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No. 072814

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

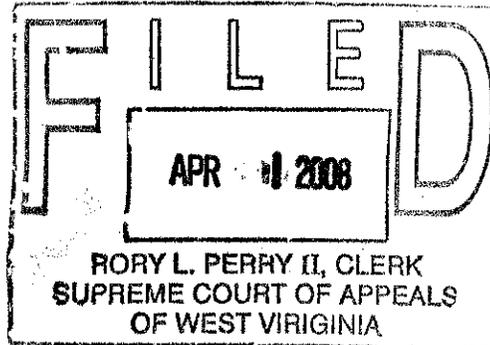
CONTRACTOR ENTERPRISE, INC.,
a West Virginia corporation,

Appellant,

v.

WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF
HIGHWAYS, a West Virginia agency,

Appellee.



BRIEF OF APPELLANT

Submitted by,

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I. Kind of Proceeding and Nature of Ruling Below

The West Virginia Department of Transportation through its Division of Highways filed an action seeking to condemn property owned by the Appellant Contractor Enterprise, Inc. (CEI) in Logan County. CEI challenged the propriety of the condemnation proceedings on the grounds that the proposed taking was not necessary to accomplish a public purpose. CEI filed a motion to dismiss the action, got a preliminary injunction and thereafter the matter was treated as one for permanent injunction which the Circuit Court denied, thereby transferring title to the State of West Virginia.

The Circuit Court's order of June 8, 2007, sets forth the following findings and conclusions which CEI emphasizes for purposes of this appeal:

- The original plans for the project (construction of a section of Route 10) did not refer to a waste site, p. 6, ¶13.
- All bids received for this project were rejected by DOT, p. 3, ¶4. At the time of final hearing and judgment no award had been made for this project.¹
- The pattern, practice, and custom on road construction projects generally and on this project in particular provided for the contractor to locate and to purchase or lease waste material sites, p. 6, ¶13.
- After rejecting all bids the DOH changed the project plans to state that CEI's property "would be provided for a potential waste site to be used if the contractor so desires,"² p. 6, ¶13.

¹During the period since the Circuit Court's decision, the State readvertised the project for bids. CEI once again submitted the lowest bid which was accepted this time. Construction has begun.

²The precise language contained in the plans as modified is: "**POTENTIAL WASTE SITE** Right of way, Right of Station 361+00 is provided *for a potential waste site to be used if the contractor so desires*. All design associated with the waste site including drainage and erosion and sediment control shall be submitted to the Engineer for approval before using the waste site."

- The Court below specifically recognized that the modified plans “allow the contractor to make a decision as to whether or not the property would be used as a waste material site.” This is comparable to Federal Guidelines, pp. 6-7, ¶13.
- Because there exists a public purpose for the optional use of the property in question CEI must show that the decision to condemn was arbitrary, capricious, based upon fraudulent behavior, oppressive, in bad faith or contrary to law, p. 8, ¶13.

II. Statement of Facts

CEI purchased the property in issue in April of 2006 for the sum of \$125,000. CEI is a family-owned corporation which is engaged in general contracting and surface mining. The same family also owns a corporation which is engaged in heavy construction, building such things as highways and dams. The companies own and operate substantial numbers of heavy equipment pieces in their daily operations. In recent years their operations have both included surface mining and highway construction in Logan County.

The property in issue was purchased from the Cecil Walker Machinery Company and is located adjacent to Walker’s Logan County facility. The Plaintiff and the sister company need to regularly service their heavy equipment which for the most part was purchased or leased from Walker and that too was a significant factor in the decision to buy this property. Another important factor was the sister company’s experience in previously constructing several sections of Route 10 between Man and Logan. As such, and consistent with the industry custom and practice, CEI contemplated that the same property could serve as a waste site if the low bidder later wanted to select the property or to negotiate with CEI for its use. Consequently, CEI expended an additional \$252,000 to improve the site as the Circuit Court so found, Order p. 6, ¶11.

After rejecting all bids on this project as originally submitted the Department changed the plans for the Route 10 project so as to identify CEI's property as being available as a "potential waste site." The Department did this knowing that CEI's sister company, with the same family ownership and the same President, had been rejected as the low bidder. Moreover, the Department changed the plan only after CEI had already improved the property at great expense. The DOH right of way agent contacted CEI President David P. Heeter in October, 2006 indicating that DOH had decided to take CEI's 32 acres for it's "possible use" as a waste area. The price offered - \$119,000, some \$6,000 less than CEI had paid only six (6) months earlier.

At the hearings held below former Cabinet Secretary of DOT and DOH Commissioner Fred VanKirk testified that the plans for this project fail to meet the requirements for condemning private property as interpreted during his 39 years with the Department, CEI Exhibit 6, T 2/6/07, pp. 76-77. He explained:

"The wording in the first sentence there does not appear to be. It says, 'provide for potential waste site to be used if the contractor so desires', which implies that there are alternative sites to be used or could be used. Therefore, it is not expressly needed, the particular site might not be expressly needed for the highway project."



"During my tenure with the Department of Transportation, Division of Highways, either one, I don't recall the Highways Department ever condemning a site for waste or a piece of property for a waste site.

Q. Was there a particular reason why that was the pattern, practice and custom?

A. Well, it was a policy that as far as I know is still in the Division of Highways. We required the contractor to obtain the waste sites. There are economic reasons as well as liability issues involved with obtaining waste sites which we put that responsibility onto the contractor." T 78.



“Q: Was there any other rationale that supported the practice and custom of not condemning waste sites? In other words, you’ve identified a couple. Is there any other?”

A: Well, with regard to the permitting process, the Division of Highways put that responsibility onto the private contractor simply because one reason would be the liability issue.

The holder of the permit is responsible for anything that happens to that site even after the construction project is over with. The other bigger reason or a reason for the policy was economics. Highway contractors are innovative. They’re entrepreneurs. They can go out and they can find different waste sites. They can cut a deal, so to speak, if you want to use that language, with a property owner in a waste site. The Highway Department would have to go through an appraisal and purchasing process and hold title to that property after the project is over. With having the contractors do it, they can go out, they can lease it, they can buy it. They can work with the property owner to improve their property, and all of that boils down to economics in the bidding process to the Division of Highways,” T 80-81.



“Q: Does it have an economic impact then? Was that part of the rationale?”

A: Well, you would have an economic impact with the bidding process. The contractor can choose his waste site which is the most economical and fits his plan for construction of the project, and therefore resulting in lower bids to the Division of Highways, as well as, I think the issue came up earlier about taxation. If the State . . . owns property it’s taken off the tax rolls, and if the contractor owns it, he would still have to pay taxes . . .” T 81-82.

Mr. VanKirk related that the supporting rationale for the practice and custom involved both economic and liability considerations which justified placing responsibility for the waste site on the contractor, T. 78, 80-81. Further, when the State owns the property it is removed from

the county tax rolls, T. 81-82. According to the Logan County Chief Deputy Assessor the property purchased by CEI and condemned by the State brought in tax revenue of \$1,685.36 in 2006, T. 38-39.

No fewer than six (6) other suitable waste sites were available in the vicinity according to those who testified in this case, T. 2/6/07, pp. 15-16, 17-18, 24-25, 47, CEI Exhibits 3 and 4, Deposition pp. 7-9. These witnesses included other contractors who were CEI's competitors in the bid process and landowners whose property was available for use as waste sites. That testimony appears totally consistent with DOH's own standard specifications which state that:

“The contractor shall locate and furnish all sites for disposition of waste and surplus property, except those sites shown on plans,”
CEI Exhibit 5, T. 82-83.

As developed below the controlling federal authority states that a waste site cannot be mandated, T. 2/12/07, pp. 70-72, CEI Exhibits 11 and 12, 23 C.F.R. 635.407(g). As the record discloses, the State officials were well aware of this as this project uses federal funds. Accordingly, the “use” involved in the taking was optional, but the property was condemned anyway. It is this aspect of the evidence upon which CEI focuses in this appeal and which CEI believes is dispositive of the issue.

III. Assignment of Error

THE CIRCUIT COURT SHOULD HAVE DISMISSED THE CONDEMNATION ACTION UNDER THE CIRCUMSTANCES OF THIS CASE.

**IV. Points and Authorities
and
Discussion of Law**

A. THE CIRCUIT COURT'S ORDER IS SUBJECT TO A *DE NOVO* REVIEW.

This appeal challenges the right of the State to take CEI's property under the authority of eminent domain which the Circuit Court of Logan County adjudicated. In large part the findings of fact which were reached by the court below are either favorable to CEI's point of view or otherwise are accurate and favor neither party. The Court's ruling in this matter on the ultimate legal question is subject to *de novo* review, Charleston Urban Renewal Authority v. The Courtland Co., 203 W.Va. 528, 509 S.E.2d 569 (1998). Appellant respectfully urges this Court to reverse the judgment below as being contrary to the facts found and the controlling law.

B. THE DECISION TO TAKE CEI'S PROPERTY BY EMINENT DOMAIN WAS ARBITRARY, CAPRICIOUS, OPPRESSIVE, IN BAD FAITH AND CONTRARY TO THE LAW.

According to the Circuit Court the decision of the West Virginia Department of Transportation, Division of Highways to exercise the power of eminent domain should not be interfered with by a Court absent arbitrary, capricious or fraudulent behavior, Order p. 4, ¶7. The burden according to the Circuit Court was upon CEI to prove that DOT's actions were arbitrary, capricious, oppressive, fraudulent, in bad faith, or contrary to law. In all due respect to the Circuit Court, CEI submits that it met the foregoing burden as identified by the court below. The Circuit Court's own findings which are clearly taken from the evidence as presented require that the judgment below be reversed. Simply stated, the Circuit Court's decision is not consistent with the facts nor supported by them.

For starters, the project plans call for a “potential waste site” which can be used “if the contractor so desires.” That fact standing alone renders the eminent domain “take” both arbitrary and capricious and contrary to the law. Traditionally, a decision is arbitrary and capricious when it disregards facts or determining principle, Black’s Law Dictionary, West Publishing 1979. “Caprice” refers to a seemingly unfounded motivation or disposition to change one’s thinking or to act impulsively, Webster’s New World Dict., Simon and Schuster 1995. The general law on eminent domain and West Virginia precedent have historically required that before the government can condemn a citizen’s land the taking must be deemed necessary to carry out a public purpose, Nichols on Eminent Domain (3d ed.) §62.07[3][c][ii] and F.R.B. Cemetery Association v. Redd, 33 W.Va. 262, 10 S.E. 405 (1889). As the Court said in Redd:

“An application to condemn land for public use must distinctly state that the land is needed for public use, *and will, when condemned, be devoted to such public use,*” syl. pt. 2. (Emphasis added).

It is arbitrary and capricious (and for that matter indicative of bad faith) to change existing plans so as to take the property of one who has improved that property either for its own use or for the use of another, especially when the practice of private ownership represents the industry custom. It is likewise arbitrary and capricious to ignore the fact that there are as many as six (6) sites available for the same use while taking the property of one person and then making its use optional as opposed to mandatory. What if the State takes the property and it is never used for dumping waste? It is also arbitrary and capricious to defy practice, the industry custom, and your department’s own publication for standard specifications. The modification of the plans for this project also smacks of caprice as that term is ordinarily defined.

The optional use proposal contradicts the law's requirement that the condemned land must distinctly be needed and that it will be so devoted when condemned, *Redd supra*. This project is also a federal project. Controlling federal law holds that highway construction contracts cannot specify mandatory waste sites absent very particularized supporting findings which aren't present here:

"The contract provisions for one or a combination of Federal-aid projects shall not specify a mandatory site for the disposal of surplus excavated materials unless there is a finding by the State transportation department with the concurrence of the FHWA Division Administrator that such placement is the most economical except that the designation of a mandatory site may be permitted based on environmental considerations, provided the environment would be substantially enhanced without excessive cost."
(Emphasis added). Title 23.C.F.R. §635.407(g).

The Circuit Court clearly erred when it concluded that the condemnation *sub judice* conforms to the law.

The essential error in the Circuit Court's decision is found in the following passages:

"... the DOT Commissioner has, within his authority and discretion, decided to obtain the property condemned and to make such property available to whomever is the contractor on these road projects while realizing that the DOT cannot require the use of any particular site.

While there are other sites available this particular site may be the best suited . . . whether it will actually be used . . . is not the issue.
Order p. 7, ¶13.

CEI respectfully disagrees with the foregoing for two reasons. First, since DOT cannot require the property's use, it should not be allowed to take the property by eminent domain. That appears to be a basic flaw in the Court's reasoning. Second, the optional nature of this take is indeed the issue – the dispositive issue in the opinion of the Appellant.

The Circuit Court further identified the burden on CEI as including proof that the decision to take CEI's property was "oppressive." That term is defined as "causing discomfort, tyrannical, distressing," Webster's New World Dictionary *supra*. Obviously, the action of DOT/DOH under these circumstances was distressing and caused discomfort to CEI.

Historically, the power of eminent domain has certainly been compared to despotism and tyranny, see Railroad Co. v. Iron-Works, 31 W.Va. 710, 8 S.E. 435 (1888); and see discussion regarding the reaction to the decision in Kelo v. City of New London, 545 U.S. 469 (2005) *infra*. Consequently, CEI submits that the Circuit Court also erred by failing to find that the taking of property in this case was "oppressive."

C. THE POWER OF EMINENT DOMAIN SHOULD BE LIMITED TO SITUATIONS IN WHICH ALL REQUIRED CRITERIA HAVE BEEN MET BY THE GOVERNMENT ENTITY WHICH PROPOSES THE TAKE.

The Circuit Court concluded that CEI failed to discharge its burden of proof. The Court appears to rely on a strict reading of those cases which allow that the agency's judgment about the exercise of eminent domain power should not be overridden except where the exercise is arbitrary, capricious or fraudulent, State v. Darnall, 129 W.Va. 151, 38 S.E.2d 663 (1946); Brady v. Smith, 139 W.Va. 259, 79 S.E.2d 851 (1954). However, such strict adherence to the narrow holding in that line of cases ignores the threshold requirement in every eminent domain action that the government must prove certain things *before* the taking of property can be approved. The cases must be read together to capture the true letter and spirit of the law.

As a condition precedent to the exercise of eminent domain powers it must be established that the taking is for public use, that the taking is necessary to achieve that public use, that the use which the public is to have is fixed, definite, and direct, and that the use which the public

must have is a substantially beneficial use, Gauley & S.R. Co. v. Vencill, 73 W.Va. 650, 80 S.E. 1103 (1914); State v. Professional Realty Co., 144 W.Va. 652, 110 S.E.2d 616 (1959); Charleston Natural Gas Co. v. Lowe, 52 W.Va. 662, 44 S.E. 410 (1901); Varner v. Martin, 21 W.Va. 534 (1883); see generally Vol. 7A Michie's Jurisprudence Eminent Domain §§16-22; Nichols on Eminent Domain (3d ed.) §62.07[3][c][ii]. In the case *sub judice* there is not even the basic finding by the State agency that the property taken will be used for any purpose as that choice was left entirely to the company which got the job. Accordingly, the taking was unnecessary on its face therefore, the Circuit Court should not have permitted the State's taking to go forward.

A good example of a court's denial of eminent domain is found in the decision of Katz v. Dade County, 367 So.2d 277 (Fla. App. 1979). There the county sought to condemn the appellants' property for purposes of urban renewal. The landowners argued that there was no reasonable necessity for taking their property. The appeals court agreed with the landowners finding that the county failed to meet its burden of showing a reasonable necessity for taking the property *in order to serve a public purpose*. By comparison, in CEI's case the State has proved even less than Dade County did in that there is not even an allegation that it is being taken, *i.e. to be used [only] if so desired*.

The firestorm of controversy set off by the decision in Kelo v. City of New London, 545 U.S. 469 (2005) is instructive. That decision upheld the exercise of eminent domain power in order to transfer land to a private owner for purposes of economic development. Protests to the decision came in various forms and from varied groups, see www.en.wikipedia.org/wiki/kelov.newlondon. Justices O'Connor, Scalia, Thomas and Rehnquist dissented on the grounds that the opinion gives the government license to transfer property from those with fewer

resources to those with more. Business publications railed against the decision, see e.g. Scott, Paul R., *Mississippi Business Journal*, July 11, 2005. Legislatures reacted, see e.g. Bell, Ginny Property and Construction Law Update, Summer 2006 www.maslon.com and www.goliath.ecnext.com. The ABA weighed in on the subject, www.abanet.org. Nolan, John R. And Backer, Jessica A., *U.S. Supreme Court Takings Cases Raise Research Issues*. The U.S. Senate considered legislation, S.B. 1313 "Protection of Small Business and Private Property Act of 2005." New Hampshire amended its constitution. The President issued an executive order against such action on the part of federal agencies. Such diverse groups as the NAACP, Libertarian Party, AARP and the American Conservative Union protested. In summary, the decision has been viewed as a dangerous advancement of the power of the State to take its citizen's property.

The undersigned submits that the mood which is represented by the protests to Kelo is more than merely an adverse reaction to an unpopular judicial decision. It represents a fundamental concern on the part of citizens that the government is not concerned with the rights of its own people and is more than willing to selfishly act without regard to the consequences. The best way to guard against such government overreaching is for the courts to hold the government's "feet to the fire." In other words, make the government dot the i's and cross the t's. The Circuit Court below failed to do so in this case.

D. THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION REQUIRES THAT THE DECISION BELOW BE REVERSED.

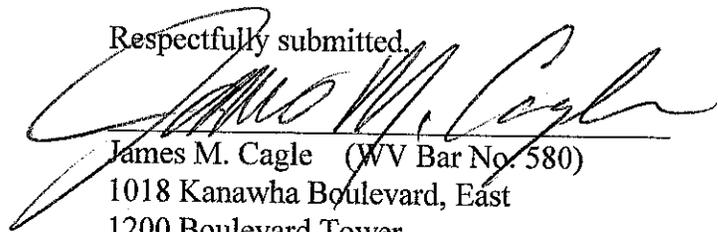
The U.S. Constitution, Article VI states in part that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . ." It is therefore settled that to the

extent that state law is in conflict with federal law, state law is nullified, Tipton v. Secretary of Educ. of United States, 768 F. Supp. 540 (S.D.W.Va. 1991); Jones v. Credit Bureau of Huntington, Inc., 184 W.Va. 112, 399 S.E.2d 694 (1990); DK Excavating, Inc. v. Miano, 209 W.Va. 406, 549 S.E.2d 280 (1991). As noted *supra*. pp. 6, 9 federal regulations prohibit the government from mandating a waste site in the absence of specific findings as to the needs and propriety of doing so. This aspect of the case was developed in the record at hearing, CEI Exhibits 11 and 12, encompassing a series of e-mails which clearly reflect that the proposed condemnation is contrary to federal regulations. The Appellee's representatives defied that warning by going ahead with the condemnation action. They were not permitted to do so as this project is subject to the federal regulation which CEI relies upon. The Circuit Court committed error in disregarding this facet of the case.

Relief Prayed For

For the foregoing reasons Appellant CEI respectfully prays that this Honorable Court **reverse the judgment** of the Circuit Court of Logan County and **remand this case with directions** that the condemnation action **be dismissed** from the docket of the Court.

Respectfully submitted,



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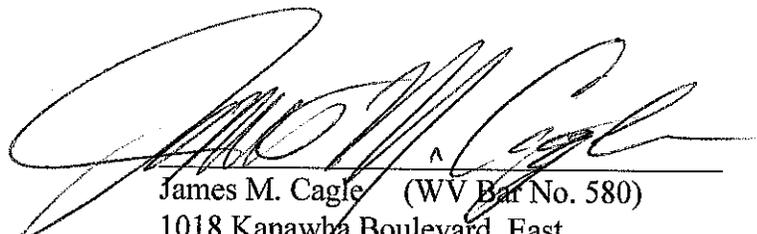
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CERTIFICATE OF SERVICE

The undersigned, James M. Cagle, Counsel for Appellant Contractor Enterprise, Inc., does hereby certify that a true and correct copy of the Brief of Appellant was served by mailing same in a properly stamped and self-addressed envelope via the United States Mail, to Robert B. Paul, Esquire to his last-known address of West Virginia Department of Transportation, Division of Highways, 1900 Kanawha Boulevard, East, Building 5, Room A519, Charleston, West Virginia 25305-0430 and J. Timothy Poore, Esquire, at West Virginia Department of Transportation, Division of Highways, P. O. Box 880, Huntington, West Virginia 25712, on this the 1st day of April, 2008.



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