

PUBLIC USE VS.

Did Thomas Jefferson and his friends really intend for our City Fathers to



PUBLIC BENEFIT

take private property and re-convey it to build a private health club?

BY J. MICHAEL "MIKE" JONES, SR/WA

Right of way practitioners have a somewhat unique perspective about the sanctity of private property rights in America. These property rights frame the “universe” we work in every day. You can pick up almost any basic “Right of Way 101” training manual and somewhere near the front, you will find the following excerpt from the U.S. Constitution:

“... nor shall private property be taken for public use without just compensation.”¹

This simple phrase within the Fifth Amendment forms the very foundation of a property owner's right to receive payment for property taken for public use. In the period since the U.S. Constitution was ratified, this issue has been well established by our judicial system across the country and at every level of government. A public agency and property owner may disagree as to what constitutes "just compensation" in a given case, but it is a generally-accepted fact that just compensation must be paid. And as a last resort, our judiciary system will decide what constitutes "just compensation."

American society has become tremendously more complex than the society in which the framers of the Constitution lived. Over time, societal changes have caused some dramatic shifts in the role of our government – on all levels. Americans today demand much more from our government than did our forefathers. We expect our federal government to do far more than provide for our national defense and secure our borders (although that has taken on a much broader scope since 9/11). We demand adequate law enforcement

at all government levels. We expect our federal and state governments to work cooperatively to provide the necessary funding for good schools and transportation facilities. On the local level, our governments have jurisdiction over everything from securing library sites, to managing trash collection, to implementing land use regulations. And the trend goes on ...

"Democracy is not an easy form of government, because it is never final; it is a living, changing organism, with a continuous shifting and adjusting of balance between individual freedom and general order."²

In short, many Americans want the government to provide a growing list of goods and services. But as with all such things, there is a price. By definition, there is inherent conflict between government and the rights of the citizenry whenever the government exercises its power. Government action – any action – usually has implications on some segment of its citizens.



Let's go back again to the U.S. Constitution's Fifth Amendment. What do you suppose our founding fathers had in mind when they inserted the term "public use" into the highest law of the land? It sounds simple enough, right? Take a minute or two and reflect on what the term "public use" connotes to you? Like many people, you probably think about things like highways, transit routes, rail corridors, airports and port facilities. Maybe facilities like the local post office, courthouse, school, library, and police and fire station come to mind. How about the public parks in your area?

But what about a site for new, upscale condominiums or a hotel/health club/office development? "No way! That's not a public use!" you exclaim? Well, it's happening today – and it's taking shape all across America. In recent years there has been a growing trend across the land (primarily by local governments) with respect to the use of eminent domain. The result of that trend has expanded the interpretation of the term *public use* to mean *public benefit*. According to the Institute for Justice, a partial list of big companies that have been involved in projects related to the use of condemnation for private use in recent years includes Costco, Home Depot, New York Times, IKEA, CVS, Nordstrom, Walgreen, H.J. Heinz and Pfizer.³

"Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."⁴

Given the frequency with which these projects are happening, and the disparate locations in which they are occurring, it's probably safe to assume that there is no conspiracy by "evil-minded rulers" (See above). These scenarios are being initiated by elected officials and government staff "... of zeal and well intentioned." Those involved are simply trying to find innovative ways to reinvigorate their communities and add to the tax base in times when other, traditional local government funding sources are severely strained or have disappeared altogether. Whether or not these governments are "... without understanding" is an issue that has yet to be finally resolved. But that may be about to change.

In recent years, growing numbers of affected property owners are contesting the legal authority of government to use eminent domain in these economic development projects. This issue virtually burst into the national



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“ In recent years, growing numbers of affected property owners are contesting the legal authority of government to use eminent domain in these economic development projects. ”

consciousness on September 29, 2003. That night, “60 Minutes” aired a segment about a local economic development project in Lakewood, Ohio known as the “West End Project.” The segment centered on Jim and Joanne Saleet, a couple who had lived in Lakewood for nearly four decades. Over 50 properties, including the Saleet’s home, were slated for demolition to make way for the construction of high-end condominiums. The new upscale housing would provide the town with a much-needed infusion of tax dollars.

In the Lakewood project, many of the affected properties were designated as “blighted” as part of the justification for their acquisition. The following is a sampling of a few of the criteria that could result in a property being designated as blighted:

- Lack of a two-car attached garage
- Less than two full bathrooms
- Less than three bedrooms

However, very few homes in the City of Lakewood have a two-car attached garage. Reportedly, a large majority of Lakewood homes have less than two full bathrooms. If the same standards were applied to the residences of the Lakewood Mayor and the City Council members, those homes too would have been designated as blighted, but for the fact they were located in areas of the city that were not under the threat of eminent domain.⁵

In the transcript for that “60 Minutes” piece, referring to then Lakewood Mayor Madeline Cain, correspondent Mike Wallace stated, “The mayor told *60 Minutes* that she sought out a developer for the project because Lakewood’s aging tax base has been shrinking and the city simply needs more money. The Saleets live in an area called Scenic Park, and because it is so scenic, it’s a prime place to build upscale condominiums. With great views, over the Rocky River, those condos will be a cinch to sell.”⁶

Another such local government project is located in New London, Conn. In that project, city officials announced plans to raze homes in one neighborhood to clear the way for a privately owned riverfront hotel, health club and offices. New London officials maintained that the project was an appropriate use of eminent domain because the proposed development served a “public purpose” (i.e. spurring economic growth and increasing the tax base). A number of affected area residents objected and



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fought the proceedings. In March 2004, the Connecticut Supreme Court, in a split 4-3 decision, upheld New London's contention that the prospect of additional tax revenue justified the town's use of eminent domain.

And it is this case that we'll no doubt be hearing much more about over the next several months. In late September 2004, the U.S. Supreme Court agreed to hear an appeal on this case in their upcoming session. The resulting court opinion [*Kelo v. City of New London* (No. 04-108)] may have far-reaching effects on local governments that have relied on eminent domain to implement their economic revitalization projects. So stay tuned for that decision.

[*Author's Note:* A source of additional information about numerous cases involving eminent domain for economic development is the Institute for Justice Web site. The Institute, founded in 1991 claims to be the "... nation's only libertarian public interest law firm." Readers are cautioned that the IJ Web site addresses the issue from the perspective of its own philosophy. The Web site contains links to a number of cases on this issue around the country. The Web address for the page listing the court cases is www.instituteforjustice.org/cases/index.html.]

This fascinating topic is bound to remain "front and center" for right of way professionals in the foreseeable future. In fact, at the 2005 IRWA International Education Conference in Toronto, Ontario, Canada June 12-16, the International Local Public Agency Committee will be sponsoring a break-out session titled "Eminent Domain for Economic Development." Make a mental note to stop by that session, where you're bound to hear the latest information from all sides of the issue. ❖

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¹Fifth Amendment to the U.S. Constitution

²Ilka Chase (1905 -1978) US actress, writer

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⁴ "Justice Louis D. Brandeis, dissenting, *Olmstead v. United States*, 277 US 479 (1928)

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