Legal

How Private Can A "Public Use" Get?

By GIDEON KANNER

Persons involved in the field of public land acquisition are well aware of the constitutional provision that limits governmental takings of private property to public uses. In spite of this constitutional limitation, it has been a historically unrewarding endeavor for landowners to challenge the right to take their property on the grounds that the use to which it would be put eventually could not be characterized as "public." The prime example of that is takings for redevelopment projects, in which the land is eventually resold to private profit-making enterprises. The courts have reasoned in such cases that the term "public use" is not to be literally taken; that its interpretation includes "public benefit." And so, in the redevelopment cases the courts reason that it is the elimination of the blight which is the rationale for the redevelopment project, that constitutes the public purpose or public use; what happens after blight is eliminated is not controlling, and there is no obstacle to governmental enlistment of private enterprise in the process of rebuilding the redevelopment area.

Still, a nagging problem remains. What if a taking were to be attempted in which the legislature decides that title to property should be transferred from one group of private citizens to another, to pursue some desired social policy? Surely, argue landowners who do not wish to part with their property, this is a case of taking from one private citizen and transferring to another. This surely cannot be a case of "public use" within the meaning of the constitution. But here too the judicial response has not been too hospitable to such arguments. Some time ago, in *People of Puerto Rico v. Eastern Sugar Associates* (1st Cir.) 156 F. 2d 316, the Federal courts upheld the right to condemn the land of large agricultural enterprises in pursuit of a program of agrarian reform. The court rejected pleas that this was "state socialism" and permitted the taking. Now, about 30 years later, we have a new decision by the U.S. District Court of Hawaii that takes the right to take a step further.

The Hawaii legislature enacted a law under which it is permissible for the state to condemn the lessor's interest in large tracts of land, and to convey them to lessees occupying portions of those lands under long-term leases. The legislative policy had to do with the fact that in Hawaii there are many very large land holdings whose owners have not been selling, but leasing. The Hawaii legislature was evidently of the view that such large concentrations of landownership were undesirable, and adopted a procedure whereby upon request of the lessees, the lessors' interest is condemned and conveyed to the lessees so that they can become landowners. The lessees eventually pay for their landlord's interest, but where necessary the state provides the financing. When Hawaii decided to condemn the lessor's interest of the Bishop Estate under that law, it was met by an action brought in the Federal court, challenging the constitutionality of this scheme on two grounds. First, that the taking was not for a public use, and second that the valuation provisions of the statute were violative of the constitutional "just compensation" guarantee. As to the second point, the court agreed with the landlord and issued a preliminary injunction; the court's opinion on that point may be found in *Midkiff v. Tom* (D. Haw.) 471 F. Supp. 871. However, on the issue of right to take the court was not persuaded; it declined to issue a preliminary injunction and reserved that issue for later. Now, the court has reached that issue and has granted summary judgment in favor of the state on the right to take, *Midkiff v. Tom* (D. Haw.)___F. Supp.___ (Case Civil No. 79-0096, Memorandum Decision filed December 13, 1979).

The court began by invoking the Federal standard for establishing "public use"; namely, that the taking will be allowed if there is any possible rationale for the statute, expressed or not, and if the statute "is not arbitrary or the product of legislative bad faith." Neither of these obstacles was found to be present. Although the lessor argued that it could demonstrate that the economic justification for the statute used by the legislature was wrong, the court ruled that this would not make any difference. Said the court: "looking only at one social goal of the legislation—that of redistributing the land—this Court could never say, regardless of how much 'evidence' was presented by the plaintiffs, that the Legislature's belief in the social evils to be combatted by [the Act] was arbitrary. Social benefit alone is enough to bring a statute within the purview of the police power." ". . . it is the Legislature's province to determine just how far to go in trying to solve a problem or series of problems. There are limits to legislative line drawing—those imposed, by, *inter alia,* the equal protection clause—but those are not at issue in this case. What is in issue is the right of the Legislature to conclude, as it did, that 'The State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this chapter is for public use and purpose of protecting the public safety, health and welfare of all the people of Hawaii.' "

In spite of the lessor's urgings that it could disprove the Legislature's economic rationale in enacting the statute, the court would not even take evidence on this point: ". . . it is not this Court's function to determine whether the Hawaii Legislature was wrong . . . No matter how much evidence plaintiffs presented, they could not establish that the Legislature was arbitrary with respect to every economic rationale advanced in support of the statute . . . There are limits to judicial deference, but those limits are not even approached in this case. The Legislature simply came up with a plan to improve the quality of life in Hawaii. Whether it was right or wrong is up to the voters, not this Court."