

Eminent Domain

A century has passed since town planners, social scientists, and city engineers acknowledged the need for cities to follow a plan. City development once focused solely on the physical development of cities; however, a comprehensive approach to physical, social, economic and services management in cities and metropolitans characterize urban planning today. Comprehensive planning faces the issues of how far governments can actually go to restrict the use of private land. The government is allowed to take land for public purposes as long as just compensation is provided to the property owner this is the law of eminent domain (Morgan, et. al, 2007, p. 129-130). The following literature review will discuss the issue of eminent domain as well as discuss eminent domain in the City of Norwood, Ohio.

What is Eminent Domain?

Eminent domain is a government's power to take private property for a public use while compensating the property owner, which is an inherent right of sovereignty, Eminent domain is also referred to as "appropriation," "condemnation," and "taking." The Fifth Amendment of the United States Constitution expressly restricts the federal government's use of eminent domain; it requires that eminent domain be invoked only for "public use" and "just compensation" be paid to those whose property has been taken. The Fourteenth Amendment extends the legal requirements of public use and just compensation to the states through its Due Process Clause. In addition,

states have a number of constitutional provisions, statutes, and case law which outline the various permissible uses of eminent domain, recourses available to property owners, and procedures required to take or evaluate a property. States may also grant eminent domain authority to local governments, which may further delegate this authority to a designee, such as a development authority or community group (GAO, 2006, p. 6-7).

Typically, local government legislation authorizes “condition precedent” and “condition subsequent” takings. A condition precedent occurs when government exercises the power to redress a before-the taking existing land use. The most notorious condition precedent is that before taking the land, it must be blighted. Condition subsequent takings occur when land is confiscated in order to create a future, “after-the-taking” are traditionally used for public use such as a highway, reservoirs, airport, or public facility (Kayden, J., 2006, p. 107).

The Role of Local Government

In 1981, General Motors proposed to build a new automobile plant in Detroit. The plant was to be placed in residential neighborhood, and GM asked the city to take the land from the neighborhood landowners, At the time the mayor of Detroit was Coleman Young and he was faced with the decision to give in to General Motors, keep jobs, and tax revenues in the city or destroy a neighborhood. In the end, Mayor Coleman Young chose to give in to GM, the land was seized the homes were demolished, and people were

displaced. The previous story illustrates that local governments exercise the power of eminent domain in order to promote municipal economic development by creating new jobs, increasing tax and other revenues, and revitalize distressed urban areas. A Wal-Mart can displace a community if it can persuade a local government to lend its eminent domain power (Kayden, J., 2006, p. 106-113).

In 1998, the Supreme Court gave local governments' broad rein to take private property for economic development, ruling that transferring land to private investors for projects, which promised to bring jobs or commerce was a public use similar to building a park or paving a road. The 5-4 decision lifts a cloud over redevelopment projects across the country that hinge on local authorities using eminent domain powers to assemble parcels for private investors to develop commercially. Justice John Paul Stevens wrote, "Promoting economic development is a traditional and long-accepted function of government, an aim sometimes better achieved through promoting private enterprise than state ownership (Bravin, J. 2005)."

In November 2005, the House passed a bill, 376-38, which cuts federal economic development aid to states and localities for two years if they use eminent domain for development projects. Several mayors are concerned that the bill will end numerous development projects that benefit their communities. Philadelphia, which says it has the most abandoned real estate, per capita, of any U.S. city, seizes about 2,000 properties a year and develops 500 to 600 affordable housing units, according to Philadelphia Redevelopment Authority Executive Director Herb Wetzel. "An outright ban on the conveyance of property to private citizens through use of eminent domain would mean

none of those units could be built," he says. Bill Hudnut, senior fellow at the Urban Land Institute and former mayor of Indianapolis, says some municipalities abuse eminent domain, but most projects are necessary (Buckley, B., 2006).

The power of eminent domain has been used to allow cities to acquire land for transportation, urban renewal, and as a tool for developing facilities such as airports and shopping malls. Eminent domain is accepted as an efficient and often fair way to acquire property needed for public purposes; however, many city managers approach its use with caution. Matthew Cypher and Fred Forgey discuss that in a national survey of city managers, many officials express concern about the matter of equity to property owners and developers that is involved in eminent domain actions (Morgan, et. al, 2007, p. 129-130).

Norwood, Ohio

Norwood, Ohio a financially struggling city, used eminent domain to attain properties to complete the site for the planned Rookwood Exchange, a \$125 million complex of offices, shops, housing and restaurants on Edwards Road (Kemme, S., 2006). Tearing the homes down would allow the city to generate \$2 million in tax revenue. The City contends that it is serving the public good by trying to replace a deteriorating neighborhood with a new development that would create jobs, housing, and generate badly needed tax revenue. Three homes were the only remnants of the middle-class neighborhood that bordered Interstate 71, Edwards road, and Edmondson road. The other 64 homes and two small businesses were demolished. The courts protected the remaining three buildings from the wrecking ball while the case was being decided. At first, 66 of 71 property owners in the neighborhood agreed to sell to the Rookwood Exchange

developers, Anderson Real Estate and the Miller-Valentine Group. After two lower courts ruled in Norwood's favor, three of the five decided to appeal to the Ohio Supreme Court. Until the three remaining buildings were torn down, the developers could not start building the Rookwood Exchange and Norwood was not able to begin collecting the anticipated tax revenue (Kemme, S., 2006).

The developer, Anderson, paid for a “study” the Norwood government used to declare the well-kept neighborhood was “deteriorating” so it could use eminent domain under Ohio law. Under the Ohio Constitution and urban renewal laws, eminent domain can only be used to eliminate actual conditions of slum and blight (Institute of Justice, 2006). A trial court found the neighborhood is not blighted, but agreed with the City that the neighborhood is “deteriorating” because too many people own their own homes and businesses. The Supreme Court, (1) rejected *Kelo*'s rationale that takings for economic development are a “public use”; (2) held that courts should apply “heightened scrutiny” to uses of eminent domain; (3) that statutes authorizing the taking of property cannot be vague, and that Norwood's definition of “deteriorating” failed that test; (4) and that an Ohio law allowing property to be taken and destroyed before an appeal is completed is unconstitutional (Institute of Justice, 2006).

The case of eminent domain in the City of Norwood followed the case of *Kelo v. City of New London*. In *Kelo v. City of New London* (2005), the United States Supreme Court, upheld the City of New London's authority to use eminent domain to condemn and acquire property located within an area designated as a “distressed municipality,” even though the condemned property was not blighted or otherwise in poor condition.

This decision allowed for private-to-private transfers of property for economic development purposes, such as New London's action in an area that had experienced decades of economic decline. After *Kelo*, many states have been reviewing the use of eminent domain and considering legislative changes or constitutional amendments to control its use, and Ohio is one of these states. For example, in November 2005, Ohio enacted legislation that created a task force to study the use and application of eminent domain in the state and how the *Kelo* decision affects state law governing the use of eminent domain. On August 1, 2006, the task force issued its report, which recommended that the state retain the use of eminent domain as a tool for the elimination of blight, even if the property that is taken is converted to another private use; rewrite and tighten the definition of blight; and require that a majority of the properties in an area be blighted to designate it as such. The report also recommended (1) prohibiting eminent domain takings solely for the purpose of generating added tax revenue, (2) prohibiting declaring blight solely on the basis of additional revenue that could be generated, and (3) compensating the property owner for actual moving and relocation expenses, and, when appropriate, loss of business, goodwill, and attorney's fees. In addition, Ohio imposed a moratorium, through December 31, 2006, on the use of eminent domain to take land within a non-blighted area when the purpose is economic development that leads to ownership of the property being vested in another private person (GAO, 2005).

Two reasons that contributed to the unconstitutional ruling of *Norwood* are that *Kelo v. New London* created apprehension in Ohio regarding takings. The City's apprehension lead to a series of actions that attempted to control eminent domain. In addition, Norwood engaged in the abuse of eminent domain law because the developer,

Anderson, paid for the “study” in which Norwood was declared “deteriorating” so it could use eminent domain under Ohio law. The developer conducted the study; therefore, leading to bias in favor of the developer. Thus, when the case went to the Ohio Supreme Court they concluded that Norwood did not in fact meets Ohio’s definition of blighted.

Alternatives

Cities contend that eminent domain is necessary to increase tax revenue. However, eminent domain is not the only manner in which to increase tax revenue. Land use exactions can be used as substitutes for taxes. Developers in the majority of communities pay various types of fees or provide goods in order to get permission to do their projects. The payments are called exactions. Before 1970, the exactions were minimal. However, over the last two decades, developers in many communities were asked to pay not just for on-site improvements, but also for facilities elsewhere in the community. Exactions, thus, become a substitute for local taxes. The major reason for the growth of exactions has been the dramatic expansion of land use regulations since 1970. The communities who collect the most exactions have the most regulations; therefore, if developers can do projects “as of right” the community would have no leverage to exact any payment beyond property taxes. On the other hand, some of the critics of exactions say that exactions have become unfair and inefficient alternatives to general taxation (Fischel, 1995, p.341-342).

Another alternative is that judges should be subject to the scrutiny of takings. The problem with judicial takings is that no one judges the judges. Therefore, the U.S. Supreme Court can be regarded as mostly interested in disciplining the state courts that are not willing to take takings seriously (Fischel, 1995, p. 331-332). Voter initiatives

warrant no less inspection. Critics of voter initiatives consider that the ability to conduct hearings, present evidence, and refute other claims is bypassed when legislation is passed by voter initiative. The problem with local land use controls are that the decisions are from the resident-voter's point of view. They add to their own wealth at the expense of someone else. However, at the local level, initiatives reflect the will of the people. Thus, statewide initiatives should be treated by courts with no less scrutiny (Fischel, 1995, p. 332-334).

Flexible zoning is, yet, another possible remedy to takings. By making zoning more flexible, planning can often make zoning work without resulting in a diminution of value. Thus, it can evade challenges by eliminating diminution in value that might otherwise result from public requirements that prohibit or gravely limit development. For example, instead of requiring that a 40 acre tract be divided into quarter acres lots and then prohibiting construction on the floodplain; instead, allow 60 dwelling units on the tract if none were located in the floodplain, which accomplishes preservation of the flood plain (Strong, et. al, 1996, p. 5- 16).

Compensable regulation is another possible remedy to eminent domain. A combination of compliance and regulation is an approach to a situation in which the government wants to limit the use of property to the degree that it may amount to a taking. Under such a system, the regulations are passed with a supplementary guarantee to the property owners affected that whenever they decide to sell their property in the open market, if the sale price is less than the value of the property directly prior to the enactment of the regulation, they will obtain compensation equal to the decrease in value. The advantages are that no compensation is payable until the owner decides to sell. In

addition, the government can modify the regulation as experience may suggest, and the market is the determinant as to whether any loss has occurred (Strong, et. al, 1996, p. 5-16).

There needs to be penalties for condemning authorities that abuse the eminent domain process. In the past, condemning authorities have been capable of abusing the process without fear of consequences. Thus, landowners should recover their costs and expenses when the condemning authority abandons a condemnation proceeding. In addition, courts should have the discretion to penalize a condemning authority if it is determined to the satisfaction of the courts that a condemning authority acted in bad faith (Jarrett, T., 2005, p. 7-8).

The procedure and process required for eminent domain needs to be improved. Improving the way eminent domain is exercised includes changes in the condemnation process and taking steps to make sure the process is fair as well as changing the compensation structure. Recommendations under this category include:

- Providing earlier and better notification to landowners when there is a possibility that their property may be acquired through eminent domain;
- Requiring condemning authorities to present the landowner with a “Landowners Bill of Rights” at the beginning of the process so that landowners are aware of their rights under the law;
- Requiring condemning authorities to negotiate in good faith;
- Requiring the courts to make sure that the commissioners they appoint are qualified to determine the value of property;
- Requiring commissioners to hold an informal hearing to allow both parties an

opportunity to be heard and present evidence on the value of land;

- Focusing on making the landowner whole in determining just compensation by allowing additional factors to be considered beyond just the fair market value of the land;
- Requiring entities with eminent domain authority to give full consideration to alternative routes/sites proposed by landowners;
- Providing free consultations to citizens in order to help them understand the eminent domain process (Jarrett, T., 2005, p. 7-8).

Implications

In the book *The Ethics Primer for Public Administrators in Government and Noprofit Organizations*, Svara (2007) indicates that in order to reinforce positive interactions with citizens, leaders need to promote equity and encourage citizen participation. Thus, it is important for organizations to model a commitment to social equity and make certain that it is meeting standards of equity in its practices (p. 140). The power of eminent domain has severe implications for urban administration. First, eminent domain destroys communities and opportunities for minorities because individuals are displaced. An estimated three to four million Americans, mostly minorities have been forcibly displaced due to eminent domain (Bieto, D, 2008). The fact that eminent domain is used in blighted neighborhoods which consist primarily of minorities demonstrates that urban administrators are not promoting equity among all ethnicities. Instead, administrators are displacing large minority groups. In many cases, the individuals who live in these neighborhoods are given housing vouchers for the new developments, but the reality is that once the new developments are built the displaced individuals cannot

afford the new housing. Local governments are promoting a planning technique that creates inequality toward community and individuals who primarily poor and/or minorities.

In the article “Unintended Consequences: Eminent Domain and Affordable Housing (2006),” Parlow discuss the link between eminent domain and affordable housing. Though rarely discussed, this link reveals a long history of cities' use of their eminent domain power to advance development projects that rarely include affordable housing. Moreover, when cities condemn property through eminent domain to further new development projects, they often do so in a manner that undermines many of the goals of building more affordable housing (p.1)

The use of eminent domain can lead to widespread cynicism toward local government. In the article “Dealing with Cynical Citizens (1997),” Berman discusses the widespread concern that exists about public cynicism. Manifestations of public cynicism include beliefs that government policies and public officials are corrupt, incompetent, or out to take advantage of citizens. The disillusionment causes alienation and disengagement of citizens in local government (p.1). Citizens are less likely to be involved in local government efforts, and more likely to distrust government once eminent domain has been exercised on their property.

In conclusion, local governments use eminent domain as a tool for city planning and economic development. The previous literature review discussed the role of eminent domain in local governments particularly in Norwood, Ohio. Furthermore, alternatives for eminent domain as well as its implications were discussed.

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