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IN THE THIRD CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

2010 FEB -5 AM 10: 34

RICHARD R. ROOKER, CLERK

D.C.

METROPOLITAN DEVELOPMENT AND HOUSING AGENCY,

Petitioner,

v.

TOWER MUSIC CITY II, LLC, SUNTRUST BANK, ARENA PROPERTIES, LLC, CENTRAL PARKING CORPORATION, JULIAN L. BIBB, TRUSTEE, MARIA RENEE MCKINNEY, TRUSTEE, PREMIER WEST BANK and CHARLES E. CARDWELL, in his capacity as METROPOLITAN TRUSTEE,

Respondents.

Case No. 09C3636

BILL GARRETT, Davidson County
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ORDER

This matter came before the Court on January 29, 2010 on the Motion in Limine of the Petitioner, the Metropolitan Development and Housing Agency ("MDHA"), the Motion to Continue filed by Respondent Tower Music City II, LLC ("Tower"), the Responsive Brief of Tower in opposition to the Motion in Limine of the Petitioner, argument of counsel and upon the entire record.

Pursuant to Rules 104, 402 and 403 of the Tennessee Rules of Evidence, MDHA's Motion in Limine sought to exclude from evidence at the possession hearing in this condemnation case all testimony, evidence and argument: 1) pertaining in any way to the presence or absence of blight or to any determination of blight with respect to the properties contained within the Capitol Mall Redevelopment Project Plan; and 2) concerning any proposed alternative development of the subject property by Respondent Tower under T.C.A. § 13-20-105.

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It appears to the Court that pursuant to Ordinance No. BL2009-437 MDHA was authorized by the Metropolitan Government of Nashville and Davidson County ("Metro") to utilize Metro's power of eminent domain to condemn Tower's property. Based upon this finding, Tower's right to take defenses concerning the determination of blight in the Capitol Mall Redevelopment Project Plan and Tower's proposed alternative development under T.C.A §13-20-105 are not applicable and, therefore, all testimony, evidence and argument concerning these defenses are irrelevant and inadmissible at trial. Accordingly, the Motion in Limine is well taken and should be GRANTED in all respects.

In light of the Court's ruling on the Motion in Limine, counsel for Tower withdrew Tower's Motion to Continue.

For the reasons stated in open Court on January 29, 2010, as reflected in the Transcript of Proceedings attached to this Order and made a part of this Order by reference, the Court concludes that there is no admissible evidence to be considered on the issue of MDHA's right to take the property that is the subject of this action and that MDHA should be granted title and possession of the property that is the subject of this action.

To the extent Tower desires to make an offer an proof regarding any of the excluded evidence, the Court will receive such an offer by stipulation of counsel at any time or through other such means as may be requested and allowed.

Accordingly, it is hereby ORDERED that:

1. All testimony, evidence and argument: 1) pertaining in any way to the presence or absence of blight or to any determination of blight with respect to the properties contained within the Capitol Mall Redevelopment Project Plan; and 2) concerning any proposed alternative development of the subject property by Respondent Tower under T.C.A. § 13-20-105 is hereby

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EXCLUDED from evidence at the possession hearing, pursuant to Rules 104, 402 and 403 of the Tennessee Rules of Evidence.

2. MDHA is hereby granted exclusive possession of the property rights described in Exhibit A of the Petition, attached hereto and incorporated herein by reference, as of the date of the entry of this Order.

3. If necessary, without further order from the Court, the Clerk may issue a Writ of Possession to put MDHA in full and complete possession of Property.

4. Without the necessity of a filing of a Declaration of Taking by MDHA, all right, title and interest in Property is hereby divested out of the respondents and vested in MDHA as of the date of the entry of this Order, free from the right, title, interest or lien of any party, and the recordation of a certified copy of this Order shall be muniment of title.

5. The funds deposited with the Court by MDHA and all interest earned shall be disbursed upon the entry of an agreed order of disbursement signed by Petitioner and Respondents, or upon other order of this Court.

6. The amount of just compensation to which the Respondents will be entitled shall be determined at a later date.

7. All other matters are reserved.

Entered this the _____ day of February, 2010.

BARBARA N. HAYNES,
CIRCUIT JUDGE

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APPROVED FOR ENTRY:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded by U. S. Mail, postage prepaid, facsimile transmission or via e-mail to:

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c/o Agent for Service of Process
GKL Corporate/Search, Inc.
915 L Street, Suite 1250
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on this the 3rd day of February 2010.

G. Brian Jackson

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EXHIBIT "A"

Land in Davidson County, Tennessee, being Lot No. 5 on plan of Nashville Arena First Revision, Phase 2 as shown on plat of record in Plat Book 9700, pages 249, 250 and 251, in the Register's Office of Davidson County, Tennessee, to which plat reference is hereby made for a more particular description.

Being the same property conveyed to Tower Music City II, LLC, by Special Warranty Deed of record as instrument# 20070112-0005539, Register's Office for Davidson County, Tennessee.

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IN THE CIRCUIT COURT
OF DAVIDSON COUNTY
STATE OF TENNESSEE
20TH JUDICIAL DISTRICT

METROPOLITAN DEVELOPMENT AND HOUSING AGENCY, Petitioner, vs. TOWER MUSIC CITY II, LLC, SUNTRUST BANK, ARENA PROPERTIES, LLC, CENTRAL PARKING CORPORATION, JULIAN L. BIBB, Trustee, PREMIERWEST BANK, and CHARLES E. CARDWELL, in his Capacity as Metropolitan Trustee, Respondents.	)	CASE NO. 09C-3636

MDHA's Motion in Limine

Tower's Motion to Continue

Before The Honorable BARBARA HAYNES

January 29, 2010

APPEARANCES:

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PROCEEDINGS

THE COURT: Do we need some extra chairs at counsel table?

MR. JACKSON: I think we're good, Your Honor.

MALE SPEAKER: Your Honor, could I make an announcement in light of the weather?

THE COURT: Have you looked outside?

MALE SPEAKER: I have looked outside, yes.

(Discussion off the record.)

THE COURT: Let's take a five-minute break before we start this, because I think we're going to be here a while.

(Recess observed.)

MR. JACKSON: Your Honor, I know Your Honor will be thrilled to hear that we will not be discussing indemnity in this matter.

THE COURT: Would that not make a good law school question?

MR. JACKSON: It would. It would.

THE COURT: And I wish you could have seen the contract.

MR. JACKSON: Well, if Your Honor please, I'm Brian Jackson. Along with Renard Hirsch

APPEARANCES: (Continued)
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and Carolyn Piphus, I represent the Metropolitan Development and Housing Agency in this case.

We're here today first, I guess, on MDHA's motion in limine to exclude certain evidence. As Your Honor knows, this matter is set for a possession hearing next Friday, February 5th, 2010.

And the motion today that is filed by MDHA is to present certain of MDHA's evidentiary objections to the Court before the hearing, as is permitted, and indeed encouraged, by our local rules that encourage parties to bring up these issues ahead of the trial in order to avoid wasting a lot of unnecessary time and to give the Court an opportunity to consider the issues carefully in advance.

And the motion today is an attempt, Your Honor, to streamline the proof next week and to avoid the necessity of hearing the testimony of at least five or six witnesses whose testimony is simply not relevant and not probative to any legal issue that is before the Court.

It's especially important, I think, for the Court to consider these issues today in light of the legislature's direction in T.C.A. 29-17-104(a)(2)(B), that objections to the

right-to-take in condemnation proceedings should be heard promptly and as a matter of law.

Now, the evidence that's the subject of this motion today relates to two equally irrelevant topics. First, Tower wants to offer extensive testimony about whether or not a 2009 blight survey that was performed by MDHA was performed properly or whether there are issues with that blight study.

Now, the blight survey that was prepared by MDHA was one of the bases, not of Ordinance BL2009-437, which authorized the condemnation of Tower's property. That blight survey was one of the bases of one of the other ordinances concerning the convention center project, broadly speaking.

Basically, the Council enacted several ordinances in the same period of time, one of which authorized the condemnation of certain parcels of property, including Tower's, and another of those amended the long existing Capitol Mall Redevelopment Plan that has been around since 1977, basically to make the uses within the plan to conform to the new convention center plan, and also to expand the availability of TIF financing for the project.

But it didn't change. Tower's property

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was in the district before Amendment Number 8 and it was in the district after Amendment Number 8. So the ordinance that enacted Amendment Number 8 to the Capitol Mall Redevelopment Plan was not the ordinance that authorized the condemnation.

Instead of talking about Ordinance 437, which is the ordinance that the Metro Council actually directed MDHA to condemn this property, Tower focuses all of their arguments and all of their comments on these other ordinances, these ancillary ordinances, if you will. In a moment I'll explain why that's improper.

But the second larger area of evidence that is covered by our motion in limine is the plaintiff's expert representatives and corporate representatives -- expert witnesses, excuse me, and corporate representatives who are going to come in and tell the Court about a plan that they have to redevelop their own property and somehow claim that that plan is consistent with the plan of the Metropolitan Government to build a $400 million convention center on the property.

So those are the two broad issues that our motion in limine cover. They cover lots of witnesses and lots of proof. There's no way this

case can be tried in one day if all of that evidence comes in. I'll tell Your Honor that upfront. Because there's at least seven or eight witnesses that would go to these two issues, including expert witnesses.

So this is a matter that's critical to whether we're going to have a prompt hearing, and whether it's going to occur, and how it's going to occur. I think it is important that the Court consider these issues as a threshold matter so that we don't waste a lot of time on things that as a matter of law are not relevant.

Let me turn first to the issue of blight and this blight study that Tower has focused on almost obsessively throughout this case.

In essence, what Tower is claiming is that the purpose of this condemnation was to cure blight and not for any other public purpose. Or alternatively, they're arguing that somehow the petition for condemnation was defective or unclear about why the property was being condemned and for what purpose. That's the basic Tower argument.

Your Honor, we have to go back then to the petition for condemnation and go back to what this proceeding is all about and what it's based on,

which is the petition that was filed for condemnation.

On October 26th -- I'm sorry, October 16, 2009, MDHA filed its petition for condemnation. And paragraph 2 of the petition set out specifically the statutory bases for this condemnation.

This paragraph 2 cited both T.C.A. Section 13-20-104(a)(17), which is the statute that contains MDHA's general power of eminent domain, and has nothing to do with blight. There's nothing about blight in that statute. Not a single word about blight in 13-20-104(a)(17).

But the petition also cited Title 29, specifically Chapter 17 of Title 29, which is the municipality -- it's the statute by which Metro and other municipalities derive their power of eminent domain.

So there we have in the petition, in paragraph 2 of the petition, both MDHA's own independent statutory power of eminent domain cited, and the Metropolitan Government's bases, which is Title 29, Chapter 13 -- 17. Excuse me.

Now, in case there was any doubt about, the purpose of the condemnation and the authority it

was proceeding under, paragraph 12 of the petition stated, quote, pursuant to Ordinance Number BL2009-437, Petitioner MDHA is authorized by the Metropolitan Government of Nashville and Davidson County to acquire the property through condemnation for the furtherance of the convention center project, a/k/a Music City Center, closed quote.

Now, Ordinance Number 437 was not merely referenced in the petition; it was also attached in its entirety as Exhibit C to the petition. And Ordinance Number 437, enacted by the Metropolitan Council in June of 2009, could not be more clear on its face as to what this property is being taken for.

It says, reading from the fourth paragraph of the ordinance, "Whereas, it is in the public interest that the property listed on Exhibit B" -- including Tower's property -- "which is attached hereto and incorporated herein, be acquired through negotiation or condemnation for the purpose of acquiring land for the construction of the new convention center..."

Then it says a couple paragraphs down, "Whereas, the Metropolitan Development and Housing Agency, as the agency designated to construct the

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convention center project on behalf of the Metropolitan Government of Nashville and Davidson County, will transfer the convention center project, or portions thereof, when completed, to the Metropolitan Government."

Be it enacted that, by the Council, Section 1 of the clause that's given, empowering clause at the end of the ordinance, the Metropolitan Development and Housing Agency is hereby authorized to acquire by negotiation or condemnation the fee simple property interest in the property listed on Exhibit B.

Whatever the Court -- this blight issue, all these witnesses that Tower wants to call, whatever the Court were to determine from those witnesses about the quality or lack of quality or validity or invalidity of the blight survey, none of that would have any impact whatsoever on the validity and force of Ordinance Number 437.

Tower has never explained in any pleading, in any argument in this case how any finding about blight could affect the validity on its face of Ordinance Number 437. Just haven't done it. Haven't offered that argument. That's why they haven't talked about 437.

They want to talk about blight. They want to talk about this redevelopment plan. But they try to avoid talking about the ordinance that very plainly and clearly, as enacted by the elected representatives of the Metropolitan Council, directed MDHA to acquire this property for the City of Nashville.

And Tower has to acknowledge, as we all know, that the Metro Council has the authority and power to condemn land anywhere in the county, whether it's blighted or unblighted, whether it's, whatever, in a development district, outside a development district. The blight issue is completely irrelevant to Metro's right of eminent domain.

And what Tower is arguing, in essence, is, well, Metro may have the power to condemn, but they have to sue in Metro's own name, and not -- they can't use, Tower argues, an agency of the Metropolitan Government to acquire property by eminent domain.

But the very definition of eminent domain that is adopted by the Tennessee legislature, which is T.C.A. 29-17-102, defines eminent domain as the authority conferred on the government and the

entities to whom the government delegates such authority.

So the principle of delegation of eminent domain is written into the statute. As the Court knows, it's delegated not only to cities and counties, but it has in the past been delegated to private entities, universities, acting on behalf of the government. Through laws private entities have been given the powers of eminent domain, as long as it's to further a public purpose.

The Metro Charter, which itself grants Metro the power of eminent domain, states in Section 106 -- I brought it with me today to make sure I got it right. I'm sorry. Section 1.06 -- that "the governmental and corporate authority of the Metropolitan Government shall be vested in a mayor, a council, and such officers, agencies, boards, and commissions as may be provided by the constitution or by ordinance."

And, Your Honor, MDHA is an agency of the Metropolitan Government. I looked this up -- looking at the response brief yesterday, I located a case which I hadn't seen before, but I'll bring to the Court's attention. I have a copy of it (tendering).

Which is the case of Lewis versus 138 Fifth Avenue South. The second paragraph of this case states that MDHA is an agency of the Metropolitan Government of Nashville and Davidson County. This is a Court of Appeals case from 1998, probably out of Your Honor's court, I would guess.

It is also true, as the Court notes, MDHA's board is selected by the Metropolitan Council and -- selected by the Mayor with the approval of the Metropolitan Council.

So MDHA is an agency of the Metro Government. It is operating in this instance at the express direction of the Metropolitan Council through ordinance.

Now, really, since no one disputes that the Metro Council has the authority to condemn this property, regardless of whether it's in a blighted area or not, the only question before the Court that stands between a resolution of this motion in limine and our trial is whether the Metro Government can direct one of its own agencies to act on its behalf to acquire property for a Metro project.

And if it can, the blight, the study, all that stuff, is completely irrelevant. We don't need to spend days of proof on that because it

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doesn't have any bearing on any probative issue.

I would also bring to the Court's attention in this regard is the statute -- the Interlocal Cooperation Act, which is T.C.A. 12-9-101, et seq. And the Interlocal Cooperation Act provides, in essence, that agencies and political entities may divide their -- may delegate their powers among themselves freely, that they're authorized to do so by agreement or by direction.

So that is yet another way -- another confirmation, if you will. In addition to the Metro Charter, and in addition to the case law, and in addition to the other things we discussed, this Interlocal Cooperation Act also provides that authority to delegate the powers of condemnation.

And, Your Honor, I would note that the procedure followed in this case to condemn this property, as we pointed out in our brief, was the exact same procedure that was followed in the stadium cases that Your Honor presided over. At least one of those went up on appeal. It was affirmed. The Trinity Marine case. We've cited that to the Court, provided a copy of it. The Court is well aware of it.

This is not a novel theory that we're advancing here. This is the way the Metropolitan Government of Nashville and Davidson County has for many years performed its major projects, through the use of its agency, MDHA.

Your Honor, I would submit to you in summary on the blight issue, it's the red herring of all red herrings. It's a creative attempt, if I can use another metaphor, to generate a fog of confusion over this case. It's a really simple case. The elected Council approved Ordinance 437 to acquire Tower's property for a convention center. And you don't have to look further than that to realize, as a matter of law, that the condemnation may move forward.

Now, the rest of that evidence that is going to be offered is going to just delay this process even further. And we've submitted in connection with a motion to continue that there are serious consequences to delaying this process further. There are several members here today, not of the MDHA administrative team, but of the construction team. They're here not because I asked them to be here. I didn't even know they were coming. They're here because they're very concerned

about the schedule of this project, Your Honor. I don't want to jump ahead to the motion to continue, but it is one of the reasons I've filed this motion in limine. Because any delay of this trial will have a very, very consequential effect on the construction project, which is well underway.

Now, turning pretty briefly to this other issue, this redevelopment issue, Tower contends that under T.C.A. 13-20-105, it has the right to development its own property. And, Your Honor, as we've pointed out in our brief, the statute just doesn't apply to a public purpose condemnation for a convention center, any more than it would apply to the City condemning land for a road or a school. A property owner can't say, well, wait a minute. I have my own plan to build my own school here. I'd like to build half the school and glue it to your school. Or I'd like to have the road run this way rather than that way.

I mean, this statute applies only when land is acquired for purposes of resale and it also applies only when the plan of redevelopment can, in itself, accomplish the objectives of the government. Well, there simply, as a matter of law, Tower cannot build a $400 million convention center on its

5 acres of property. That's a 15-acre project. It's going to cover 15 acres of the City. They cannot redevelop their own land into their own convention center and somehow glue it onto ours, or hotel, or whatever the plan is.

That's not before the Court today, what their plan is. Whatever it is, it can't be done in a way that's consistent with the direction of the Metropolitan Council.

This property is not acquired for resale. The argument seems to be that because we're -- MDHA will be reimbursed for its cost and will be paid, I think, one dollar, that that, quote, is a resale. As we all know, that's a legality to transfer this land, the title of this land back to the Metropolitan Government at the conclusion of the process.

But Metro Ordinance 437, again, makes it very clear, this is a Metro Government project. The City of Nashville and the people of Nashville will own the convention center at the end of the day. It's not being resold to any party.

Your Honor, in closing, let me just direct the Court's attention again to something -- I'm sorry if I'm being repetitive about it. The

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most critical document in this case, the one that Tower so rarely mentions in its own brief, is Ordinance 437. That ordinance doesn't mention blight. It mentions a convention center.

Ordinance 437 was attached to the petition in this case from day one. Ordinance 437 was mentioned in the Complaint in this case, explicitly referenced as the basis for this condemnation. Ordinance 437 sets out exactly why and for what purpose this property is being condemned. That's to build a convention center.

Your Honor, the blight issues have no relevance to interpreting Ordinance 437. So we would respectfully ask the Court to exclude the testimony relating to the blight issues and the redevelopment issues.

THE COURT: Mr. Conner?

MR. CONNER: Your Honor, my partner John Phillips is going to argue the motion in limine, and I'll be arguing the motion for continuance.

THE COURT: Mr. Phillips?

MR. PHILLIPS: Good morning, Your Honor.

In response to MDHA's petition for

condemnation, Tower has asserted two primary right-to-take objections, defenses. The first one has to do with the Capitol Mall Redevelopment Project Plan.

Under applicable Tennessee statutes and common law, MDHA as a housing authority can only condemn property if that property is subject to an urban renewal plan, a housing project, or, as we have here, a redevelopment plan.

But in order for a redevelopment plan to be valid, it has to encompass a geographical area that has properly been determined to meet the criteria for blight. If that property is not blighted, then that plan is no longer valid. And because MDHA has to only condemn properties subject to a plan, if the plan is invalid, MDHA will lose --

THE COURT: Let me ask you a question. We're not discussing what authority MDHA has on a regular basis. We are discussing what authority that the Charter or the Council can give to an agency of government. Is that not the issue here?

I understand what MDHA stands for, what it says, what its Charter says, who it reports to. That is below what the Council can do. Would you not agree with that?

MR. PHILLIPS: Yes, Your Honor.

THE COURT: Okay. So if the Council says to Barbara Haynes, I'm going to take your property for resale, then I have a lot of other alternatives. True? Kelo gives me certain rights as a property owner when the government is going to take my land to resell it to make a profit. Would you agree with that?

MR. PHILLIPS: Is your question if MDHA takes your property for resale?

THE COURT: If anybody takes my property and it's for resale, then that's an entirely situation, isn't it?

MR. PHILLIPS: From what we have here?

THE COURT: Yes.

MR. PHILLIPS: No, Your Honor. This is a project -- they are trying to take our property for the purposes of resale. It will be resold. MDHA is seeking to acquire our property --

THE COURT: Okay. Who are they going to resell it to?

MR. PHILLIPS: Under Resolution 2009-698, it states that this property will be resold to --

THE COURT: To Metro Government.

THE WITNESS: To Metro, that is correct.

Now, I understand MDHA's argument that, well, this statute is only interpreted -- should be interpreted to apply only to private resale. But that's not what the statute says. The statute simply says for the purposes of resale.

And since you must strictly construe these statutes, and because these legislators should be presumed to know how some of these deals are structured, you can't simply read into there --

THE COURT: Mr. Phillips, I'm sure you know I'm married to a legislator. I can tell you that many times they do not know.

MR. PHILLIPS: Well, Your Honor, the fact remains that this must be given strict construction. And there is no language in there limiting it to only cases where you sell it to a private developer.

They are going to resell it. They're going to sell it to Metro. Metro didn't have to ask MDHA to do this. But they did. And because MDHA is the one that's condemning this property, they are subject to the strict language of the statutes that govern their condemnations.

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THE COURT: Does 437 say that, Mr. Phillips? I thought it's sort of clear that the Metro Council is transferring it only to MDHA for the taking and construction as their arm, I guess you would call it.

MR. PHILLIPS: Well, Your Honor, there are three pieces of legislation that passed.

THE COURT: I understand that.

MR. PHILLIPS: You have to look at all three of those pieces of legislation.

THE COURT: I did.

MR. PHILLIPS: And if you look at 436, what 436 says is that MDHA -- well, first of all, it says that all of this property we find to be blighted in this plan.

And because it is blighted, MDHA should -- that said area -- the area that includes Tower's property.

"...that said area or such portions thereof as deemed necessary for acquisition by MDHA by negotiation, condemnation, or otherwise, as provided by any applicable provision of the Housing Authorities Law...should be so acquired by MDHA; and such blighted conditions eliminated."

You have the Council, through this 436

ordinance, passed the same day as 437, saying there is blight here. MDHA should go out and condemn it. They should cure the blight and they should condemn this property pursuant to the Housing Authorities Law. That is the only direct construction as to what law they should proceed under.

Now, you go to 437, all 437 does is state what Metro's power of eminent domain is under the Charter. And then later, in Section 1, they tell MDHA, go out and get it. They don't say, use Metro's power of condemnation. They never say that. There is nothing in here that expressly says, use our power of eminent domain. And that's what the law says.

If you are going to transfer power of eminent domain, it must be an express transfer of power. You cannot rely on inferences in arguments. It must be express. There's simply nothing in 437 that is an express transfer of power, where they say, MDHA, use Metro's power.

And if you look at 436, they do tell -- the Metro Council says, go out and get it under the Housing Authorities Law.

And then, the third piece of legislation, Resolution 2009-698, it says again that

"...pursuant to Tennessee Code Annotated 13-20-101" -- the Housing Authorities Law -- "MDHA is authorized to acquire property and prepare it for development pursuant to one or more redevelopment plans..."

They are, again, instructing MDHA as to which law they should proceed under. That is an express instruction. And given that language in 698 and in 436, there's simply no way that any inference from 437, simply based on the fact that Metro says, this is our power and then later it says, MDHA, go get this property. They've already told MDHA twice how to get this property, under the Housing Authorities Law.

And if MDHA is proceeding under the Housing Authorities Law, then they have to be doing it pursuant to a redevelopment plan, renewal plan, or housing project. In fact, this has been recognized by an appellate court in Tennessee. It's the Alcoa case, Alcoa Housing Authority versus Monday.

In that case the Alcoa Housing Authority tried the exact same argument that MDHA is using here. Alcoa said, we admit, we did not follow the requirements under the Housing Authority Law,

because the Housing Authority Law says, if you're going to condemn property, you have to give notice. It's different notice depending on whether it is for a redevelopment plan, renewal plan, or housing project, but you have to give notice.

THE COURT: Wait just a minute. Are you trying to tell the Court that Tower, when they purchased the property in 2007, had no idea of the Capitol Redevelopment Plan or any of that?

MR. PHILLIPS: I'm sorry. Is your question did we have notice that this was a redevelopment plan?

THE COURT: Did you have notice that this piece of property might be condemned when you purchased it in 2007?

MR. PHILLIPS: Your Honor --

THE COURT: You brought up notice. Alcoa says they had to have notice.

MR. PHILLIPS: I'm sorry, Your Honor, I'm not bringing that up as a purpose of bringing notice in this case up for issue. The reason I'm bringing it up is that was -- the Alcoa Housing Authority says, yes, we have to provide notice, but we're condemning under section -- I forget the number. It's the same one they're using, the same

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one they cited in their petition, which is 13-20-104(a)(17).

Alcoa said, we're not condemning this property under a redevelopment plan or anything like that. We're doing it under Subsection 17. That gives us the right to condemn any real property. And the Court of Appeals looked at it and said, no, it does not. While it seems to be broad in its grant of power, when you read the sections as a whole, it is clear that your authority to condemn as a Housing Authority is limited to only -- is limited to any real property, subject to a redevelopment plan, renewal plan, or a housing project.

So you cannot rely, and the courts have specifically held that they can't rely on Subsection 17 to condemn any property of law. They have to do it in connection with one of these plans or a housing projects.

Your Honor, that's what we're arguing today, is that MDHA has already said what they're doing. They've already been instructed as to how they need to condemn, what procedure to use. They were instructed on that two times expressly; as required by law, expressly said, take this property under the Housing Authority Law.

And MDHA, in their own petition said, we are condemning this property subject to the Housing Authority Law. Because in paragraph 2, they state that pursuant to Tennessee Code Annotated 13-20-104(a)(17), which is in the Housing Authority Law, and Tennessee Code Annotated 29-17-101, et seq., which is just the general eminent domain law procedure for public agencies in general, MDHA is expressly vested with the power of eminent domain.

So MDHA identifies the Housing Authority Law as what they're proceeding under. And if you go and look at that subsection -- if you'll look in 13-20-104, what they rely on, and you check it, one of the only cases that cites to it is this Alcoa case, where the Court says, you can't condemn property unless it is under one of these projects or plans.

So they have identified what procedure they're going to use. And to be honest, Your Honor, we were shocked when we got their motion in limine. That's the first time MDHA has raised this transfer of power argument. It has not come up before. They've been relying on Housing Authority Law.

This specific issue has been addressed

previously by the courts. In City of Johnson City versus Campbell, the City tried to take property. It filed a petition for condemnation, and the City says, we're going to take this property under Section 7.1 of our Charter, under Tennessee Code Annotated 29-16-101, et seq., and all other applicable statutes that provide for the right to exercise the power of eminent domain.

Now, the thing was, Section 7.1 of the Charter requires an ordinance to be passed before it can instigate the condemnation proceeding. And the City didn't do that.

And when the landowner raised that as an issue, the City said, well, we know that we have to do an ordinance under our Charter, but we also cite to Tennessee Code 29-16-101. And under those sections, I believe it's 104, they can institute a condemnation proceeding simply by filing a petition for condemnation.

So they said, even though we had to have an ordinance under our Charter, we don't have to do that if we follow under Chapter 16.

And the Court said, no, you can't do that. When you identify the procedure that you're going to use, then you have to continue with that.

Because it's not fair.

It says that -- the Court notes that if it bought the City's argument, then the petition would leave the landowners with uncertainty as to the theory upon which the City relies on to condemn its property.

Quotes, property owners, such as the defendants, do not have to guess, anticipate, or extrapolate as to the theory upon which plaintiff wishes to proceed to condemn their property.

Your Honor, we submit that in this case MDHA says exactly what they're going to use. They're going to use Subsection 17 of 13-20-104. We have a court case that says, you cannot use that section unless that property is subject to a housing project, renewal plan, or, as we have here, a redevelopment plan. That is clear and express.

Now, MDHA says, well, yes, but we attached Ordinance 437. Well, there's nothing in there that says go out and use Metro's power of eminent domain. Nothing about a transfer. In fact, if you look at these other ordinances, it says Housing Authority Law, just like MDHA said in their petition.

So, Your Honor, we feel like we're

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battling against a moving target here. We have done extensive discovery into blight. And there are serious deficiencies being raised. MDHA all of a sudden says, whoa, whoa, hold on, hold on. Two weeks before trial they filed something that says, that's not really what we're doing here. We're not using 13-20-104 at all. We're proceeding under the authority of Metro to do this.

Now, I think that this raises another key issue here. Because regardless -- regardless of the merits of this argument, it just -- it shows the inequity of the situation, because what MDHA is trying to do through this motion in limine, they have essentially drafted a motion for summary judgment and dressed it up to make it look like a motion in limine. Because motions in limine are meant to exclude specific pieces of evidence to streamline the process at trial.

Well, we just listened to 15 or 20 minutes of counsel for MDHA talking about why all of Tower's evidence concerning blight and its alternative design should be excluded because of the -- they object to the validity of our defenses. And that is improper under -- through a motion in limine.

In the court case of Duran versus Hyundai Motor America, a Tennessee Court of Appeals case, 2008, what the defendant tried to do in that case was, on the eve of trial it filed a motion in limine and says, you can't submit any evidence on punitive damages, because your punitive damages claim is invalid. You can't make it out.

And the Court of Appeals noted that a motion in limine is not the proper vehicle to use to attempt to preclude a claim or defense. It is not equivalent to or a substitute for a motion to dismiss or a motion for summary judgment. It is essentially a substitute for an evidentiary objection at trial.

And the Court goes on to note that motions in limine serve a fundamentally different purpose than motions for summary judgment. They're not subject to the same procedural safeguards, notice provisions, or burdens of proof.

If you look at MDHA's brief, there's very little question that they are not attacking specific pieces of evidence. They don't even cite to any specific piece of evidence. They are attacking our defenses.

They say, it is clear that most, if not

all of the evidence that Tower intends to present at that hearing, the right-to-take hearing, relates to the two defenses.

That's essentially a summary judgment motion. They're seeking to exclude all of our evidence.

They go on to say, the issue of whether or not the redevelopment district is blighted is irrelevant to whether Tower's property can be condemned.

Again, they're attacking the very basis of our right-to-take defenses as a whole. Not any specific piece of property. They are seeking to litigate our defenses through a motion in limine. They can do that, but not in a motion in limine. It has to be a motion for summary judgment or a motion for partial summary judgment.

The alternative design does not constitute a valid defense to such a taking. This is exactly what the Court in Duran says you can't do in a motion in limine. You cannot adjudicate an entire defense. You can only seek to exclude certain specific pieces of evidence.

And indeed, in Local Rule 26.01, dispositive motions must be scheduled to be heard at

least 30 days before trial. And summary judgment cannot be heard until at least 37 days after it is filed. That's because, unlike motions in limine, summary judgment motions seek to attack the very foundation of certain claims or defenses. And the Courts have recognized that parties need additional time to fully brief that issue. And the burdens of proof are different.

In a motion in limine, which can be filed a few weeks before trial -- or not even that. Five days before trial, I believe is what it says. Of course, they're encouraged five days before trial to do it.

It's trial by ambush to allow this to -- for them to bring in all of these new issues and -- in a motion in limine and seek to totally cut Tower off at the knees by attacking its defenses, the entirety of its defenses through a motion in limine.

If that was necessary, if they really wanted this to happen prior to trial with briefing, then we should have built into the schedule sufficient time to allow for dispositive motions to be heard before trial. But the Court has said that you simply can't do this in a motion in limine.

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Now, Your Honor, I know that we've covered the requirement that the ordinances have to -- you know, what kind of power do they transfer, if any. And I spoke to you about the requirement that the language in the ordinance, if there's any kind of purported transfer of power, it has to be express language. But that's not really the beginning of the discussion.

If this Court deems that generally Metro can transfer or can delegate authority to another agency, it still has to look at, okay, has Metro provided for the transfer of its power to MDHA in general in its Charter.

And if you look at the Charter, you've got 2.01, which says that Metro has the power, the power, to provide for the taking and appropriation of real property within its area for any public purpose. And then it goes on to say, in accordance with the provisions of 29-16-101.

Now, in a separate section, and what MDHA says is somehow an express ability to transfer this power of eminent domain, is 106. And it says, the governmental and corporate authority, not power, but authority, of Metro shall be vested in -- and then there's a long laundry list of different

entities.

And at the end you have the catchall: And such officers, agencies, boards, and commissions as may be provided by the constitution for general laws in the state of Tennessee or by ordinance enacted pursuant to this Charter.

Now, this very broad and vague description of who is vested with authority, with Metro's authority, never mentions MDHA specifically, never mentions the power of eminent domain. And there's no mention of whose name that property should be condemned in. None of these things are present in this Section 106.

Now, when MDHA -- when Metro want to specifically and expressly delegate its power of eminent domain, it's done that. For example, the case of Electric Power Board of City of Nashville versus Thoni, in that case, the Court noted that the Electric Power Board is expressly authorized -- now, this is from the Charter.

And the Court, quoting the Charter says, said board is expressly authorized to exercise the power of eminent domain on behalf of -- on behalf and in the name of the City of Nashville within or without said city.

So there you have an express -- that is an express delegation of power.

THE COURT: Let me ask you a question. If we read the petition that was served on your client, and they were all filed in October, and you contend that MDHA must proceed based upon the petition they filed, isn't it inconsistent now to come in here and try to say that 436, concerning blight, is applicable?

MR. PHILLIPS: No, absolutely not, Your Honor. Because in this petition, MDHA cites to the Housing Authority Law. And that's section -- it says 13-20-104(a)(17).

THE COURT: And they also cite 29-17-101. That's clearly in the petition.

MR. PHILLIPS: That's correct.

THE COURT: Right?

MR. PHILLIPS: That's correct. And if you look at 13-20-104(a)(17), the courts have said that you can't do that unless the property is contained within a redevelopment plan. It's very clear about that. You cannot do it unless it is connected to a redevelopment plan.

Therefore, if the redevelopment plan is invalid, then Tower's property is no longer subject

to a redevelopment plan. MDHA has no authority to take it. And there have been cases --

THE COURT: So you are saying that the redevelopment plan, as structured, is invalid?

MR. PHILLIPS: Absolutely, Your Honor. The redevelopment plan -- the redevelopment plan is only proper if the property within that plan is blighted. And there are criteria that are used for blight. There's a statutory definition.

And, Your Honor, as I said before, we believe there are serious, serious deficiencies with the way that this blight determination was made. We expect to have substantial evidence to show that this is -- this was conducted in a manner that was never done before and has not been done by other agencies.

There are very, very serious issues with this. And that is why we believe that MDHA has now come up with this theory that they're -- that Metro has transferred their power to them, and therefore, blight is irrelevant.

They don't want to face this issue. They don't want to face the blight determination issue at trial of right-to-take. Because if this property is not blighted, then the redevelopment

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plan is no longer valid, and MDHA will lose its right-to-take.

THE COURT: Mr. Jackson, do you agree with that premise?

MR. JACKSON: No, Your Honor, I do not. I don't agree for several reasons.

First of all, it's just an incorrect statement of the law that if an amendment to the Capitol Mall Redevelopment Plan were invalidated -- let's assume they're right. Let's assume the amendment was invalidated.

The Capitol Mall Redevelopment Plan was first approved by Metro Council in 1977. It's been in effect ever since. It's been amended eight times. And nullifying one amendment to it would have no effect. I guess you would just set the clock back to wherever it was, at which time Tower's property is still in the area anyway.

But I haven't briefed that because I didn't want to get into the -- this really rabbit trail of concern about the redevelopment plan.

And this claim, I find it remarkable, this claim of surprise. Wow, we had no idea you were relying on the authority of the Metro Government. I don't know what magic words MDHA

would have to use, Your Honor, beyond attaching to the Complaint that was served on this party in October of last year, an enacted ordinance of the Metropolitan Council that says the MDHA is hereby authorized to acquire by condemnation these people's property.

I mean, I've yet to hear what magic words would suffice. Do we have to have the words, and we delegate? I mean, isn't that what this ordinance is doing?

There's absolutely no legal authority, none whatsoever, for the proposition that there has to be some sort of magic incantation of phrases in order for the Metropolitan Council to tell one of the Metro Government's agencies to go and condemn a parcel of property for a public project.

MR. PHILLIPS: Your Honor, I believe that, as I said before, there must be strict construction for this. And as far as, you know, Mr. Jackson's request for magic language, we've seen how this can be done. I quoted to you from the Electric Power Board case in Nashville, where they say, you're expressly granted the authority, our authority to condemn. That is not in here. I invite counsel to show me where it says, use Metro's

power of condemnation.

MR. JACKSON: The Metropolitan Development and Housing Agency is hereby authorized to acquire by condemnation the property interests. .

I mean, Your Honor, if that's not a delegation of authority, I don't know what is.

MR. PHILLIPS: MDHA has its own authority to condemn. There are ways in which MDHA can condemn. Metro can authorize MDHA to condemn. That still does not answer the question, whose power do they condemn under. We've already had that question answered in 436 and the resolution, which you must read together.

THE COURT: Why, if MDHA already had the authority, would the Council go to the trouble of passing another ordinance?

MR. PHILLIPS: Your Honor, they have said several times, they've instructed MDHA to go out and condemn this. And the purpose of 437 is to acknowledge the existence of the convention center on that property and that that's what is going to be there. And they just tell MDHA to go out and get it, as in, this is it, get out there and start going.

THE COURT: You know, you don't -- if

what you say is true, you don't need an ordinance. You can just call them and say, MDHA, go out there and get it, and MDHA is supposed to have this magical globe of their own.

MR. PHILLIPS: Your Honor, what we're arguing about now is whether or not it should be inferred that the intent and purpose of this ordinance was to transfer the power from Metro to the MDHA.

THE COURT: I understand that.

MR. PHILLIPS: And that is not the proper test. It has to be express. And if the law says that if you have to -- if you can only get there through inference or by argument or by presumptions, you can't do it. It has to be express or else there is no transfer.

Your Honor, there's -- you know, regardless of whether you could reasonably assume that Metro should transfer -- again, I don't get that. I'm not saying that that is the case. But it's not a reasonable assumption issue. It is a strict construction. There has to be express. There is nothing in here that is express.

We've seen examples of express language. We've seen how they do it. You are

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expressly delegated with our power to go out and get this. All they do here is say, this is Metro's power. And then later on they say, okay, go out there and condemn the property.

There is nothing in there that says, use Metro's power. There's nothing in there that says anything at all about what power they are to use. If you look at the legislation, the two other pieces of legislation passed on that day, they do say how to do it. They say pursuant to the Housing Agency law.

THE COURT: Let's get back to the subject matter at hand in the motion in limine.

When they said for a public purpose, doesn't that eliminate blight as a reasoning?

MR. PHILLIPS: No. No, Your Honor. The elimination of blight is, in itself, a public purpose. And that is why this elimination of blight in slum areas, that is why MDHA was created. They were not --

THE COURT: I understand that. But I'm saying, in everything that's been presented to this Court, it was presented for a public purpose, building the convention center. Would you not agree with that?

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MR. PHILLIPS: No, Your Honor. No, Your Honor, I would not. Because what is intended to be put on this property is a convention center. But because they're using MDHA, it has to be under a redevelopment plan, and the purpose there is to cure blight.

Now, the convention center may have that effect of curing blight, but to simply say that because the convention center is a public purpose, that resolves or relieves MDHA of any -- of any requirement that follow the redevelopment plan or the statutes that it itself has acknowledged in its Complaint that it is following. I don't believe that is proper.

THE COURT: Okay. Mr. Jackson, do you have anything to add?

MR. JACKSON: Well, Your Honor, again, I feel like I'm beating a dead horse. But Ordinance 437 sets out what the purpose of this condemnation is for. It clearly says, it is in the public interest to acquire a property by condemnation to build a convention center. Not for blight. Not for any other purpose. To build a convention center.

And I've yet to hear any argument as to

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why Ordinance 437 is invalid or improper or why it shouldn't be applied as the Council enacted it, which is to authorize MDHA, citing the Title 29 powers, it cites them very clearly in the ordinance. And it says, MDHA, please condemn this property on behalf of the City of Nashville, build a building on it, and then give it back to us. That's essentially what this ordinance provides, in lay terms.

THE COURT: Let me ask you a question. My understanding, having heard a few of these before, is if that ordinance had said condemn this property for blight reasons, then Metro would be able to sell it to private people to do anything with it. Is that not true?

MR. JACKSON: Yes, that is true, Your Honor.

THE COURT: Is that not the biggest difference?

MR. JACKSON: It is, Your Honor.

THE COURT: Wouldn't Metro not have had to state -- they stated what it was for, where the other implication wasn't there. Would you not agree with that?

MR. JACKSON: I do agree with that, Your Honor. I agree that there are -- it is

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possible for MDHA to acquire property for purposes of curing blight.

THE COURT: Sure it is.

MR. JACKSON: And we've done that in the past, and cases have been before Your Honor about those. And that does raise, under Kelo and other cases, lots of other issues --

THE COURT: It does indeed.

MR. JACKSON: -- and concerns. And we can today, in this redevelopment district, acquire other property outside this convention center footprint through the proper processes if we want to -- if MDHA wants to to cure blight. But none of that has to do with this.

THE COURT: It doesn't. Let me ask you this question: Do you agree or disagree that your adversary says you're converting this into a motion to dismiss or summary judgment motion?

MR. JACKSON: I disagree with that, Your Honor. There are many -- I mean, it is a case directed towards the evidence that's to be presented. We have a hearing set next week. And it makes a big difference to know whether we're going to have six witnesses on blight or not, in the preparation of the case, in the expense of the

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preparation. So this is a motion in limine that asks the Court to make a preliminary evidentiary ruling.

Now, I don't see anything -- the fact that it may be damaging or even fatal to the other side's case is not a basis to object to a motion in limine. There are many motions in limine that may be even -- may be equally devastating. A motion in limine to exclude an expert in a medical malpractice case, if granted, could eviscerate the case. Yet Courts routinely hear those as a pre-trial matter.

So I do think that it is appropriate to be heard now. I also believe there's nothing to be gained by going to trial next week, having six witnesses sitting out in the hallway, and then the first blight witness comes to the stand and I will stand up and object and say, Your Honor, this is isn't relevant because of Ordinance 437 and these other arguments.

I mean, what is really to be accomplished by doing that? And the idea that we should wait more time until 37 days has run -- I mean, Tower hasn't said they need to conduct any more discovery that will shed light on Ordinance 437 or that there will be any prejudice to having this

heard today. Because these are legal issues. What 437 says and how it should be applied is something that the Court can determine as a matter of law.

I would also direct the Court to Title 29, and again, that language which encourages that these hearings be heard promptly. So I think that has to be put into the mix, if you will, of the rules and the statutes so that we understand why we're here today on a motion in limine and not a motion for summary judgment.

Obviously, our timetable has been very short in this case. And, you know, if we weren't -- if we didn't have a legislative directive to move promptly and if we didn't have a $500 million project waiting, we might have a more leisurely examination of all of these issues.

But there's been plenty of time for Tower to respond. And Tower has filed a 20-some-odd-page legal response to this motion in limine. So I don't think they can claim that they haven't had the opportunity to brief this issue fully and argue it before Your Honor.

THE COURT: Well, this Court hears motions in limine routinely that change the complexion of lawsuits without it being a motion to

dismiss or motion for summary judgment simply because the evidence is not relevant.

MR. PHILLIPS: Your Honor, if I may briefly raise a few points, and I promise to be brief.

First of all, I've heard from Mr. Jackson a couple of times the language that Metro has asked MDHA to do this on behalf of Metro. That's not in 437.

Now, in the resolution that I cited you to, it does say, on behalf of, and then has a whole long laundry list of things to do. But then the very next paragraph is the language which I quoted to you, which says MDHA is authorized to condemn this property -- to condemn property under the Housing Authority Law.

MR. JACKSON: Your Honor, I don't mean to interrupt counsel, but I do want to point out that it does say, whereas, the MDHA is designated to construct the convention center project on behalf of the Metropolitan Government.

MR. PHILLIPS: Right.

MR. JACKSON: The language is in the ordinance.

MR. PHILLIPS: To construct the

convention center. Not to acquire. Your Honor --

THE COURT: Isn't that just --

MR. PHILLIPS: No. It's absolutely different. The construction activities that go on after this property is acquired --

THE COURT: How can they build property if they don't acquire it?

MR. PHILLIPS: They are authorized to acquire the property pursuant to the Housing Authority Law. And then --

THE COURT: Mr. Phillips, I have been very patient with both of you all. I have heard hundreds of these cases. I have read everything you all have put before this Court, and so has my law clerk. And the Court is going to grant the motion in limine.

Now I am willing to listen to your argument about why you want to continue this case.

Mr. Jackson, you can draw an order.

MR. JACKSON: Thank you, Your Honor.

THE COURT: I guess we have precluded Metro from having a say today. They were here the other day. I never know when they're in here.

MR. JACKSON: Yes, Your Honor. It's just me today, so I'll draw the order.

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THE COURT: Mr. Conner.
MR. CONNER: Your Honor, I don't know if we need a continuance now, because we have no case left. We have no case left when it comes to possessory hearing. And the reason being, you have just entered a summary judgment in regard to our defenses.
If I cannot put on proof in regard to the blight issue, and if I -- I'm not trying to re-argue the motion. As far as the continuance is concerned, I don't need it. And if I cannot put on evidence in regard to the alternative design, which we have taken a week's worth of depositions now on, then that is my case. That is my case. And that's the result of this.
So Your Honor is correct, you might as well enter a possessory hearing order today.
THE COURT: I didn't say that. I had no intention of doing that.
MR. CONNER: Well, Your Honor, that's what this does. Because if we go to the right-to-take trial on Friday and I cannot put on any witnesses in regard to what we view as the defense on the blight issue, I cannot put on any witnesses in regard to the alternative design, then

I have no proof, Your Honor, that they -- that there's a right-to-take issue.
THE COURT: Mr. Conner, it seems to me that the argument I've heard is that 437 is improperly drawn. Is that not what you were saying?
MR. CONNER: No, Your Honor, it's not improperly drawn.
THE COURT: You're saying it doesn't give the appropriate authority.
MR. CONNER: Your Honor, it's the Government's responsibility to do this correctly. If Metro Government had filed this, if Metro Government had filed this, I couldn't make this argument. They chose to use MDHA. That was their choice. That was their choice.
Now, Your Honor, we're a landowner. And our property rights are being taken. I know this is a big public project. I know all their arguments on why it has to proceed. But this is all we're left with, Your Honor.
And in order for us to even present our case, to do it on a motion in limine basis as opposed to a summary judgment motion, I should be able to show issues of fact in regard to what the blight issue is. I've got depositions.

One of the reasons, Your Honor, that I needed additional time, and I don't -- if Mr. Jackson will agree to my expert now -- I had to take Joe Cain's deposition in order to figure out how he made the blight determination. And the proof would show, Your Honor, if we would be permitted to submit it next week, is that Metropolitan Government, first MDHA, the board of MDHA, was not presented with the new blight methodology and did not approve it. Metro Government was not -- did not approve it, and it wasn't presented to them.
Joe Cain did it. You know how he came up with this new methodology, what changed? It was in his head. The only way for me to ask him questions about that so I could get an expert and use that expert to say whether that's reasonable or arbitrary, was to depose Mr. Cain, because it was all in his head. That's what I did.
Now, then I called my expert, and she advises me the night of Mr. Cain's deposition that she has a conflict, their company does, and can't serve. So I had to turn around and get on the phone and try to find another expert, which I did. And I apprised Mr. Jackson of this as I was doing it.
I found another expert. And

Mr. Phillips went to Knoxville yesterday, met with him. We intend to -- and we've given him all of the information. And I told Mr. Jackson, sent him an e-mail this morning, gave him the curriculum vitae of this gentleman, and what we expect he will say, but told him I would have a full disclosure under Rule 26 on Monday and would offer this witness for deposition either by video from my Knoxville office, in our office on Tuesday, or in person.
Now, that was the reason, one of the reasons -- I'm not going to go into all of the issues in regard to the discovery. I'll play with the cards I've been given. But the playing field has just been removed from under us.
So I'm at a loss, Your Honor. The only thing that I can do at this point is suggest that we set the hearing on Friday for an offer of proof. Because the only place for me to go from here is the Court of Appeals.
THE COURT: Mr. Jackson?
MR. JACKSON: Your Honor, if that's where we need to go, that's where we need to go. I think we've just heard Mr. Conner acknowledge what he has told me informally, which is that he doesn't even have a blight expert until this morning. He

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sent me a name of somebody. I haven't even had time to read the e-mail yet. But there is apparently somebody. He doesn't know what their opinions are, but maybe next week, a couple of days before the trial, we'll find out.

Your Honor, you know, there is no reason to delay the entry of possession order at this point on the blight issue. I think the Court has very correctly determined that it is irrelevant.

And the fact that that may be devastating or harmful to Mr. Conner's case is not at issue here. The point is, is it relevant or is it not relevant? The Court has just concluded that under Ordinance 437 blight is not a predicate of this -- or prerequisite of this condemnation.

So if Mr. Conner wants to take an offer of proof for his appeal, I guess that can be scheduled at the Court's convenience.

I don't really believe that the Court of Appeals would need live testimony on the blight issue, because all the Court of Appeals needs to decide is whether blight is relevant or not to this condemnation under Ordinance 437. For purposes of that determination, it doesn't matter what some expert that he's just hired this morning may say.

THE COURT: This Court is here to serve both sides. If you want to take an offer of proof, the Court will be glad to conveniently arrange a time for you.

MR. CONNER: Would the Court consider reconsidering your ruling with regard to the motion in limine until next Friday, until you've heard the proof?

THE COURT: Let me think about that.

MR. CONNER: Because, Your Honor, seriously, what we have here, if I'm not, as I said, able to put this on and put this defense on -- and, Your Honor, this is a defense that is no surprise. We raised it in our right -- in our Answer. MDHA had the ability --

THE COURT: Mr. Conner, I've heard it. I've read everything y'all have submitted. I am not a novice at this kind of case. And I am perfectly willing to allow y'all to put on proof, an offer of proof.

You're asking me to put off making that ruling of this Court until such time as I hear the proof?

MR. CONNER: Yes, Your Honor.

MR. JACKSON: Your Honor, that's the

very purpose of the motion in limine. Now, I can prepare for these witnesses and --

THE COURT: I understand. The Court is not going to do that. I'm willing to let you to put on an offer of proof. The Order is not final for 30 days, and you'll have a period of time to do whatever it is you want to do.

MR. CONNER: All right, Your Honor. Is it necessary, then -- I mean, if Mr. Jackson has won on the relevancy issue and my evidence is going to be excluded in regard to blight, then I assume there's no need for my witness to even be deposed.

MR. JACKSON: Well, I don't know, Your Honor. I guess first I would ask I be served with some kind of report on what this witness is going to say, and then I'll make a determination as to whether it's necessary to depose him or not.

THE COURT: I will be here all week, by phone, by video, or in person for any ruling that I need to make.

MR. CONNER: Your Honor, could we go ahead and deal with that issue now? Because if I'm not going to be permitted to even have a blight expert now for an offer of proof, then I don't want to go to the expense and trouble of bringing it in.

We'll put that at issue with the Court of Appeals as well.

MR. JACKSON: Well, Your Honor, on that point, I would say that the Court should exclude the testimony of any witness that wasn't identified until today, which is --

(Overlapping speech.)

MR. CONNER: Can I make a point on that, Your Honor? He has yet to respond --

MR. JACKSON: May I finish my comment?

MR. CONNER: He has yet to respond and identify his experts in this case, Your Honor. I received a report, a letter, Tuesday or Monday evening, the first time ever. He has yet to amend his disclosures under Rule 26, and it's the pot calling the kettle black, Judge.

MR. JACKSON: Your Honor, Mr. Conner and I have actually cooperated very well this week in doing about nine depositions. Believe it or not, we've cooperated very well.

MR. CONNER: We have, Your Honor.

THE COURT: I find that hard to believe.

MR. JACKSON: We really have, Your Honor.

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MR. CONNER: We have, Your Honor.
MR. JACKSON: And I don't want to end on a sour note.
THE COURT: We're not going to. Now, tell me where you are, because the snow is getting deeper. You have a long drive. You have a drive.
MR. CONNER: Your Honor, I bought a Subaru from Jim Reed, so I ought to be okay, I hope.
THE COURT: Can I have a ride home?
MR. CONNER: Yes, ma'am. I'll be glad to.
MR. JACKSON: Your Honor, my suggestion would be this: If Mr. Conner is correct that his only defenses have just been excluded under motion in limine and now he wants to make an offer of proof, I would ask that the Court go ahead and enter an order of possession.
If Mr. Conner wants to seek an interlocutory appeal, he can file an application with the Court -- with this Court first, as the procedure provides. And then we can take it up.
And I don't think we have to wait -- I mean, he can do his offer of proof at any time when the Court is available, but I don't think, personally, that this issue requires a lot of

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testimony. And we shouldn't go to that expense and trouble when the issue is a purely legal one that the Court of Appeals could readily address. And if they wanted to send it back and tell us to take proof, then we can do it at that time. To me, that makes the most sense for both sides.
MR. CONNER: Your Honor, here's where we are. We've got a project. They have a project. We hope -- we wish we had a project with them, but we don't. They have a project. If you enter an order of possession today and then I put my order of proof on and we go to the Court of Appeals and the Court of Appeals finds in my favor, what is going to happen? Is the Court of Appeals going to order them to take down the convention center?
MR. JACKSON: Your Honor, he can ask for a stay of the order of possession and we'll deal with that at the time. An order would be subject to a motion for stay. And we'll deal with that at the appropriate time. We would oppose that, of course, and ask that a bond be placed, a very, very substantial bond. But that would be for Your Honor.
And then the Court of Appeals has the opportunity to stay it as well. That's another procedure that can be followed. Once we get to the

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Court of Appeals, Mr. Conner's client can ask the Court of Appeals to stay the possession order. If the Court of Appeals finds that an appropriate course to do, then they can do that on whatever conditions they find appropriate.
THE COURT: Isn't that a better alternative?
MR. CONNER: No, Your Honor, it's not. Your Honor, if the Court -- I can't stop the Court from doing what the Court wants to do. That's obvious. I'm not going to try to. Well, I will appeal everything.
What I would suggest is that we go ahead and proceed on Friday. I would request, and I assume the Court would like trial briefs in regard to this, and what we will ask the Court to do is to reconsider this ruling.
THE COURT: Okay. In order to reconsider, there has to be a ruling on the Court's minutes.
All right. This is what we're going to do. You draw an order granting possession. You both can file briefs. Next Friday I will hear your motion to reconsider.
MR. CONNER: So you're giving them

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possession today?
THE COURT: I'm giving them a right to draw an order, pending your motion to reconsider.
MR. CONNER: Okay. So the possessory order will not be entered until Monday -- I'm sorry, Friday of next week.
THE COURT: No. He'll submit an order on Monday or Tuesday, you'll get it, you'll have the right to present an order, and I'll sign it after the period we hold it. But you will be here Friday to ask me to reconsider that order.
MR. JACKSON: All right. Your Honor, just so I understand, I will draw one order that grants the motion in limine, excluding the evidence. And based on the representations of Tower that that was the substance of their objection to the taking, the Court awards possession to MDHA.
I will then submit the order to the Court, and Your Honor will -- won't sign it until some point next week. Then Mr. Conner's motion -- and those, I think, take some time to become effective anyway, as I remember.
THE COURT: They do.
MR. JACKSON: And Mr. Conner can then on next Friday argue a motion to reconsider that

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order.
THE COURT: Right.
MR. JACKSON: Thank you.
MR. CONNER: Your Honor, I would appreciate if the Court would note that that is a motion for -- that a summary judgment -- that this has been treated as a summary judgment. Because that's exactly what that is.
MR. JACKSON: Your Honor, Mr. Conner has told --
THE COURT: This Court has not considered it a motion to dismiss or a motion of summary judgment. I have treated it no differently than I treat hundreds of motions in limine pre-trial, whether it's a week, a month, or the day of trial. I looked at the evidence. I looked at it, and I limited what you were going to put on.
Now, do we understand where we are for next Friday?
MR. CONNER: I don't, Your Honor.
THE COURT: I thought you wanted to file a motion and a brief on a petition to rehear?
MR. CONNER: I will, Your Honor. In doing so, will I have argument on that when?
THE COURT: Next Friday.

MR. CONNER: Okay. Should I have witnesses here? I have witnesses from all over the country. Should I have witnesses here for that?
THE COURT: No. I'm not going to hear witnesses on petition to rehear. I don't hear witnesses on Friday, or on motions.
MR. CONNER: I thought that's when our trial was scheduled, Your Honor.
THE COURT: I'm sorry?
MR. CONNER: On Friday, I thought that's when our trial was scheduled.
THE COURT: Wait a minute. Do you want the trial on Friday or do you want your motion to reconsider or do you want both?
MR. CONNER: Well, Your Honor, I think I know what your ruling is going to be, Your Honor.
MR. JACKSON: It seems to me that Mr. Conner -- the reason -- the Court hasn't treated this as a motion for summary judgment. The Court ruled on an evidentiary objection.
Mr. Conner advised the Court that he had no other proof to offer, so therefore, the Court has determined there is no reason to have a possession hearing next Friday, and instead we'll hear Mr. Conner's argument as to whether the Court

was incorrect in the Court's ruling today.
MR. CONNER: Your Honor, I would appreciate this: I need -- before I make an admission on behalf of my client, I'd like to talk to my client in that regard.
THE COURT: Certainly you would. I'll agree with that.
MR. CONNER: So I would prefer for the order not to reflect that I am in agreement that the possessory order should go down because of this ruling on the motion in limine.
THE COURT: I don't think he intended to put that in there.
MR. CONNER: I think he did.
MR. JACKSON: No, Your Honor. I was simply summarizing what I thought I heard Mr. Conner say earlier. The order is just going to say the motion is granted and that possession will be awarded to MDHA, et cetera, with all of the other legal -- I won't put any representations about Mr. Conner.
THE COURT: That's redundant.
MR. JACKSON: The transcript will speak for itself.
THE COURT: It will.

All right. We're at the point that you want to see a copy of his proposed order and you want to talk to your client.
MR. CONNER: Yes, Your Honor.
THE COURT: Then you'll notify the Court on Monday how you two want to proceed.
MR. CONNER: Your Honor, I guess with respect to my expert in regard to blight, what do I need to do with that?
THE COURT: I can't make that decision for your client and for you.
MR. CONNER: I understand that, Your Honor. But if I'm going --
THE COURT: You have to talk to your client and make a decision on how you're going to proceed at this point. Once you make the decision -- then you have to make a decision about your expert.
You all drive very safely and watch out for all of the idiots.
MR. CONNER: Thank you.
MR. JACKSON: Thank you.
(At which time the proceedings were adjourned.)

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REPORTER'S CERTIFICATE

I, Jerri L. Porter, RPR, CCR, Notary Public and Court Reporter, do hereby certify that I recorded to the best of my skill and ability by machine shorthand all the proceedings in the foregoing transcript, and that said transcript is a true, accurate, and complete transcript to the best of my ability.

I further certify that I am not an attorney or counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

SIGNED this 1st day of February, 2010.

Jerri L. Porter, RPR, CCR

My commission expires: 4/12/2010

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EDWARD R. ROCHE, CLERK

STATE OF TENNESSEE

I, **RICHARD R. ROOKER,** Clerk of the Circuit Court for Davidson County, in the State aforesaid, do hereby certify that the foregoing is a true and correct copy of the order heretofore entered in the THIRD Circuit Court for Davidson County, Tennessee, on the 05 day of FEBRUARY , 2010 , in the Case Number 09C3636 between METROPOLITAN DEVELOPMENT AND HOUSING AGENCY Plaintiff, and TOWER MUSIC CITY II, LLC ET.AL Defendant, as same remains of record in the Minutes of said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at office, in Nashville, the 08 day of FEBRUARY in the year two thousand ten and in the 233rd year of American Independence.

RICHARD R. ROOKER, Clerk,

By _____ Deputy Clerk

SEAL

