

Newsletter from the Ombudsman for Property Rights

March 10, 2008

Proposed Legislation. The Planning and Development and Judiciary Committees have each raised bills concerning eminent domain and associated relocation assistance issues.

Raised Bill No. 5636 deals with the issue of compensating businesses displaced by eminent domain for loss of goodwill. The bill as presented would apply to retail establishments displaced pursuant to Chapter 130 Redevelopment or Chapter 588/ Economic Development and Manufacturing Assistance but not to other properties taken pursuant to other statutes or other types of businesses. The bill as drafted would not include Department of Transportation (DOT) even though DOT utilizes eminent domain more than any other public agency. The Ombudsman for Property Rights has requested the Planning and Development Committee co-chairs and ranking members to add language to remedy these omissions.

The Ombudsman has also proposed protection for public agencies from having to pay for loss of goodwill if the business owner has otherwise been compensated for the loss through the Uniform Relocation Assistance Act or other award. The business owner would have to prove the loss is caused by the taking of the property and show that reasonable steps to prevent the loss were undertaken.

Raised Bill No. 5857 deals with the issue of exaction. This bill will prohibit any person from demanding a payment as a condition for allowing an owner of real estate to use or rehabilitate his/her property for a purpose not inconsistent with the applicable development plan. Violation of the provision will be deemed an unfair or deceptive trade practice under CUTPA.

The Ombudsman had requested the committee to consider making a demand for money or an interest in the owner's property or development opportunity in exchange for a reprieve from eminent domain and approval to develop the property a criminal offense as well as a civil violation of law.

Other Recommendations of the Ombudsman. The Ombudsman has made other recommendations to the co-chairs and ranking members of both committees. Principally the Ombudsman has asked the legislature to shift the burden of proof from real estate property owners to government with respect to proving the development project will, in fact, result in a public use and not be a pretext for taking property of one private property owner to give to another for that owner's use and profit.

The Ombudsman has also recommended the legislature shift the burden of proof to government with respect to proving the reasonable necessity of the taking of private property. The wisdom of shifting the burden of proof was presented cogently by the three dissenting Connecticut Supreme Court justices in the Kelo case. They also suggested the level of proof be by clear and convincing evidence.

Adoption of these recommendations would go a long ways towards making the eminent domain process as used in municipal development projects more balanced and fair. Under existing statutory and case law the property owner is asked to prove a negative that the project is not for a public use and the taking of the owner's property is not necessary. Invariably, there are few instances when a property owner wins.

Government has greater access to information regarding developer interest in the properties, negotiations relating to the disposition of the properties and the necessity of taking properties, especially non-blighted properties to implement the development plan. There are, as the dissenting justices said in *Kelo*, "tremendous social costs of the takings" and often little evidence that "development prospects are such that the condemned property will, in fact, be used for the intended public purpose."

The Ombudsman has recommended the legislature define what "public use" or "public purpose" means to give the court new and clear guidance and direction. Currently, there is no statutory definition and the court has stated time and again "there can be no precise line" between public and private uses. The court relies upon the declarations of policy that precede statutory authority for particular projects. Those declarations are purposely expressed in broad and general language. Municipalities believe they need broad eminent domain powers to assemble properties into larger tracts. That having been said, there is still good reason for the legislature to take the lead in establishing greater public awareness and involvement before plans are approved and private properties taken.

Property Owner's Right to Contest a Blight Designation. Citizens have a constitutionally protected right to own property. Both the federal and Connecticut constitutions state that no one can be deprived of life, liberty or property without due process of law. When a municipality designates an area blighted or properties within that area deteriorating or deteriorated, government has affected the rights of property owners and the value of the property. Often after a designation of an area as blighted is made, a swifter decline occurs. That condition is called "condemnation blight."

The Ombudsman has recommended that the legislature provide a process to allow a property owner to contest the designation of "deteriorated" or "deteriorating" or "blighted" as to the owner's property and the designation of "blighted" as to the area or neighborhood. The governmental agency making the determination should be required to notify every property owner within the area. The notice should contain a description of the deficiencies. Currently, there is no requirement of a notice. The agency should allow for a hearing before public members of the agency board (not paid staff) and a right of appeal to the legislative body of the community and perhaps even to the court in the event of an adverse decision.

Conclusion. There is much that can be done to redress legitimate grievances of private property owners by making the process and procedures fairer and yet not deprive government of its ability to carry out needed public purposes. Let's hope this session continues the progress of last session towards these ends.