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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, Justice, dissenting:

I dissent from the majority decision because the circuit court's decision to permit the taking of this property is arbitrary and capricious, and in contradiction with applicable federal rules and regulations.

In the case *sub judice*, the original project plans did not refer to a waste site. All bids received for this project were originally rejected by DOH. At the time of the final hearing and judgment, no award had been made for this project. Testimony was taken during the proceedings that indicated that 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. 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*."¹

It is a fundamental premise of eminent domain power that the property taken

¹ Specifically, the modified construction plans provide that: "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."

will be used for a public purpose. Our precedent requires that before the government may condemn a citizen's land, the taking must be deemed necessary to carry out a public purpose. *F.R.B. Cemetery Association v. Redd*, 33 W. Va. 262, 10 S.E. 405 (1889) (“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”). 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. *Gauly & 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); see Vol. 7A Michie's Jurisprudence *Eminent Domain* §§16-22; *Nichols on Eminent Domain* (3d ed.) 62.07[3][c][ii].

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. Title 23 C.F.R. §635.407(g) specifically provides:

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 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.*

Title 23 C.F.R. §635.407(g) (Emphasis added). Because the use of the waste site at issue was not, and according to federal regulation and could not be, mandatory, it was not necessary for a public purpose. Thus, it was not the proper subject of eminent domain proceedings.

In assessing whether the taking was necessary for a public purpose, the circuit court should have considered this federal regulation. The Supremacy Clause of the U.S. Constitution, Article VI, requires that all courts in this State conform their decisions to governing applicable federal law. It provides, in part, that “[t]his 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 . . .” Any state law that is in conflict with federal 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).

The power of eminent domain is to be exercise with restraint, not abandon. *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 768 N.E.2d 1 (2002). Thus, when construction plans delineate that a particular property may or may not be used as a waste site, it is not certain that the property will in fact be used for a public purpose, and thus, a taking under eminent domain is inappropriate.

The taking by DOT herein was both arbitrary and capricious and contrary to the law. I therefore agree with and join Chief Justice Maynard in dissenting to the majority opinion.