

Virginia Viewpoint

Property Rights, Condemnation, and Special Interests

By Donald J. Kochan, J.D.

Summary

Taking property from families to flip to commercial developers is a great way to generate increased property tax revenues and future campaign contributions. Of course, this scam makes a mockery of private property rights.

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When takings for private use are allowed, the state becomes merely an agent of coercion, with the interested buyer as its principal.

Imagine the government kicking you out of your home or business only to give your property to another private individual whom it prefers? It may seem implausible in a country like the United States, but uses of the “eminent domain,” or “condemnation,” power by government to wrest private property from one person for the benefit of special interests is hardly unheard of.

A January 10, 2003 court opinion examined this issue. In *Ottofaro v. City of Hampton*, the Virginia Supreme Court heard a case in which the City of Hampton condemned the property of private landowners, Frank and Dana Ottofaro. A small portion of the condemned property was to serve as a road. The residue of the land was to be transferred to the Hampton Industrial Development Authority, a political subdivision of the Commonwealth of Virginia. Two months after the condemnation decision was made, the Development Authority entered into an agreement with a commercial development project for the use of the former Ottofaro land as part of a retail shopping center.

The Virginia and U.S. Constitutions specifically restrict the condemnation power to “public uses,” forbidding government from taking private property unless the government proves that the property is necessary for its operation or otherwise needed to meet its obligations to the citizenry. This vital concept is too often lost on government officials and, unfortunately, on many courts.

Quoting past precedent, the Virginia Supreme Court cautioned that “a due protection for the rights of private property will preclude the government from seizing it [from] the hands of the owner, and turning it over to another on vague grounds of public benefit from the more profitable use to which the latter may devote it.”

Despite this strong language which sounds protective of property rights, the court nonetheless upheld the condemnation of the Ottofaro property against a challenge that it constituted an illegitimate “taking” for private use. The portion condemned for the road, it found, would be used by the public. That seems to pass the public use test, so long as there is no evidence the road is only necessary to provide access to a shopping mall.

However, the court’s justification for the condemnation of the rest of

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the Ottofaro property seems less convincing. The court found no evidence that the residue would be “conveyed to a private entity.” Why? Because it would be transferred to the Development Authority which, in turn, “will lease the property to a private developer.” Does filtering the ultimate transfer to private development through a Commonwealth agency really remove any potential “private use” taint?

Condemnation for private commercial development projects has long been sanctioned by many courts, so long as the legislature or a municipality can claim that the ends are in the “public interest.” Yet, governments have proven themselves to be poor economic planners and susceptible to the influences of special interests.

Regardless of whether the full factual record in the *Ottofaro* case proves the landowners’ claims, it is at least an instructive example of the potential harm inherent in the condemnation power when political entities have broad discretion in its application and commercial development is in play.

There are dangerous incentives. Suppose Company Z wants to build a new factory, but there are homes in its way. The homeowners, for reasons either economic or sentimental or both, refuse to sell.

So Company Z uses its political clout to convince the city to condemn the private property, force the owners out, and grant Company Z title or a lease. The transaction often will cost far less than if the company had to buy the property on the open market.

Municipalities have at least two incentives to engage in such transactions: first, to curry favor with private companies; and second, because the new owners will likely generate significantly more tax revenue. At the end of the process, the coercive power of eminent domain has been used to kick a private property owner off his land for the mutual benefit of the developer and the municipality.

Private negotiations in property disputes are often more costly than an investment in convincing the state to condemn. If an owner refuses to sell or demands a price higher than the interested buyer is willing to pay, the market provides no means by which the interested buyer can force the owner off the land. When takings for private use are allowed, the state becomes merely an agent of coercion, with the interested buyer as its principal.

As James Madison observed in 1792, a just government “impartially secures to every man, whatever is his own.” Without judicial reanalysis of constitutional limitations on condemnation or legislation that specifically reins in the condemnation power, private property rights in Virginia may not receive this impartial protection.

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