USE IT OR LOSE IT: MUNICIPAL TAKINGS OF SCHOOL DISTRICT PROPERTY IN *VILLAGE OF WOODBRIDGE V. BD. OF EDUC.*, 933 N.E.2D 392 (ILL. APP. CT. 2010)

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I. INTRODUCTION

Eminent domain procedures are not a modern legal concept; there is historical evidence to suggest the practice of taking private property for public use stretches as far back as the second century B.C.E.[1] Medieval lords in England were required by "royal orders to hold an inquiry" when private land had been taken without compensation.[2] Early colonial statutes and decrees uniformly stood for the proposition that the sovereign may take private land for public use, but differed on whether just compensation to the private owner was required.[3]

Today, federal eminent domain authority emanates from the Takings Clause in the Fifth Amendment of the Constitution, which states "nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[4] While the plain text of the Fifth Amendment speaks only to private property taken for public use, the Supreme Court "long ago rejected any literal requirement that condemned property be put into use for the general public," thus creating the possibility that private property could be taken for limited private uses.[5]

The Second District Appellate Court in *Woodridge v. Board of Education* was essentially forced to choose between statutory authorizations given to both School District 99 (District) and the Village of Woodridge

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1. SUSAN REYNOLDS, BEFORE EMINENT DOMAIN: TOWARD A HISTORY OF EXPROPRIATION OF LAND FOR THE COMMON GOOD 17 (2010).
2. *Id*. at 39.
3. *Id*. at 79.
4. U.S. CONST. amend. V.
5. Kelo v. City of New London, 545 U.S. 469, 479 (2005) (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984)).

(Village) by the state legislature.[6] The District was holding the property for investment purposes, while the Village sought to take the property for use in their town center.[7] While the Second District stated "the legislature has directed us regarding how to resolve this issue,"[8] and that their decision did not "impermissibly intrude into the realm of the legislature,"[9] the holding failed to acknowledge that the legislature had also given school districts authority to determine whether "a site or building has become unnecessary, unsuitable or inconvenient for a school."[10] The court's determination that this dispute is justiciable[11] was correct insofar as the judiciary was not "divest[ed] . . . of authority over disputes arising under" the municipal condemnation statute.[12] Municipalities' ability to take property from school districts creates unnecessary friction between state entities, and this case shows courts *can* resolve such friction, but a statutory solution would be more efficient in the long term.

The Second District's finding that holding property for investment purposes is not a "use already existing"[13] was technically correct, but the Court's doubt as to whether municipalities will "suddenly go on a condemnation spree"[14] marginalizes school districts' need for discretion to determine how to best use their own property.[15] *Woodridge v. Board of Education* illustrates that eminent domain disputes initiated by one public agency against another public agency (interagency disputes) can produce complex, protracted litigation and consume the fiscal resources of both corporate municipalities and public school districts.

This casenote provides an overview of Illinois' municipal condemnation statutes and the majority opinion's central holding in *Woodridge*. Critical tax dollars would be saved by revising Illinois' current statutes permitting municipal condemnation of school district property with a focus on requiring ballot measures for interagency eminent domain actions involving large or expensive parcels of real property.

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6. Vill. of Woodridge v. Bd. of Educ. for Cmty. High Sch. Dist. 99, 933 N.E.2d 392 (Ill. App. Ct. 2010).
7. *Id*. at 396-97.
8. *Id*. at 404.
9. *Id*.
10. 105 ILL. COMP. STAT. 5/10-22.13 (2006).
11. *Vill. of Woodridge*, 933 N.E.2d at 403-06.
12. *Id*. at 405.
13. 65 ILL. COMP. STAT. 5/11-61-2 (2006).
14. *Vill. of Woodridge*, 933 N.E.2d at 409.
15. *See* 105 ILL. COMP. STAT. 5/10-20, 5/10-22.13 (2006).

II. BACKGROUND

Illinois courts have long recognized that the legislature may delegate to municipalities the authority to initiate eminent domain actions.[16] Early cases in many jurisdictions held property already devoted to a public use was categorically exempt from eminent domain proceedings absent legislative authorization to the contrary.[17] Current Illinois statutes do, in at least two places, explicitly permit municipal corporations to take public property for alternate public uses.[18] The court in *Woodridge* was interpreting a more specific and narrowly applicable municipal condemnation statute (*Woodridge* statute), as compared with the municipal eminent domain authority contained in the Local Improvement Act.[19] The Local Improvement Act's municipal condemnation statute and the *Woodridge* statute are compared herein because the former is accompanied by a larger host of common law authority supporting the general rule that municipalities may take property already devoted to another public use. The condemnation authority given to municipalities in the Local Improvement Act is also broader than the eminent domain authority contained in the *Woodridge* statute.[20] As will be discussed later, these two statutory sources of municipal eminent domain authority should be placed within the same statute to streamline sources of such authority and clarify the legislature's intent.

A. Illinois' Municipal Condemnation Statutes

The municipal condemnation statute at issue in *Woodridge* states, "[e]stablishment, improvement, and vacation of streets, sidewalks, wharves, and parks" by the Illinois legislature, falls within the broad ambit of "corporate powers and functions."[21] This statute presumably gives Illinois municipalities the power to initiate condemnation proceedings against several types of public and private entities.[22] Without explicit statutory

16. *See* Chicago & N.W. Ry. Co. v. City of Chicago, 37 N.E. 842, 852 (Ill. 1894); Chicago & Alton R.R. Co. v. Joliet, Lockport & Aurora R.R.Co., 105 Ill. 388, 402 (1882).
17. *See* Vt. Hydro-Elec. Corp. v. Dunn, 112 A. 223, 227-28 (Vt. 1921); City of Albuquerque v. Garcia, 130 P. 118, 120 (N.M. 1913); City of Fort Worth v. Burnett, 115 S.W.2d 436, 440-41 (Tex. App. 1938).
18. *See* 65 ILL. COMP. STAT. 5/11-61-2 (2006); 65 ILL. COMP. STAT. 5/9-2-15 (2006).
19. *Id*.
20. 65 ILL. COMP. STAT. 5/9-2-15 (2006).
21. 65 ILL. COMP. STAT. 5/11-61-2 (2006).
22. 65 ILL. COMP. STAT. 5/9-2-15 (2006).

authorization, state agencies have no power to condemn public property.[23] The plain text of the statute is as follows:

> The corporate authorities of each municipality may vacate, lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds; and for these purposes or uses, to take real property or portions thereof belonging to the taking municipality, or to counties, school districts, boards of education, sanitary districts or sanitary district trustees, forest preserve districts or forest preserve district commissioners, and park districts or park commissioners, even though the property is already devoted to a public use, when the taking will not materially impair or interfere with the use already existing and will not be detrimental to the public.[24]

Municipalities cannot condemn public property for other uses "which interfere with the duty of preparing them for public use or to meet the public necessities."[25] This statute confers upon municipal corporate authorities the power to condemn property for various improvements and is primarily used for road construction and improvement.[26]

The Local Improvement Act, in its current form, permits "that private or public property [may] be taken or damaged for public use" by municipalities.[27] Early Illinois cases recognized that only private property could be taken under the Local Improvement Act, a statute giving municipalities broad authority to condemn private property.[28] Prior to the twentieth century, railroads in Illinois had statutory authority to "take real estate for railroad purposes," but this eminent domain power did not, at that time, extend to property already devoted to a public use.[29]

In *City of Moline v. Greene*, the Illinois Supreme Court extended this reasoning and refused to permit the city of Moline to take a ten-foot strip of public library property in order to widen an existing street.[30] *Greene* was decided in 1911, when the Local Improvement Act did not include language allowing one public entity to take property from another public entity.[31] Later statutory revision to the Local Improvement Act was recognized by Illinois courts as permitting the taking of public property for another public

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23. *See* Dept. of Pub. Works & Bldgs. v. Ells, 179 N.E.2d 679, 680 (Ill. 1962).
24. 65 ILL. COMP. STAT. 5/11-61-2 (2006).
25. People *ex rel*. Mather v. Marshall Field & Co., 107 N.E. 864, 868 (Ill. 1915).
26. *See generally* Jacobs v. City of Chicago, 244 Ill. App. 132, 136-37 (Ill. App. Ct. 1927).
27. 65 ILL. COMP. STAT. 5/9-2-15 (2006).
28. City of Moline v. Greene, 96 N.E. 911, 913 (Ill. 1911).
29. Ill. Cent. R.R. Co. v. Chicago B. & N. R. Co., 13 N.E. 140, 144 (Ill. 1887).
30. *Greene*, 96 N.E. at 912.
31. *Id*. at 913.

use.[32] The broad grant of eminent domain power given under the Local Improvements Act is unavailable in the *Woodridge* statute, however, because the condemnee is a school district.[33]

When compared to the public library in *Greene*,[34] it *appears* as though eminent domain actions against school districts, park districts, and the like would only be authorized under the *Woodridge* statute.[35] But the Illinois Supreme Court, in its *Group Five* decision, allowed a city to take public property owned by a community college under the Local Improvements Act without requiring the city to prove the taking would not materially impair the college's already existing use of the property or whether the taking would be detrimental to the public.[36] The ruling in *Group Five* was handed down almost twenty years after the *Woodridge* statute was enacted,[37] and the problem is that the municipality in *Woodridge* could have proceeded under the Local Improvements Act, which by its less restrictive language[38] would essentially render portions of the *Woodridge* statute pertaining to school, park, and sanitation districts meaningless.[39] The Illinois Supreme Court, professedly intent on preventing a statute's language from being "rendered meaningless or superfluous," did just that by failing to require the municipality in *Group Five* to proceed under the more restrictive *Woodridge* statute.[40]

The Local Improvement Act's condemnation statute and the *Woodridge* condemnation statute contain two important distinctions. First, the statute at issue in *Woodridge* only allows municipal authorities to take public property already in use "when the taking will not materially impair or interfere with the use already existing and will not be detrimental to the public."[41] The Local Improvement Act does not limit municipal power to take public property based on a material interference or impairment of the currently existing use, but only provides for just compensation upon such a taking.[42] Second, there is no specified group of public entities enumerated

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32. Petition of City of E. Peoria, 413 N.E.2d 472, 475-76 (Ill. App. Ct. 1980).
33. Vill. of Woodridge v. Bd. of Educ. for Cmty. High Sch. Dist. 99, 933 N.E.2d 392, 396 (Ill. App. Ct. 2010).
34. *Greene*, 96 N.E. at 912.
35. 65 ILL. COMP. STAT. 5/11-61-2 (2006).
36. City of E. Peoria v. Grp. Five Dev. Co., 429 N.E.2d 492, 494 (Ill. 1981).
37. *Id*. at492; 65 ILL COMP. STAT. 5/11-61-2 (2006)(*Group Five* was handed down in 1981, while the *Woodridge* statute was enacted in 1961).
38. *Id*.
39. *Id*. (municipalities can take from ". . . school districts, boards of education . . . forest preserve districts . . . and park districts . . . ").
40. *Grp. Five Dev. Co.*, 429 N.E.2d at 494.
41. *Id*.
42. 65 ILL. COMP. STAT. 5/9-2-15 (2006).

in the Local Improvement Act's condemnation statute.[43] The fact that the legislature included a list of public agencies in the *Woodridge* statute suggests an intention to provide additional protection against municipal takings for this limited class of public entities, including sanitation, park, and school districts.[44]

B. School District Legislative Control Over Real Property

The Illinois School Code grants school districts broad authority to exercise powers "that may be requisite or proper for the maintenance, operation, and development of any school or schools under the jurisdiction of the board."[45] Among the powers granted to school districts is authority "to decide when a site or building has become unnecessary, unsuitable, or inconvenient for a school."[46] School districts and boards of education have powers similar to a municipal corporation.[47] In fact, the Illinois School Code states that school districts are "bod[ies] politic and corporate."[48] Like municipal corporations, school districts derive their power from the state legislature.[49]

School districts can be required to sell district property to another district or municipality when first presented with a petition from a municipality signed by ten percent of voters in the District.[50] After receiving such a petition, a school district is required to certify a proposition for the sale to voters, and the school district is permitted to "fix the price therefore."[51] This statute will be analyzed *infra* as a potential solution to interagency eminent domain disputes involving school districts.[52] Both the Illinois legislature and courts have clearly enunciated that public schools have a degree of autonomy in conducting their affairs; the bounds and limitations of that autonomy shape the *Woodridge* dispute.

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43. *Id*.
44. 65 ILL. COMP. STAT. 5/11-61-2 (2006).
45. 105 ILL. COMP. STAT. 5/10-20 (2006).
46. 105 ILL. COMP. STAT. 5/10-22.13 (2006).
47. Tyska v. Bd. of Educ. Twp. High Sch. Dist. 214, 453 N.E.2d 1344, 1352 (Ill. App. Ct. 1983).
48. 105 ILL. COMP. STAT. 5/10-2 (2006).
49. *See* Winnebago Cnty. v. Davis, 509 N.E.2d 143, 144 (Ill. App. Ct. 1987).
50. 105 ILL. COMP. STAT. 5/5-24 (2006).
51. *Id.*
52. *See* discussion *infra* Part IV. B. 1.

III. EXPOSITION

A. Statement of Facts

The Village initiated condemnation proceedings against the parcel on May 23, 2005.[53] The District countered with a resolution outlining its continued need for the property on August 15, 2005.[54] In the resolution, the District noted:

> [Deprivation of] the ability to use the property in the future for school facilities; that the District will not realize the full value of the property in an eminent domain action; that the District will not be able to purchase comparable property with the proceeds of an eminent domain action; and that the 'future taxable value of the [p]roperty will be lost.'[55]

The District also determined that condemnation "will materially impair or interfere with the uses already existing, such current uses including but not limited to providing for outdoor educational opportunities and the real estate needs of the District."[56] The District contended that its own legislative findings in the course of adopting the resolution should be given deference by the trial court.[57]

In a hearing on the District's traverse and motion to dismiss, the District's president testified that bids were solicited in an attempt to sell the property.[58] The District president also testified that the District had voted in 1997 to build a new high school on the parcel, but the school was not constructed on the parcel due to "the failure of a referendum in 1997."[59] The District superintendent testified that a lack of popular sentiment and inadequate funding both contributed to the District's failure to build a new high school on the parcel.[60] The superintendent stated both the District's decision to seek bids for the parcel and "the fact that the District had determined what it would do with the proceeds of a sale" was not proof the District had conclusively decided to sell the property.[61] Testimony from a district board member supported the Village's contention "that the District

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53. Vill. of Woodridge v. Bd. of Educ. for Cmty. Sch. Dist. 99, 933 N.E.2d 392, 396 (Ill. App. Ct. 2010).
54. *Id*.
55. *Id*.
56. *Id*.
57. *Id*.
58. *Id*.
59. *Id*. at 397.
60. *Id*.
61. *Id*. at 398.

had no present need for a third high school," but also the District's position that they had a continued need for the property.[62]

The Village's director for parks and recreation testified that the Village had contracted with a design group to draft plans for a new "town-center area," which would include the District's parcel.[63] The park district maintained the property under a long-standing lease with the District, and used the property for "soccer practices, hay rides, garden plots," and a "summertime jubilee."[64] However, the parks director also testified that a new high school or athletic facility "would comport with the park district's developmental plan," and that the design group hired by the Village had noted "that the District's needs would have to be considered."[65]

The Village administrator's testimony revealed no intent to change the existing use of the property by the park district, but that he believed the District intended to sell the property to a developer for use as "multi-family townhomes."[66] The administrator further testified that the Village "wanted the District to take the property off the market," and that the Village might use the property for additional facilities."[67] Another district board member testified that acquiring additional property near the current high schools would be "too costly."[68]

The circuit court determined that the Village's condemnation of the property would not "materially interfere with an existing use or be detrimental to the public."[69] The circuit court noted that it was not determining whether the Village would best use the property, only applying the municipal condemnation statute, and that the District had never used the property for educational purposes.[70] Thus, because there was no present use of the property, there was no "existing use" of the property, notwithstanding the District's efforts to sell or build a new high school thereon.[71] The circuit court's denial of the District's traverse, motion to dismiss, and motion to reconsider, was appealed to the Second District Appellate Court (Court).[72]

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62. *Id*.
63. *Id*.
64. *Id*.
65. *Id*. at 399.
66. *Id*.
67. *Id*. at 400.
68. *Id*.
69. *Id*. at 402.
70. *Id*.
71. *Id*.
72. *Id*.

B. Majority Opinion

The Court identifies five major arguments advanced by the District. First, the District contended that they and the Village both passed valid legislative determinations as to the best use of the property, and the court would be deciding a nonjusticiable political question to choose between the two entities.[73] Second, that the trial court impermissibly denied equal discovery to both parties.[74] Third, that the municipal condemnation statute did not actually authorize the taking contemplated in the instant dispute.[75] The fourth and fifth arguments advanced by the District in this case pertain to appraisal testimony used by the trial court to ascertain fair market value of the parcel.[76]

Illinois courts cannot decide political questions.[77] However, the test for determining whether a dispute presents a political question is not the political nature of the rights and questions involved.[78] The importance of "attributing finality to the actions of the political departments and also the lack of satisfactory criteria for a judicial determination" are of paramount importance.[79] The Court found plenary criteria in the municipal condemnation statute for determining whether the Village can take the parcel through eminent domain.[80] The Court also rejected the District's contention that they are also statutorily authorized "to determine whether a taking will be detrimental to the public."[81] The Court held that, if the District's statutory authority to determine when property is no longer needed[82] were given deference, then the District would essentially be given ultimate authority to determine the outcome of the dispute.[83] The Village could have presented the District with a petition, signed by ten percent of district voters, evincing a desire for the property, at which point the District would have been required to pass a resolution for the sale of the parcel.[84] While the Village could have taken the parcel in this manner, they were not

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73. *Id*. at 403.
74. *Id*. at 406.
75. *Id*. at 407.
76. *Id*. at 403. The Illinois Appellate Court affirmed the circuit court's assessment of the parcel's fair market value. *Id*. Portions of the appeal centered on appraisal and valuation are mentioned only briefly herein.
77. Roti v. Washington, 500 N.E.2d 463, 465 (Ill. App. Ct. 1986).
78. *Id*.
79. Baker v. Carr, 369 U.S. 186, 210 (1962).
80. *Vill. of Woodridge*, 933 N.E.2d at 405; *Cf.* Moore v. Grafton Twp. Bd. of Trs., No. 2–11–0499, 2011 WL 3524417, *2 (Ill. App. Ct. Aug. 8, 2011) (citing *Woodridge* while holding no clear criteria for judicial determination existed in statute authorizing appointment of township attorney).
81. *Id*.
82. 105 ILL. COMP. STAT. 5/10-22.13 (2006).
83. *Vill. of Woodridge*, 933 N.E.2d at 405.
84. *Id*.; 105 ILL. COMP. STAT. 5/5-24 (2006).

required to utilize a petition, and could proceed under the municipal condemnation statute.[85]

Because the trial court did not rely on the Village's ordinance permitting the eminent domain taking, the District was not prejudiced by their inability to inquire through depositions as to the Village's reasons for enacting the ordinance.[86]

The municipal condemnation statute had not been judicially interpreted under circumstances similar to the instant dispute.[87] The plain language of a statute is the best way to determine the intent of the legislature in enacting the statute.[88] Even though the Village may intend to use the parcel for expansion of police or public-works facilities, this use is consistent with other improvements of public grounds as authorized by the statute.[89] The Court again flatly rejects the District's argument that their own legislative findings as to continued need for the parcel should be accorded deference, stating that the municipal condemnation statute commits "to the courts the question of whether a taking would be detrimental to the public."[90] The Court did not reach the question of whether there was material impairment or interference of the use already existing,[91] because the District was not presently using the property.[92]

The District argued that holding the parcel as an investment, or for potential future use as the site of a new high school or athletic facility, would be a "use already existing" under the municipal condemnation statute.[93] However, the District has never made use of the parcel, other than leasing the parcel to the park district for the past thirty years.[94] Other jurisdictions have held that property "about to be lawfully appropriated for a public use" may not be taken by eminent domain.[95] However, the intent to use property for a future public use should be clearly cognizable and "evidenced by conduct which practically guarantees its speedy consummation."[96]

Next, the Court defines the term "use already existing."[97] Generally, statutes should not be construed so as to render a portion or all of a statute

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85. *Vill. of Woodridge*, 933 N.E.2d at 405-06.
86. *Id*. at 406.
87. *Id*. at 407.
88. *Id*. at 407 (citing Abruzzo v. City of Park Ridge, 898 N.E.2d 631, 636 (Ill. 2008)).
89. *Id*. at 407.
90. *Id*.
91. 105 ILL. COMP. STAT. 5/11-61-2 (2006).
92. *Vill. of Woodridge*, 933 N.E.2d at 409-10.
93. *Id*. at 408.
94. *Id*.
95. E. Hartford Fire Dist. v. Glastonbury Power Co., 102 A. 592, 594 (Conn. 1917).
96. *Id*.
97. *Vill. of Woodridge*, 933 N.E.2d at 408-09.

meaningless.[98] To permit holding property for a future use as constituting a use already existing would, according to the Court, "eviscerate" the legislative intent behind the municipal condemnation statute.[99] Any ownership of property under the District's rationale could be considered use already existing, and precludes condemnation actions in almost all instances, because any property could be claimed held for investment purposes.[100]

The District appealed the circuit court's refusal to allow cross-examination of a village appraiser to impeach the Village appraiser's testimony regarding the value of the parcel.[101] The District wished to impeach the Village appraiser by introducing evidence of an offer from a developer, with a $10 million base price that would increase depending on the number of residential lots developed on the parcel.[102] The circuit court ruled the offer had low probative value and may confuse the jury.[103] Although the Court found no abuse of discretion in the lower court's ruling, it nonetheless held the developer's offer was speculative, because no evidence could be proffered to show how many residential lots would be purchased, and that the offer was not *bona fide*, because the developer retained the right to cancel the offer within ninety days.[104]

The Court likewise affirmed the circuit court's refusal to allow one of the District's appraisers to testify as to the value of the property.[105] Even if the lower court had erred in refusing to admit testimony from an additional district appraiser, the error was harmless, because the excluded appraiser valued the parcel at approximately $2 million less than the District's appraiser that was allowed to testify.[106] The District argued that it was prejudiced by only being permitted to admit testimony of one appraiser while the Village put two appraisers on the witness stand.[107] This argument, lacking precedential support, was flatly rejected.[108]

The Court affirmed all of the lower court's rulings in this case, although as will be discussed below, the technical legal sufficiency of both courts' decisions may be outweighed by the problems created by judicial resolution of interagency eminent domain disputes.

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98. Kraft, Inc. v. Edgar, 561 N.E.2d 656, 661 (Ill. 1990).
99. *Vill. of Woodridge*, 933 N.E.2d at 409.
100. *Id*.
101. *Id*. at 412.
102. *Id*.
103. *Id*.
104. *Id.* at 411-12.
105. *Id*. at 413.
106. *Id*. at 412.
107. *Id*.
108. *Id*. at 413.

IV. ANALYSIS

The justiciability question is something of a red herring within this case because, although the Court is adequately equipped to analyze and adjudicate this dispute, it is the occurrence of the dispute itself that is problematic. Two statutory revisions could curtail interagency eminent domain disputes involving school districts. First, the petition and ballot measure provision in the Illinois School Code[109] could be rewritten to clearly state the statute is the sole means a municipality must utilize to take school district property. Second, the *Woodridge* statute's language pertaining to school districts and other agencies holding large tracts of land could be incorporated into the municipal takings statute in the Land Improvement Act to clarify the legislature's reasons for adding requirements like the "use already existing" provision[110] in the *Woodridge* statute not appearing in the Local Improvement Act.

A. Justiciability

The Court in *Woodridge* affirmed the circuit court's determination that the dispute was justiciable, largely because a contrary holding would relinquish judicial authority over interagency disputes.[111] The political question doctrine has fallen out of favor with the Supreme Court in recent decades, and more courts are following a tendency to exert their authority in matters of statutory interpretation rather than deferring to legislative interpretive judgments.[112] But when one public agency asserts eminent domain procedures against another public agency, there are clearly political branches of government on both sides of a dispute. The Illinois Supreme Court has held questions involving educational quality are precluded from judicial determination by the political question doctrine.[113] The eminent domain procedures initiated in *Woodridge* may involve two public agencies, but this fact does not automatically create a nonjusticiable political question.[114] While a judicial determination of the rights asserted, both by the Village and the District, may not be strictly precluded by the

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109. 105 ILL. COMP. STAT. 5/5-24 (2006).
110. 65 ILL. COMP. STAT. 5/11-61-2 (2006).
111. *Vill. of Woodridge*, 933 N.E. at 405.
112. Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 301-03 (2002) (outlining declining invocation of the political question doctrine by the U.S. Supreme Court); *but see* Moore v. Grafton Twp. Bd. of Trs., No. 2–11–0499, 2011 WL 3524417, *2 (Ill. App. Ct. Aug. 8, 2011) (recent invocation of political question doctrine).
113. Comm. of Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191-92 (Ill. 1996).
114. *See generally* Vill. of Woodridge v. Bd. of Educ. for Cmty. Sch. Dist. 99, 933 N.E.2d 392 (Ill. App. Ct. 2010).

political question doctrine, it does set a precedent that municipalities can take school district property, at least when the property is held strictly for investment purposes. Moreover, because the political question doctrine logically operates to remove adjudication of certain disputes from the judicial branch,[115] the legislative branch is often left as the sole means by which interagency eminent domain disputes can be discouraged.

The District attempted to use the property for a new school, but citizens voted down several referenda that would have provided funding to build a new high school on the parcel.[116] A district appraiser testified the parcel would have a fair market value in excess of twenty million dollars.[117] Note that the DuPage County Regional Office of Education expended, in total, $238,352 during the fiscal year ending June 30, 2010.[118] The fair market value of the parcel is nearly the same as annual direct revenues received by the District.[119] It is clear from the financial reports of the District and county education office that the value of the parcel represented a significant asset for the District. Thus, the District had more than ample justification for passing a resolution seeking to keep the property.[120]

The problem with court-determined priority for property to be used by public agencies is not a lack of cogent judicial standards for determining the propriety of a taking, but rather the counter-productive infighting between public agencies that result from resorting to adversarial proceedings. Illinois municipalities are merely "creatures of the legislature."[121] As such, municipal corporations derive their power from, and have their power defined by, the state legislature.[122] Likewise, school boards and districts also derive their "character, function, and duties" from the state legislature.[123] And school districts are also corporations or quasi-corporations.[124] Because the state legislature provides both municipal corporations and school districts with the bounds and limits of their power, the legislature is best positioned to promote a climate that discourages disputes between public agencies as to their rights to own and hold property.

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115. *See also* Nixon v. United States, 506 U.S. 224, 228 (1993) (discussing situations when courts will decline to hear "nonjusticiable" cases).
116. *Vill. of Woodridge*, 933 N.E.2d at 397.
117. *Id*.
118. Dr. Darlene J. Ruscitti, *2009-2010 Annual Report*, DUPAGE REG'L OFFICE OF EDUC. 16 (2010), http://www.dupage.k12.il.us/pdf/2010%20Annual%20Report%20Final.pdf.
119. *Comprehensive Annual Financial Report*, CMTY. CONSOL. SCHOOL DIST. 89 (June 30, 2010), http://www.d89.dupage.k12.il.us/teachers/videos/Finstmt063011.pdf.
120. *Vill. of Woodridge*, 933 N.E.2d at 396.
121. Groenings v. City of St. Charles, 574 N.E.2d 1316, 1321 (Ill. App. Ct. 1991).
122. Harris Trust & Sav. Bank v. Vill. of Barrington Hills, 549 N.E.2d 578, 581 (Ill. 1989).
123. E. St. Louis Fed'n of Teachers v. Am. Fed'n of Teachers, 687 N.E.2d 1050, 1059 (Ill. 1997).
124. *Id*.

B. Potential Statutory Revisions

1. Utilizing the Existing Ballot Measure Statute

Two possible statutory solutions are apparent. First, the legislature could enunciate an intention that condemnation proceedings by a municipality against a school conform to already existing statutory procedures.[125] Specifically, the legislature could alter the ballot measure provision of the School Code, to require a school district to sell property to another school district or municipal corporation.[126] The current statute reads in pertinent part, as follows:

> Whenever a petition is presented to the school board of a school district requesting the sale of school grounds and buildings to another school district or other municipality, which petition is signed by 10% of the voters of the district, the school board of the district shall adopt a resolution for the sale of such school grounds and buildings, and fix the price therefore . . ..[127]

Potential revisions to this statute would include inserting mandatory phrasing, for example: "When a corporate municipality or other school district seeks to take real property from [a school district, sanitation district, park district etc.], a petition *must* be presented . . .."

Perhaps the difficulty and expense in requiring a petition and ballot measure to sell school district property weighed in the Court's determination that the ballot measure provision was not the sole means by which a corporate municipality could take school district property.[128] The Village passed a resolution including statistics from a survey claiming "the sale of the Woodridge parcel was favored by nearly a 2-1 margin" by voters.[129] However, to make this the only means by which a municipal corporation can take school district property would deter future legal disputes over whether property was devoted to uses already existing, or whether a taking would materially interfere with such existing uses. There

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125. 105 ILL. COMP. STAT. 5/10-22.13 (2006) (authorizes school boards to determine when property has become "unnecessary, unsuitable, or inconvenient" for a school district); 105 ILL. COMP. STAT. 5/5-24 (2006) (requiring petition signed by 10% of the District's voters to initiate ballot measure to sell school district property to another school district or municipality).

126. 65 ILL. COMP. STAT. 5/5-24 (2006).

127. *Id*.

128. Vill. of Woodridge v. Bd. of Educ. for Cmty. Sch. Dist. 99, 933 N.E.2d 392, 406 (Ill. App. Ct. 2010).

129. *Resolution Encouraging Additional Fiscal Planning by District 99*, R77-2004, VILL. OF WOODRIDGE, ILL., http://www.vil.woodridge.il.us/uploadedFiles/News/ENews_and_PR/2004/Press_Releases/Weekly_Resolution.pdf.

is no question the court has judicially manageable standards to uncover abuses of discretion and unreasonable municipal purposes in public takings,[130] but municipalities and school districts are state corporations, and contentious decisions of both agencies are often referred to voters via ballot measure.[131] Additionally, a lack of political will to approve an interagency taking, especially when public school property is involved, could be considered a democratic signal to both sides that the *status quo ante* should be preserved.

Commentators have expressed concern that direct voting on *private* takings, such as those intended for economic development projects, could be problematic because not all property owners would be benefitted or burdened equally by a taking of one private owner's property.[132] The same confidence that could be placed in the ability of local voters to "reach more nuanced judgments" as to the propriety of a public taking of private property, on the other hand, can be extended to voters' judgments regarding a taking of public property for public use.[133] An important limitation on direct voting for eminent domain actions would arise when a parcel of land is small or inexpensive. Ballot measures should not be required for every interagency taking, as voters would likely become frustrated when asked to vote on tens or hundreds of interagency takings of small strips of land or land with little value. Moreover, the cost of voting on every interagency eminent domain action would prove cost prohibitive. Minimum dollar values for parcels would have to be inserted into the statute, in addition or as an alternative to minimum acreage requirements for a direct vote on condemnation actions.

2. Clarification of Current Municipal Takings Statutes

A second viable option to reduce litigation between public entities in Illinois would be to revise statutes like the *Woodridge* statute and the Local Improvement Act's condemnation statute. The legislature has placed the District in a difficult position. Unable to pass a referendum to fund a new high school, the District was forced to sell property that could have otherwise been used or sold (perhaps at a higher price) to private developers.[134] School districts now bound by *Woodridge* will have to take a second look at their current real property holdings to determine whether its current use is primarily for investment purposes.

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130. *Vill. of Woodridge*, 933 N.E.2d at 404.
131. Thomas W. Merrill, *Direct Voting by Property Owners*, 77 U. CHI. L. REV. 275, 276 (2010).
132. *Id*. at 303.
133. *Id*. at 301-02.
134. *Vill. of Woodridge*, 933 N.E.2d at 399.

Consider the *Woodridge* statute as a whole: the bulk of the statute specifically addresses takings for grading, paving and improvement of roads and sidewalks,[135] but the statute was used to take a parcel of district property potentially worth more than twenty million dollars.[136] The Local Improvements Act gives broad authority for public agencies to condemn other public agency property, but contains no limiting language concerning road improvements.[137] It appears as though there is a possible wholesale misuse of the *Woodridge* statute in this instance; the legislature may have intended this statute be used only for the taking of property for roads or sidewalks, a contention neither advanced nor addressed by the Court.[138] The history of the Local Improvements Act reveals a time when the statute was not construed as permitting public agencies to take public property.[139] Public agencies were only permitted to take other public property after a 1933 amendment to the Local Improvements Act adding the phrase "or public" to the types of property that could be condemned.[140] The text of the *Woodridge* statute and the Local Improvement Act's provisions pertaining to municipal takings of public property could be synthesized into one statute, thus creating a clear source of municipal authority to take public property.[141] The *Woodridge* statute contains condemnation authority pertinent to "the taking municipality, or to counties, school districts, boards of education, sanitary districts or sanitary district trustees, forest preserve districts or forest preserve district commissioners, and park districts or park commissioners."[142] This list of agencies can be linked by a generally similar trait: these entities tend to hold large amounts of property. The Illinois Supreme Court has upheld a taking by a municipality from a community school district under the Local Improvement Act,[143] which contains no limiting language that may require courts to consider potential public detriment created by the taking or whether material impairment of a property use already existing would occur.[144] If the legislature intends to restrict municipal takings from school districts, the separate sources of municipal condemnation authority should be consolidated into one cohesive statute.

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135. 65 ILL. COMP. STAT. 5/11-61-2 (2006).
136. *Vill. of Woodridge*, 933 N.E.2d at 392, 413.
137. 65 ILL. COMP. STAT. 5/9-2-15 (2006).
138. *See Vill. of Woodridge*, 933 N.E.2d 392.
139. *See generally* City of Edwardsville v. Madison Cty., 96 N.E. 238 (Ill. 1911).
140. Petition of City of E. Peoria, 413 N.E.2d 472, 475 (Ill. App. Ct. 1980).
141. 65 ILL. COMP. STAT. 5/11-61-2 (2006); 65 ILL. COMP. STAT. 5/9-2-15 (2006).
142. 65 ILL. COMP. STAT. 5/11-61-2 (2006).
143. City of E. Peoria v. Grp. Five Dev. Co., 429 N.E.2d 492, 494 (Ill. 1981).
144. 65 ILL. COMP. STAT. 5/11-61-2 (2006).

The Village purported to have several of its own potential uses for the parcel, including a town-center and public works facility,[145] but it was extremely unclear that either the Village or the District had in place concrete and immediate plans to actually develop or change the use of the property. The lack of a "use already existing" is questionable because the District had been leasing the property to the park district for decades.[146] This was not determined to be an existing use, but the District could certainly have reasonably believed leasing the property to the park district and holding the property for investment purposes was enough activity to consider the property already in use. The political process failed the District in their efforts to build a new school on the parcel, and now an influx of new students to the District will require the purchase of property that, in the area around the current high school, would prove cost prohibitive.[147] The Village and the District resorted to costly litigation to resolve this dispute, partly because the legislature employs terms of legal art in the condemnation statute at issue, like "use already existing" and "material impairment."[148] These legislatively created agencies must pass on the added cost of litigating essentially internal disputes to the taxpayers. Moreover, Illinois is currently faced with massive budget deficits, including a 15% drop in revenue from April 2009 to April 2010.[149] When public agencies resort to the courts to resolve disputes, taxpayers will unquestionably bear the burden of resulting legal and extrinsic costs, which can skyrocket when large and expensive tracts of land are involved.

C. Lessons and Solutions

Ultimately, courts cannot fix inherent problems in legislative schemes. The eminent domain dispute in *Woodridge* does illustrate the kind of potential interagency "fratricide" warned of in other Illinois takings cases.[150] While the Illinois legislature retains broad power to define the bounds and powers of municipal corporations,[151] state power over local units of government is constrained by the U.S. Constitution.[152] The Constitutional limitations placed upon states vis-à-vis municipal

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145. Vill. of Woodridge v. Bd. of Educ. for Cmty. Sch. Dist. 99, 933 N.E.2d 392, 398, 407 (Ill. App. Ct. 2010).
146. *Id.* at 399.
147. *Id*. at 400.
148. 65 ILL. COMP. STAT. 5/11-61-2 (2006).
149. Amy Merrick, *Illinois Budget Woes Come to a Boil*, WALL ST. J (May 7, 2010), http://online.wsj.com/article/SB10001424052748703686304575228582377071698.html.
150. *Grp. Five Dev. Co.*, 413 N.E.2d at 496.
151. Groenings v. City of St. Charles, 574 N.E.2d 1316, 1321 (Ill. App. Ct. 1991).
152. Baker v. Carr, 369 U.S. 186, 230 (1962).

corporations does not mean that Illinois lacked power to grant the Village eminent domain power, but it does mean that the interagency takings at issue in *Woodridge* are subject to review by federal courts. Accordingly, federal courts may not read the political question doctrine so narrowly, recent scholarly commentary notwithstanding.[153] The gloss on the court's rejection of the political question argument for nonjusticiability may be a correct conclusion,[154] but a better solution than expensive litigation would be statutory revision or consolidation of Illinois' municipal condemnation statutes. When stating that "it is difficult for us to see how we would be intruding into matters properly committed to another branch of government," the *Woodridge* court fails to address the unnecessary costs incurred by both public agencies in litigating the eminent domain dispute.[155]

Direct voting on interagency eminent domain takings, especially takings of large or expensive tracts of land as in *Woodridge*,[156] would allow voters most directly affected by the movement of public property in their municipality or district to have the most powerful voice as to the propriety or necessity of such takings. Direct voting on interagency eminent domain takings could save both municipalities and school districts money. While not all interagency takings involve property with sufficient size or value to require a vote,[157] the parcel at issue in *Woodridge* would have been a strong candidate for a ballot measure.

There is a small chance that the Court has entirely misread the legislature's intentions in passing the *Woodridge* statute.[158] Perhaps the legislature intended for municipalities to take school district property only when necessary for road or sidewalk improvements. The statute itself is mainly devoted to roadways and sidewalks, not eminent domain takings of entire parcels of land.[159] This is an unlikely possibility given that the statute is reasonably susceptible to being read as a procedurally restrictive version of its municipal eminent domain cousin, the Local Improvements Act.[160] Illinois' interagency eminent domain procedures could be streamlined by moving all state condemnation statutes into the same statute or series of statutes, in addition to ballot measures for large or expensive tracts of land.

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153. Barkow, *supra* note 113, at 301.
154. Vill. of Woodridge v. Bd. of Educ. for Cmty. Sch. Dist. 99, 933 N.E.2d 392, 406 (Ill. App. Ct. 2010).
155. *Id*. at 405.
156. *Id*. at 411 (the jury in *Woodridge* awarded the District $14.2 million).
157. City of Moline v. Greene, 96 N.E. 911, 91 (Ill. 1911)(entire dispute centered on a 10-foot strip of land).
158. 65 ILL. COMP. STAT. 5/11-61-2 (2006).
159. *Id*.
160. *Id*.; 65 ILL. COMP. STAT. 5/9-2-15 (2006).

V. CONCLUSION

The manifest weight of statutory and judicial authority provides courts with the power, as well as the legal and factual standards by which to determine the rights and responsibilities of parties to eminent domain actions.[161] In many disputes between private individuals and public entities, courts offer an irreplaceable avenue for equitable valuation of property, as well as fair decision as to whether a taking is reasonable. However, as between two public agencies, eminent domain takings often cause more problems than they solve.

Public agency takings of other public property can result in the unnecessary expenditure of public funds, to the ultimate detriment of a citizenry already seeing a reduction in services as a result of state budget shortfalls.[162] Illinois lawmakers should reconsider the current procedural framework within which public agencies are permitted to take public property, to discourage further costly litigation, and to prevent a climate where public administrators are looking over their shoulders at other public agencies vying for their property. The factual basis relied upon by the District in *Woodridge* was not very strong: they purchased property which was never improved, and which was under a long-term lease to the Village's park district.[163] It would be difficult for the District to prove, under any circumstances, that they were currently using the parcel. The Village's proposed use of the parcel was not immediately clear, either, and it appears as though the court was perhaps punishing the District for its perceived stubbornness, in refusing to sell the parcel to the Village.[164]

The most troubling aspect of the litigation in *Woodridge* is the expenditure of public time and money on an internal dispute, a problem the already cash-strapped Illinois legislature could curtail with more exacting statutory language and clearer mandates to public agencies interested in taking other public land. Direct voting on interagency eminent domain takings would alleviate the judicial costs of such takings, and would be most efficient when a large, expensive, or otherwise desirable tract of land is involved. Current Illinois municipal condemnation statutes appear in at least two separate sections of the Compiled Statutes,[165] and consolidation to one or a series of statutes would make it easier for all public entities to know how to proceed with an interagency eminent domain proceeding.

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161. *See generally* Kelo v. City of New London, 545 U.S. 469 (2005).
162. *See* Merrick, *supra* note 150.
163. *See* Vill. of Woodridge v. Bd. of Educ. for Cmty. Sch. Dist. 99, 933 N.E.2d 392 (Ill. App. Ct. 2010).
164. *Id*.
165. *See* 65 ILL. COMP. STAT. 5/11-61-2 (2006); 65 ILL. COMP. STAT. 5/9-2-15 (2006).

When coupled with a statutory scheme that clearly enunciates the process by which a municipality may initiate a taking of other public property, limited ballot measures would reduce costs of litigation and promote judicial economy.