

## EMINENT DOMAIN UPDATE

By James K. O'Brien

We have reported in this newsletter before about *Kelo v. New London*, a United States Supreme Court decision that upheld the right of state government to take private property through the process of eminent domain for a purpose that provides an economic benefit to a private land developer, as long as a public purpose is also advanced. At the same time, however, the *Kelo* decision also upheld the right of states to impose more stringent requirements on the use of eminent domain to benefit private economic interests. A flurry of new legislation and case decisions followed around the country, including Michigan, even though the Michigan Supreme Court had already spoken out on the limits of eminent domain. In the *Hathcock* decision, Michigan declared that the taking of property primarily for private economic development did not serve a "public use," and therefore was not permitted under our state's constitution.

This did not stop the legislators in Michigan and other states from proposing dozens of new laws designed to guarantee, and precisely define, the rights of the private property owner whose land is threatened by a state taking through eminent domain.

In a recent California case, a landowner was not able to defeat condemnation initiated by a city so that a new hotel could be built on the property, but he did receive maximum compensation from an obviously sympathetic jury. The landowner was an immigrant who had spent two years and a lot of money renovating a warehouse and building a mail order cigar business. When two private developers were unsuccessful in negotiations to buy the property as a site for a hotel, they instead reached an agreement with the city whereby the city would condemn the property for their desired use and the developers would pay the costs and fees associated with the condemnation.

Not only did the city condemn the property, it claimed the property was contaminated, and required the landowner to perform extensive environmental testing. The city would later admit in litigation over the value of the property that such an investigation was not really feasible so long as a building remained on the property. The notice of contamination, and especially its suspicious timing, was apparently seen by the jury in the case setting compensation for the taking as a tactic to put pressure on the landowner during the negotiations leading up to the condemnation.

Although the trial court ruled that the city could condemn the land for the hotel, in the subsequent trial before a jury for damages, the landowner fared much

better. The jury awarded several million dollars for the value of the property itself and for the loss of the goodwill associated with the cigar business. Damages for loss of a business are not typical in condemnation cases, but the landowner was able to show that there was no suitable alternative location for the business, so that he would have to start over from scratch. In addition, the jury also awarded damages equal to the cost of the dubious toxicity study that the landowner had been forced to undertake. At the time this article was prepared, the case was on appeal.

Coincidentally, proposed legislation in Michigan would prevent such apparent abuse of the condemnation process. Senate Bill 693 would amend Michigan's taking statute to prohibit the taking of private property for transfer to a private entity, unless the proposed taking was for the eradication of blight, or due to the presence of hazardous substances. In such cases, the burden of proof would be on the condemning public authority to show, by a preponderance of evidence, the presence of blight or harmful levels of hazardous substances, requiring condemnation.

Taking opponents in Michigan suffered a defeat, however, in the often-litigated area of wetlands. It has frequently been claimed that when wetland regulations prevent any feasible use or development of private property, a "taking" occurs, because the property is rendered valueless by operation of the wetland laws. Recently, a 17 year long court battle on that subject came to an apparent end when an Oakland County property owner's appeal was rejected by the Michigan Supreme Court. Even though the majority of the parcel in question could not be developed due to wetland regulations, the Michigan Court of Appeals held that no compensation was due unless all economic use of the property was prevented. In addition, the court held that no compensation was due because the regulation of wetlands applies to, and benefits, all property owners, and the plaintiff, an experienced land developer, presumably purchased the property with knowledge of the presence of wetlands, and the effect of wetland regulations. Barring acceptance of the case by the United States Supreme Court, Michigan will continue to have the right to limit the use of property containing wetlands, in most cases without having to pay any compensation. †



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