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May a Washington State County Seize Private Property Without Paying the Owner?

"How strangely will the tools of a tyrant pervert the plain meaning of words."

— Samuel Adams, January 1776

A county in Washington State thinks it can turn a parcel of private property into a water treatment facility without compensating the owner for his loss.

The Fifth Amendment to the U.S. Constitution clearly states: "nor shall private property be taken for public use, without just compensation." Couldn't be much plainer: The government cannot seize private property for some public use unless the owner of that property is justly compensated for his loss.

Regardless of the plainness of that clause, governments at all levels continue attempting to annex privately held property without conforming to the "just compensation" mandate set out in the Fifth Amendment.

The Cato Institute describes one such scenario that has now been turned over to the Supreme Court to sort out the rights of the parties at odds in a case involving a local government's grab at private property, its insistence that it can do anything it wants with it, and its determination that it doesn't have to pay the owner a dime for the deprivation.

In 2012, San Juan County, Washington — the islands in the Salish Sea between Seattle and Victoria — enacted a rule that conditions shoreline owners' proposed land uses on dedicating a portion of their property as on-site conservation areas. This isn't a new tactic. In *Nollan v. California Coastal Commission* (1987), for example, the Supreme Court rejected the government's conditioning of a building permit on the landowners' granting a public easement across their property to access a beach. The Court acknowledged that conditioning a benefit on the property owners' giving up their Fifth Amendment right to just compensation is "an out-and-out plan of extortion." The Court elaborated seven years later in *Dolan v. City of Tigard* (1994), ruling that courts must apply a high level of scrutiny to conditions attached to land-use permits to prevent government "gimmickry."

In other words, if the condition by itself would be a taking, then the state cannot impose it *unless* there is a "nexus" and "rough proportionality" between "the property that the government demands and the social costs of the [landowner's] proposal." *Koontz v. St. John's River Water Management District* (2013).

The San Juan County ordinance fails these tests because shoreline property owners are required to set

aside "water quality buffers" as a condition of development not based on any harm the proposed land use itself might cause, but based on the county's general efforts to reduce pollutants and other surface runoff. A local owners' association called the Common Sense Alliance challenged the ordinance, but Washington State courts held that the nexus and proportionality tests need not even be applied here because it was the legislature that imposed the condition, not an ad hoc permitting process. The alliance has now asked the U.S. Supreme Court to step in, and Cato, joined by Reason Foundation, has filed an amicus brief supporting that petition.

At issue is the definition of "public use." This is not the first time this phrase has come under Supreme Court scrutiny. In 2005, the case of *Kelo v. City of New London*, the justices presumed to create a legal and lasting definition of this controversial concept.

As explained in an essay published by the legal blog Exploring Constitutional Law:

> In June 2005, the Supreme Court decided an important case involving the meaning of "public use" in the Fifth Amendment. In *Kelo v City of New London*, the Court, voting 5 to 4, upheld a city plan to condemn homes in a 90-acre blue-collar residential neighborhood. New London plans to give the land to a developer for $1, with a 99-year lease, to build a waterfront hotel, office space, and higher-end housing. Justice Stevens, writing for the Court, found this donation of property to a developer to be a "public use." Stevens said that the Court's jurisprudence gave government "broad latitude" to determine what uses might be "public." In a concurring opinion, Justice Kennedy indicated that the Court still stood willing to review on constitutional grounds takings that are arguably simply the city favoring one private owner over another, rather than takings based on a good faith analysis of the public interest. Angry property rights advocates reacted to the decision by suggesting that local governments consider condemning the homes of justices in the majority and turning them over to private developers for construction of B & Bs.

That's right. The Supreme Court sided with a real estate developer in a deal that destroyed the Founders' concept of "just compensation" and whipped up a whirlwind of opposition among Americans recognizing that the right of property is not only unalienable, but is vital to the perpetuation of liberty and limited government.

Given the frequent violations — outright or by the "gimmickry" end-run around the "just compensation" requirement of land-use regulations — of the right of property and the "just compensation" mandate, it is illustrative to read the words of the Founders and illuminate our own understanding of the original meaning and intent of this now-controversial clause of the Constitution.

Writing in the winter of 1778, in an unpublished pamphlet entitled "A Freeholder, A Hint to the Legislature of the State of New York," John Jay declared, "It is the undoubted Right and unalienable Priviledge of a Freeman not to be divested, or interrupted in the innocent use, of Life, Liberty or Property, but by Laws to which he has assented, either personally or by his Representatives."

He then turned to history, warning that its pages present a never-ending scene of sovereigns who transformed into tyrants, taking property as they went:

> In short, it is difficult to conceive of any arbitrary Act, which that prolific Mother of Tyranny may not breed, and when in Conjunction with Power, has not bred. There is scarce a Page in the History of any Nation, which does not exhibit a black account of some of her Progeny, or which does not represent her as a common Prostitute to all the Tyrants in the World, from Great Tyrants on Thrones, down to Petty Tyrants in Village Schools.

History is horrifying when it comes to the future of property rights.

As former U.S. Senator Ron Paul once wrote,

> Privacy is the essence of liberty. Without it, individual rights cannot exist. Privacy and property are interlocked. If both were protected, little would need to be said about other civil liberties. If one's home, church or business is one's castle, and the privacy of one's person, papers and effects [is] rigidly protected, all rights desired in a free society will be guaranteed. Diligently protecting the right to privacy and property guarantees religious, journalistic and political experience, as well as a free market economy and sound money. Once a careless attitude emerges with respect to privacy, all other rights are jeopardized.

Perhaps there was no one more influential on our Founding Fathers when it came to the concept of the relationship of liberty and property than John Locke, who wrote:

> *Whenever the Legislators endeavor to take away, and destroy the Property of the People*, or to reduce them to Slavery under Arbitrary Power, they put themselves into a state of War with the People, who are thereupon absolved from any farther Obedience, and are left to the common Refuge, which God hath provided for all Men, against Force and Violence. Whensoever therefore the *Legislative* shall transgress this fundamental Rule of Society; and either by Ambition, Fear, Folly or Corruption, *endeavor to grasp* themselves, or *put into the hands of any other an Absolute Power* over the Lives, Liberties, and Estates of the People; By this breach of Trust they *forfeit the Power* the People had put into their hands, for quite contrary ends, and it devolves to the People, who have a Right to resume their original Liberty. [Emphasis in original.]

There is a reason, it seems, that our Founders considered the right to own property as the *sine qua non* of liberty.

The Supreme Court has not yet decided whether to hear the case of *Common Sense Alliance v. San Juan County*.

Photo is of Lopez Island in San Juan County, Washington