

No. 33869 – West Virginia Department of Transportation, Division of Highways, A State Agency v. Contractor Enterprises, Inc. and The Sheriff of Logan County

**FILED**

**December 16, 2008**

Maynard, Chief Justice, dissenting:

released at 3:00 p.m.  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

This case required the Court to determine whether the West Virginia Department of Transportation, Division of Highways (hereinafter, the “DOH”), appropriately condemned property owned by the appellant, Contractor Enterprises, Inc. (hereinafter, “CEI”). The majority opinion concluded that the DOH’s condemnation of CEI’s land was proper. For the reasons outlined below, I believe that the majority of this Court has made a grave error in upholding the DOH’s actions. Therefore, I dissent.

The dangers of abusing government power to take private property cannot be overestimated or overstated. The power of eminent domain should only be used to take private property when the taking is absolutely essential for a public purpose and when there are no reasonable alternatives to such a taking. In this case, the taking was not essential or even necessary and many other reasonable options clearly existed. This taking is even more disturbing when one realizes that the DOH condemned property it simply did not need, and did so in a way that has never been done in the history of this State. The record before us includes testimony from former Cabinet Secretary of the DOT and DOH Commissioner Fred VanKirk who stated clearly that the plans for this project failed to meet the requirements for condemning private property as interpreted by the DOH during his thirty-nine years with the

agency. Mr. VanKirk said,

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.

Mr. VanKirk also explained that the supporting rationale for the practice and custom of *not* condemning property for waste sites involved both economic and liability considerations which justified placing responsibility for the waste sites on the contractor.

Mr. VanKirk explained that during his tenure with the DOH,

[w]e 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.

....  
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.

In this case, the record includes evidence that no fewer than six other suitable

waste sites were available in the immediate vicinity of the DOH's proposed construction project. Among those who testified on behalf of CEI in the underlying proceedings were landowners whose properties were available for use as waste sites and even other contractors who were CEI's business competitors. The record below also demonstrates that CEI purchased this property for a use which was instrumental in running the daily operations of its businesses. Nevertheless, the State, for some mysterious reason, was apparently determined to take CEI's land without regard to any other available alternative sites.

This Court previously explained in *Major v. DeFrench*, 169 W.Va. 241, 251, 286 S.E.2d 688, 694-695 (1982):

The United States and West Virginia Constitutions guarantee that no person shall be deprived of life, liberty or property without due process of law. W.Va. Const. art. 3 § 10; U.S. Const. amend. XIV. It is fundamental to say that due process guarantees freedom from arbitrary treatment by the state. Thus whenever government action infringes upon a person's interest in life, liberty or property, due process requires the government to act within the bounds of procedures that are designed to insure that the government action is fair and based on reasonable standards. (Citation omitted.).

It is very significant that the folks who drafted the above language included the word "property." They could have easily have said that no one can be deprived of life or liberty without due process of law and the constitution would still have been a wonderful document. But, the framers included "property." They obviously thought being deprived of property was equally as reprehensible and odious as being deprived of life or liberty. Nevertheless,

it is clear that our founding fathers were terrified of situations precisely like those that occurred in this case where due process was ignored. Moreover, due process simply has to mean more than the State paying some arbitrary or desultory price for land *after* forcibly taking it. Due process must at least stand for the principle that the taking of private property should occur *only* for a public purpose and then as a last resort, and *only* when there is no other reasonable alternative.

I also must point out that this particular road project was a federal project. As such, I believe that the taking of CEI's land was in violation of controlling federal law which holds that highway construction contracts cannot specify mandatory waste sites absent very particularized supporting facts. Specifically, Title 23.C.F.R. § 635.407(g), provides that:

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 enhanced without excessive costs.

With the aforementioned in mind, it was clear that the DOH did not comply with federal regulations and acted in an arbitrary and capricious manner in taking CEI's property.

In summary, the taking of CEI's land was not proper under the facts of this case. The taking was arbitrary and capricious as the record shows plainly that this particular

site was not needed for this project as other suitable land was readily available to the State to use for a waste site. For these reasons, I believe this parcel of real estate should have been returned to CEI.

Therefore, for the reasons stated above, I respectfully dissent.