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Eminent Domain or *Dominium Eminens*

by

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Horatio Vencia learned about the legal concept of “*Eminent Domain*” when he was required to enroll in PSC 101, an Introduction to American Government course. At the private university he attended some 25 years ago, the legal concept was hard for him to grasp at first, and it seemed to be counterintuitive to his own conservative political beliefs. In principle, he understood what *eminent domain* meant, but his views about the right to private property were so indelibly etched in his consciousness that it was difficult for him to accept anything less than an absolute standard of protection.

Vencia was bothered by what he learned from his seasoned professor, and as he reflected on this principle of constitutional law, he became befuddled and confused. He wondered why the state had the power to “expropriate” private property for a public use without receiving the consent of the owner.

He recalled the time that he discussed *eminent domain* with his father when he was at his parents’ home during one of his frequent college breaks. He remembered how patient and respectful he was to his father when he was told that the power of *eminent domain* was essential if the state were to make decisions beneficial to the greater community or greater society, but that it might be opposed by some land- or home-owners. He explicitly recalled his father talking about the construction of highways and roads, tunnels, airports, water treatment facilities, schools, parks, public buildings, and defense installations, and other building sites that might require public condemnation. It was during his conversation with his father, as he explained later that the notion of adequate compensation for the property taken was emphasized and making a determination of what constituted a “just” price was not easily agreed upon by the parties involved in these kinds of property transactions.

Upon returning to class, Vencia remembered asking his instructor to differentiate between “expropriation,” “condemnation,” and “*eminent domain*.” He also asked probing questions about several related topics, which he had not fully resolved in his own mind; principally how just compensation for real property was actually calculated and what constituted a public use.

It never occurred to Vencia that something he labored with understanding would become so important later on in his own professional career. In fact, he never thought he would hear again the name of the 17th century Dutch jurist, Hugo Grotius who wrote about *eminent domain* in 1625. As Vencia’s mental abstractions were fast-forwarded, he revisited why he thought “property rights” were

absolute ones, but this view was soon to be shattered by an important Supreme Court interpretation of the law and by convention.

Of course, Vencia had formed his beliefs about liberty and justice, and equity earlier on in life and he never completely embraced the idea that *eminent domain* could be “legitimately” invoked, except in what he considered to be “extraordinary circumstances” — those instances in which the public’s interest would be “universally” served. The rigidity of his philosophical and legal orientation would now be further tested as director of community and economic development for the city of Midway.

Midway had its similarities with other older industrial cities in the “rust belt.” It struggled with maintaining a reasonable quality of life while contending with a deteriorating and obsolete infrastructure that had become a maintenance “nightmare.” Also, Midway simultaneously had to contend with pockets of urban decay or blight, a declining property tax base, and the loss of several thousand manufacturing and industrial jobs due to the twin initiatives of corporate downsizing (rightsizing) and outsourcing. Faced with this daunting quandary of how to meet escalating municipal costs with shrinking tax revenue, he became “super-charged” when Apex Railroad approached him about a corporate development plan they had for his city.

Apex Railroad planned to locate a warehouse and distribution facility in an area that Midway had designated as a Brownfield Development site. Horatio was quick to grasp the magnitude of what Apex wanted and realized that this might be the “magic wand,” “the silver bullet,” “the needed surge,” that his city needed at this “critical juncture,” and he was anxious to learn the details of what Apex Railroad had in mind.

Jane Wilde, Apex’s representative waded quickly through the formalities and necessities of making the obligatory introductions and presented her plan in an assertive and straightforward manner. In brief, she forcefully indicated that the Apex initiative would require 150 acres of its own property, plus an additional 500 acres to affect the warehousing and distribution center it wanted to build. Wilde noted that the economic impact would be substantial and that Apex envisioned adding nearly 6,000 to 7,000 medium- and high-paid jobs in the future. She emphasized that her company had a good track record with labor unions and a proud record of providing a benefit portfolio of health insurance and retirement pension plans that rivaled any present corporation in Midway. Wilde also presented some preliminary data on the development’s projected impact on school funding, the municipal budget, and on regional or area economic development. She stated, “The development will serve as a magnet for employment and economic betterment for an already ailing city.”

As Vencia and Wilde went over the package, it became clear that Apex wanted an entire loaf — not just a slice of bread. She explained, “Apex as a railroad company can use the power of *eminent domain*; agreements to purchase property have been effected for nine of ten parcels associated with the 500 required acres; and, Apex is willing to use its power of condemnation to secure the two properties in dispute, but prefers that such be a course of last resort.”

The fact that so much had already been accomplished by Apex impressed Vencia. Then, as with most negotiated plans, Wilde set out several added requirements, “Apex will own the 700 acres that will constitute the new Apex Park; a logistics park. A buffer zone will need to be established between the new facilities and existing resident property; all but one property owner in the buffer zone has agreed to be purchased. That one homeowner, Agnes Stonewall, is not willing to sell her property to Apex; and, although the company was willing to use its *eminent domain* authority in dealing with Stonewall, Apex’s corporate legal team advised against taking such action, since the property in question was located in the “buffer zone” and would not be directly used by the railroad. Therefore, the city of Midway would need to use its power of *eminent domain* to take her property, if Apex was unsuccessful on conducting a sale.”

Vencia was literally stunned by what he had just heard. The development plan was an ambitious one, but it carried with it, like most projects, some added “baggage.” Although Vencia had some experience in using the power of *eminent domain*, he only sought to apply it once for an essential new water tower project that involved little land area. As such, he justified the “taking” for a “public use” as intended by the U.S. Constitution. However, Apex Railroad was asking him to use the power of *eminent domain*, if it failed to reach an agreement with Stonewall. This was an agreement associated with a plan for economic development and was contrary to his deeply held convictions. He could justify the use of the “taking clause” as it related to “public use,” but not for reasons of economic development.

Vencia’s comfortable professional life was quickly becoming more complex and complicated. The neat little philosophical boxes he was able to build earlier on in his life, were now threatened by none other than the Supreme Court of the United States.

As he traveled through the town on his way to lunch, he listened eagerly to a news reporter on National Public Radio (NPR) summarize the decision of *Kelo et al. v. City of New London, et al.* (2005). He learned that New London, Connecticut was interested in developing and aiding in the revitalization of its deteriorated economy and that it had purchased from willing sellers the bulk of the property that was to become part of a new development. For those who refused to sell, the city condemned their property! The newscast invited commentary and one listener who was conversational with the facts of the case noted that the petitioners had argued that by using the condemnation proceedings, the government had violated the “takings clause” of the 5th Amendment to the U.S. Constitution.

“The court decided,” the reporter said, “that the taking of property for ‘public use’ was justified since the development plan dealt with a distressed area that if developed would bring into the city’s coffers added tax revenue and greater new jobs.”

In short, Vencia was hearing that New London had used the power of *eminent domain* to promote economic development and this was permitted by Connecticut’s statutory law. By ruling in favor of New London’s position, it had given a “green light” for its development plan and for construction to begin.

Vencia found it difficult to believe what he had just learned. He turned his car around, returned to city hall, and rushed into his office to “Google” the case and get a quick read of the recent decision. He knew it could set off a “fire-storm” of reaction and it did. Some political commentators and talking heads took up the position that this was another instance of the Supreme Court enabling government to pursue its cause of “creeping gradualism” that would inevitably lead to its further encroachment on the right to property. Also, some pundits argued that citizens were left powerless when the government runs afoul or does not follow the “original intent of the founders.”

Vencia had to respond to Apex’s proposal. “So much,” he thought, “had transpired so quickly.” How would he handle the potential use of *eminent domain* and not threaten Midway’s future economic development? He felt he had been placed on a “high wire” and even a slight slip now on his part could have disastrous consequences. He searched for the right words as he typed the following response to Apex. He wrote:

The City of Midway is eager to see the development of the new corporate facility. However, we are unable to make a firm commitment on the use of *eminent domain* for an economic development project. Two courses of action might be reasonably taken by Apex Railroad, and either one would be acceptable to the city of Midway:

1. Apex Railroad could donate all land in the buffer zone to the city of Midway for development as a city park and recreational area. Because the park would have a public use, the city, if necessary, would be willing to use its power of *eminent domain* to secure the Stonewall property, thus permitting the project to proceed. Apex would pay for the Stonewall property, but the city would exercise its authority over the land.

2. Apex Railroad could proceed with the project, having purchased 9 of the 10 properties needed to establish a buffer zone between the city and the distribution facilities. Eventually the Stonewall case would be resolved. Upon Mrs. Stonewall's death or the sale of her home, Apex would be able to acquire the property. In turn, the city would make it clear to Mrs. Stonewall that she has been forewarned of the noise, traffic, and light issue associated with the logistics park and that complaints concerning those issues would be ignored.

Vencia had now completed his task. The "ball" had been passed to the other side of the court. He would now have to wait for Apex Railroad to respond. Although he felt relieved that the letter had been written and at least for the time being, the issue was off of his desk, he wondered if his deeply held personal values and convictions had gotten in the way of doing what was best for "good government" and the City of Midway.

Questions and Instructions:

1. Should Vencia have rejected the legal use of *eminent domain* just because he felt it was inappropriate? Please provide a cogent defense.
2. Should cities be permitted to exercise *eminent domain* for economic development projects? Please explain.
3. Although the use of *eminent domain* for the development of a city park is clearly permitted by Vencia's ethic, isn't that just a narrow, technical definition? Wouldn't purchasing land for a public park, as proposed, be using *eminent domain* for economic development purposes? Please explain.
4. What options are available other than the ones provided in the case scenario? Please elaborate.
5. If the use of *eminent domain* was not an option, should Stonewall be permitted to single-handedly stop a project that conceivably could bring up to 7,000 good jobs and millions of dollars in property taxes to Midway and the school district? Please justify your conclusion.

Case 21: *Eminent Domain* or *Dominium Eminens*

Name:

Case Log and Administrative Journal Entry

This case analysis and learning assessment is printed on perforated pages and may be removed from the book for evaluation purposes.

Case Analysis:

Major case concepts and theories identified:

What is the relevance of the concepts, theories, ideas and techniques presented in the case to that of public management?

Facts — what do we know *for sure* about the case? Please list.

Who is involved in the case (people, departments, agencies, units, etc.)? Were the problems of an “intra/interagency” nature? Be specific.

Are there any rules, laws, regulations or standard operating procedures identified in the case study that might limit decision-making? If so, what are they?

Are there any clues presented in the case as to the major actor’s interests, needs, motivations and personalities? If so, please list them.