Written by **William F. Jasper** on December 4, 2009

Eminent Domain Battles Continue: Fee Simple Is Not So Simple

The Appellate Division of the State Supreme Court in Manhattan, New York, has ruled against Columbia University's plans to use eminent domain to develop a satellite campus in Upper Manhattan. This reflects one minor skirmish in the battle that has raged nationally ever since Kelo vs. City of New London was decided by the Supreme Court in 2005.

In his "A Summary View of the Rights of British America", Thomas Jefferson made one last plea to King George to reconsider the path England was taking in its relationship with the American colonies. With elegance and eloquence, Jefferson laid the moral and political groundwork for life, liberty, and property:

> That these are our grievances which we have thus laid before his majesty, with that freedom of language and sentiment which becomes a free people claiming their rights, as derived from the laws of nature, and not as the gift of their chief magistrate: It is neither our wish, nor our interest, to separate from her. We are willing, on our part, to sacrifice every thing which reason can ask to the restoration of that tranquility for which all must wish. On their part, let them be ready to establish union and a generous plan. Let them name their terms, but let them be just. Still less let it be proposed that our properties within our own territories shall be taxed or regulated by any power on earth but our own. The God who gave us life gave us liberty at the same time; the hand of force may destroy, but cannot disjoin them.

These arguments are the bedrock of the founding documents of the Great American Experiment, and an understanding of the importance of eminent domain:

1. Rights come from God, and are not a "gift" of government.

2. "Property shall [not] be taxed or regulated by any power on earth but our own" — the very essence of the sovereign citizen philosophy and concept that makes America unique.

3. Life and liberty may be destroyed by "the hand of force," but they cannot be disjoined.

James Madison, the actual author of the Fifth Amendment, took a more "moderate" view by providing that "No person shall be … deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Note that Madison used the words "public use" rather than "public purpose," "public interest," or "public benefit" in order to limit further the opportunity for government to "take" private property at its

whim.

The most common reasons eminent domain was exercised in the United States were for building new or larger roadways, airports, or government buildings.

Until recently, that is.

The issue of "taking" or "eminent domain" reflects the current battle which rages between the "sovereign citizens" who delegated certain limited powers to a central government, and that government which increasingly seeks to make itself "sovereign" over its citizens.

When Kelo vs. City of New London was decided by the Supreme Court in 2005, it seemed to give local and state governments exceedingly wide latitude in determining when the "taking" of private property and giving it to another private party was constitutional. Specifically, that the "public use" provision of the "takings clause" of the 5th Amendment of the U.S. Constitution permits the use of eminent domain for economic development purposes that provide a public benefit.

Following that decision, a number of states enacted statutes to prevent or greatly limit similar "takings" in their own jurisdictions. These laws:

– restrict the use of eminent domain for economic development, enhancing tax revenue, or transferring private property to another private entity;

• define more closely what constitutes "public use";

• establish additional criteria for designating "blighted" areas that may be subject to eminent domain;

• strengthen various remedies open to private property owners to defend against eminent domain;

• place moratoriums on the use of eminent domain; and

• establish independent task forces to study and report their findings to the legislature.

But the battle rages on …

For instance, Nancy and Slade Lindsay, the owners of beach front property in Destin, Florida, thought their beach was private. But when Walton County "renourished" their beach property by bringing in new sand, reshaping the dunes, and increasing the size of the beach, this added "new" property which was now open to the public. The officials claimed that it was a legitimate tax-payer funded project designed to protect and restore critically eroded beaches.

The Lindsays say that was a "judicial taking" of their property by allowing the public to use it without proper compensation.

"They are literally taking our property," Lindsay said. "Changing our deeds, changing our property boundaries, no compensation and no tax breaks."

Their lawyers said that "the Florida Supreme Court suddenly and dramatically changed 100 years of state property law to achieve its desired outcome [opening the beaches to more tourists by citing land erosion]."

But Brad Pickel, who managed the beach renourishment program for Walton County, said the state didn't take away the homeowner's property, it merely increased more property between the homeowner's land and the ocean. "What you are doing is putting sand into state waters, so it is state property to begin with and state property when the project is over with," said Pickel.

Sonny Mares, the Executive Director of Walton County Tourist Development Council, said: "You've got to have access to the beach. It is our economic engine. It is extremely important."

This case is headed to the Supreme Court for final adjudication.

Another example is the Atlantic Yards project in Brooklyn, New York. This is a nearly $5 billion project on 22 acres that would house, among other amenities, an 18,000-seat arena for the hapless (and nearly winless) New Jersey Nets basketball team (owned by the developer, Bruce Ratner).

The New York State Court of Appeals ruled on Tuesday that the state could exercise eminent domain over local businesses and private homes because the area was "blighted". The judges ruled that "The Constitution accords government broad power to take and clear substandard and unsanitary areas for redevelopment."

However, "the fight against the Atlantic Yards project is far from over", said a spokesman for Develop Don't Destroy Brooklyn, a community group that opposes the project. "This is not the end of our fight to keep the government from stealing our homes and businesses."

A third example concerns the planned expansion of Columbia University in Upper Manhattan, New York, for a satellite campus. This time the Appellate Division of the State Supreme Court ruled against the expansion and in favor of the private property owners, saying that the condemnation procedure was unconstitutional.

A spokesman for Mayor Bloomberg, who favors the project, said "The Manhattanville plan is critical to Columbia's future as one of the world's leading academic institutions." It would create 14,000 construction jobs, 6,000 permanent jobs, and 100,000 square feet of public open space, he said.

And so the battle rages on…

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