Newsletter from the Ombudsman for Property Rights

April 4, 2008

The Sovereign Powers of the State. In *People v. Adirondack R. Co*., 160 N.Y. 225, (1899) *affirmed*, 176 U.S. 335, (1900) the court stated: ***"The power of taxation, the police power and the power of eminent domain, underlie the Constitution and rest upon necessity, because there can be no effective government without them. They are not conferred by the Constitution but exist because the state exists, and they are essential to its existence. They are not rights reserved, but rights inherent in the state as sovereign. While they may be limited and regulated by the Constitution, they exist independently of it as a necessary attribute of sovereignty."***

These are powerful words. They were meant to convey the fact that government could not exist without the authority to exercise certain powers among them the power to tax, to protect the health, safety, morals and general welfare of the people and to take private property by eminent domain. The words "necessity" and "necessary" appear twice. They are used to emphasize the importance of those powers to the existence of government.

One wonders, however, whether each of these powers has the same significance today as when the *Adirondack* case was decided over 100 years ago. No doubt government won't last long without the power to tax and the people and their property will be at risk in a disorderly society without police powers being performed by government to maintain order and provide essential services. However, the exercise of the power of eminent domain does not seem as essential or necessary to the existence of government today as do the other powers. Yet the actual use of the power to take private property is more prevalent now than at almost any other time in our state's and nation's history.

Transferring Property from Owner A to Owner B. Our federal and state Constitutions place mild limitations on the exercise of eminent domain powers in the words "public use" and the requirement of payment of "just compensation." Neither constitution defines the term "public use" or describes the circumstances under which the power can be used, resulting sometimes in the power being overused to allow for things never intended such as taking property from Owner A and transferring it to Owner B primarily for Owner B's profit and enjoyment and secondarily for the public's benefit and/or use. Our courts have said that type of transfer in certain instances meets constitutional standards and we can all live with that conclusion provided the agencies of government demonstrate that they are not overusing or abusing the power.

Our courts have held that it is up to the property owner to prove that the taking is an abuse of governmental authority but that requirement is an enormous burden that few property owners can satisfy. Why is it the property owner's burden? Perhaps, because

judges reason, as the judges did in the *Adirondack* case cited above, that the property owner's challenge is to the sovereign authority of government, and not unlike in days of old, the government can not be challenged without the inference arising that the challenge is directed at the heart of its existence, its inherent powers.

Redevelopment and economic development as reasons for taking private property are relatively new concepts. Connecticut's courts should but do not require proof by the taking authority that the proposed development is primarily for a public use. The courts defer to the legislature and to the personnel of public agencies who implement development plans and do not substitute their discretion. They view their role as limited, thus, they do not require government to prove with any reasonable certainty that the project serves a public purpose or that it has a reasonable chance of completion or that the properties to be taken, even if not blighted, are needed to accomplish the public purpose intended by the approval of the project.

Kelo v. City of New London. In the U.S. Supreme Court decision, Justice Kennedy who cast the critical fifth and deciding vote stated that as long as the taking was "rationally related to a conceivable public purpose" he would consider it constitutional. Then he qualified that statement to indicate the court should review the record and strike down any taking that is intended to favor a particular private party with only incidental or pretextual benefits accruing to the public.

Many of Connecticut's cities have resorted to eminent domain to pursue economic development projects. Determining the success of such projects is hard to do as there are not established, objective standards that can be used to measure success or failure of a redevelopment or economic development project.

Legislative Session-2008. The legislature has before it numerous recommendations to change the law concerning the power of eminent domain and associated relocation issues. It would be beneficial if the legislature took up these recommendations and enacted legislation which brings more clarity to the process especially with respect to rights of property owners when faced with economic development and redevelopment projects and the prospect of losing their homes and businesses. In January's and February's Newsletters the Ombudsman outlined statutory modifications that seek to balance the rights and obligations of the parties and inject more fairness and due process into eminent domain proceedings. Let's hope this session continues the progress made in the last two sessions.

Website. All of the Ombudsman for Property Rights Newsletters are posted on the Office of Ombudsman's website at www.ct.gov/pro.