Property Rights and Wrongs

BY EDWIN D. REILLY JR.
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The saying "A man's home is his castle" can be traced back at least 450 years, long before women were invented (in about 1960, I think). It was used, but not necessarily for the first time, in 1604 by the English jurist Sir Edward Coke (pronounced "Cook"—the old fossil didn't want to be considered fuelish).

Well, on Thursday, June 23, our quirky Supreme Court rendered another one of its infamous 5-4 decisions in which neither men nor women can any longer be secure in what they have long considered to be "their" castle. Four reliably conservative justices dissented, but were outvoted by two liberals, two moderates, and one conservative. Strange bedfellows indeed.

The far right is outraged because they value houses as the prime example of tangible property. The far left is equally out of its gourd because they are very fond of the people that live in houses that they allegedly own, or even rent. So this is a rare case where the Court became equal opportunity provocateurs. Surprising to me, the *New York Times*, the *Times Union*, and the *Gazette* all quickly editorialized in favor of the decision, although on June 29 the latter did run a cartoon that ridiculed it.

Let's start the analysis by reviewing the closing clause of the Fifth Amendment: *"'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."* The key phrase is "public use." The word "use" is not ambiguous, but the Court decided to take a very broad view of "public." The use of eminent domain by various levels of government is a well-established principle of common law. But my first thought was that land taken for public use would and should be retained by the exercising body in order to do something like build a bridge or a highway or a park. Years ago, Robert Moses persuaded and cajoled the state and city of New York to do a lot of this, displacing thousands of people to ensure that the automobile would be king of the road throughout his long lifetime; he died in 1981 at age 92. I strongly recommend that you take the time to read the greatest political biography ever written, Robert Caro's *The Power Broker: Robert Moses and the Fall of New York*.

But may a municipality take land, with just compensation of course, and immediately resell it to a developer who promises to so improve a neighborhood that a "public" larger than those dispossessed will benefit? This might be either tangibly,

through lowered taxes, perhaps, or intangibly, through enjoyment of the bread and circuses to be provided thereon.

The very thought made my duck-hunting buddy Antonin Scalia incredulous: "You mean you can take from A and give to B if B pays more taxes?," he said, raising his formidable eyebrows.

Well, my research reminded me that for decades before June 23, government has been only too happy to cooperate with developers who speak convincingly of what great benefit it would be to take privately held land to facilitate the building of a pyramid or two. (To this day, some malls are called "Pyramid Malls.") Painfully to this Dodger fan, *Nightline* told the story of how, in 1962, Dodger Stadium was built in Chavez Ravine (on a hill, actually) where the residents of a once vibrant Hispanic-American community had lived happily for decades.

So, such things can't happen in New York State, right? Doesn't our own constitution protect us? If only it were so. Not too long ago in New York City, a man was forced to sell a desirable corner that his family had owned for more than 100 years so that the *New York Times* could build a new office building. And a similar action made room for an expansion of the New York Stock Exchange lest it move to New Jersey and never be heard from again.

Such things are indeed possible because Article IX of our state constitution as amended in 1963 says "Local governments shall have power to take by eminent domain private property within their boundaries for public use together with excess land or property but no more than is sufficient to provide for appropriate disposition or use of land or property which abuts on that necessary for such public use, and to sell or lease that not devoted to such use."

I have not read the legal precedents that inform the reading of this passage, but it would seem to say that if a public "seed" can be identified—a small parcel suitable for a park perhaps—then there is no limit to the domain of eminence surrounding it that can be sold to a developer with deep pockets. In essence, it says that as much additional property may be taken as is "appropriate" to dispose of.

The quoted constitutional clause appears under the heading "Bill of Rights for Local Governments." Interestingly, there is no corresponding section "Bill of rights for individual persons," nor for any other class of people or institution. Two years ago, Dana Berliner of the Institute for Justice in Washington (not an oxymoron, I hope) gave the keynote address to the Property Rights Foundation of America (www.prfamerica.org). Resisting what must have been the strong temptation to open with "Ich bin ein Berliner!," she said that New York has "the worst eminent domain process in the country in terms of telling the people what is going on." She said that if

your property is condemned there is a 30-day window in which you can do something about it (like sue), but that it is very hard to find out when it starts in time to take legal action, and neither state nor local governments must send you a notice about it. Continuing, she said that there had been a proposal in the legislature in 2003 to at least tell people about the 30-day window. It passed unanimously in the Assembly and the Senate, but Governor Pataki vetoed it, saying (according to our heroine) that it was too expensive to identify affected property owners and mail them a notice.

In 2003, the mayor and city council of Lakewood, Ohio, a depressed suburb of Cleveland, supported a large urban renewal project. They declared that a certain neighborhood was "blighted" because, on average, the homes slated for condemnation didn't have "three bedrooms, two baths, an attached two-car garage, and central air." Opponents pointed out that by that standard, the mayor's home and those of most councilmen were also blighted. So November came, and the blighters (OK, the blightees) defeated the mayor and the project referendum, the latter by a mere 39 votes.

Such urban renewal endeavors are not subject to referendum in our state. Given that our constitution makes it virtually impossible for financially beleaguered cities like Schenectady to annex surrounding territory, use of eminent domain is virtually the only tool available to them to increase their tax base.

To hedge their decision, the Supremes did send a signal that individual states may do as they please. Just four days later, with a different Moses in mind, they decided that a municipality may not "covet thy neighbors' goods " provided that the prohibition is written on a stone surrounded by secular icons outside the Texas State Capitol, but not if that commandment and another nine with it are framed and hung on the walls of Kentucky courthouses. Except on Sundays, of course, when the courthouses are closed anyway.

Edwin D. Reilly, Jr., a regular contributor to the Sunday Gazette opinion pages, lives in Niskayuna in a house that, so far at least, has not been declared blighted.