The leases require complete environmental remediation prior to delivery of the leased premises to the tenants. Of approximately 120 stores planned for Tempe

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Marketplace, only one (1) is likely to be a relocation of a retail business currently existing in the trade area.

The City introduced evidence from an economic expert (Mr. Elliott Pollack) that construction and operation of the Tempe Marketplace project is projected to provide the following economic and fiscal benefits:

- During its estimated two-year construction phase, the Tempe Marketplace Redevelopment Project will generate each year approximately 1,446 jobs during construction, \$65.3 million in wage payments, and \$152.4 million in total economic activity;
- Once the Redevelopment Project is completed, the retail, restaurant and theater components of the Project will generate continued economic activity. In total, the Tempe Marketplace project is projected to facilitate or generate approximately 4,812 jobs annually, with approximately \$110.2 million in annual wage payments, and \$248.4 million in total, annual economic activity; and

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- Over the ten years commencing with construction of the first phase of the Redevelopment Project, the City is expected to receive approximately \$18.1 million in primary tax revenues and \$6.4 million in secondary tax revenues from the Tempe Marketplace project (in 2005 dollars) for a total of approximately \$24.5 million.
- Certain tax incentives were provided to the master redeveloper in the form of reduced or no municipal taxes for a number of years.

1. The net economic, fiscal (tax revenue) and job-creation benefits from the Redevelopment Project are unknown.

While the Plaintiff introduced evidence through Elliot Pollack that the Redevelopment Project would generate tax revenues, Mr. Pollack did not opine as to the impact of the redevelopment project on other businesses in the City of Tempe or in other neighboring communities or the impact of competing projects

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(such as Mesa's Riverview, which is located less than two miles away from the Redevelopment Area) on the Redevelopment Project.

Based upon appraisal reports prepared for the City by an independent expert real estate appraiser (Jan Sell, MAI), the parties have stipulated that the appropriate bond amounts for the properties being condemned are as follows:

| Property Owner | Superior Court Case No. | Assessor Parcel # | Bond Amount |
|--|--------------------------------|----------------------------|--------------------|
| Anderson as Trustee For the Bennett Family Trust | CV 2005-003756 | 132-36-002K; 002Q and 002R | \$1,615,000 |
| Berglund | CV 2005-003763 | 132-35-014U; 014V | \$515,500 |
| Downey | CV 2005-003764 | 132-35-020 | \$290,000 |
| Hayden/BRD, LLC | CV 2005-003766 | 132-35-007P; 007R | \$1,800,000 |

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| | | | |
|-----------------------------|----------------|----------------------|-----------|
| Henkel | CV 2005-003767 | 132-35-004H, 004J | \$945,000 |
| La Tierra del Rio Salado | CV 2005-003755 | 132-35-014Y | \$246,000 |
| McGregor | CV 2005-004189 | 132-35-021D | \$420,000 |
| New Construction | CV 2005-003760 | 132-35-005Q | \$270,000 |
| Pyrotek | CV 2005-004191 | 132-35-021C | \$118,000 |
| Reed / Roark | CV 2005-003761 | 132-35-009E | \$240,000 |
| Ruck | CV 2005-003758 | 132-35-017F; 017H | \$270,000 |
| Urban | CV 2005-003768 | 132-35-014X | \$245,000 |
| Valentine | CV 2005-003754 | 132-35-013C | \$575,000 |

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CONCLUSIONS OF LAW

The Court denies the Plaintiff City of Tempe's Application for Immediate Possession. The City has not established that its Redevelopment Project is a public use for the following reasons:

By resolutions in 2001, 2003, 2004 and 2005, the City Council of Tempe made the requisite determinations pursuant to ARS 36-1471 et. seq. to satisfy the requirements of public necessity. As the Arizona Supreme Court noted in *City of Phoenix v. Superior Court*, 137 Ariz. 409 (1983), a city council need not sit as a quasi-judicial body and conduct evidentiary hearings before making the findings necessary to support its decision to proceed with redevelopment of a slum or blight area. The determination of whether an area is a slum is a legislative question. The Tempe City Council made those legislative findings.

This Court can only review the determination by a city council pursuant to its statutory authority regarding necessity where questions of fraud, collusion, bad

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faith or arbitrary and capricious conduct arise. The actions of the council must be upheld when there is some reasonable factual support even if the findings are reasonably doubtful or fairly debatable.

While the Court does have some questions concerning the findings made by the Council, there is some factual support for the findings that the property being sought is a “slum” by definition under ARS 36-1471 (18) (a) (b)(i) & (iv). In other words, there are improvements and buildings where the public health safety and welfare is a concern due to conditions that endanger life and property by fire and other causes. Specifically the Court notes that the existence of concentrations of methane gas and the unstable soils could threaten life and property. There are dilapidated buildings on parts of the property being sought.

The Court concludes that the plaintiff has minimally met its burden of proof regarding the statutory “necessity” requirement.

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Regarding the constitutional requirement of “Public Use”, the Court concludes that plaintiff has not met its proof of proving a public use here. The Arizona Constitution, Art 2, Section 17, prohibits the taking of private property for private use except under certain limited circumstances not applicable here. The determination of public use is reserved exclusively for the Court without regard to any determination by a legislative body that the use is public.

The plaintiff must demonstrate that the ultimate use of the property is a public use. *Bailey v. Myers*, 206 Ariz. 224 (2003). As the Arizona Court of Appeals noted in *Bailey v. Myers*, the mere fact that the property being taken is ultimately owned by a private party is not dispositive. Past decisions of the Arizona Appellate Courts have recognized that the taking of private property satisfying the requirements of slum or blighted property may be a “public use” even when conveyed to a private person or organization. *City of Phoenix v. Superior Court*, 137 Ariz. 409 (1983).

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Because the property being sought will eventually be owned by the redeveloper, Miravista Holdings, LLC, a private party, plaintiff must demonstrate that "...the anticipated public benefits must substantially outweigh the private character of the end use...." Bailey, supra, P23. Here the evidence establishes that:

1. The property will be used for private commercial use, a retail shopping complex.
2. The private parties owning the property ultimately will use it for private profit purposes.
3. No needed public services will be provided by the end use of the property.
4. The City of Tempe, the condemning authority, will exercise only that control it has over other privately owned property within its borders.
5. There are no anticipated public uses of the property.

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6. There may be an economic benefit to the community of Tempe from the creation of jobs and some tax revenues. The net economic impact has not been determined.
7. The funds for the redevelopment project are almost exclusively private.
8. Private parties appear to be gaining more financially by the taking of the property than the public.
9. The private developer Miravista Holdings and its principals are the driving forces behind this project not the Plaintiff, City of Tempe.
10. Profit, not public improvement, is the motivating force for this redevelopment.
11. The plaintiff wants to improve the “appearance” of the property within the City of Tempe by removing any heavy industrial activity outside its municipal boundaries.

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12. There are some public health and safety issues involved in the taking. The Court refers to the need to mitigate the methane gas concentrations, improve fire protection and resolve the soil subsidence problem. These public safety concerns can be resolved by the exercise of the police powers of the City without taking the property in issue. The only health assessment of the area in question does not support the plaintiff's position.

13. The property being sought does not appear to be a true "slum" since the owners are providing legitimate and legal commercial services. The conditions that the plaintiff feels threaten the public safety can readily be addressed by exercise of its police powers without resort to taking private property.

The anticipated private purposes and benefits outweigh any public benefit or purpose.