Public-Private Partnership and the Taking by Eminent Domain of a Previously Granted Interest in Land: Litigation Pitfalls and the Continuing Impact of *West River Bridge Co. v. Dix*

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It is common for municipalities and governments to grant easements to individuals and business entities. And, it is also common for such authorities to acquire property through eminent domain proceedings. It is less common for a municipality or government to engage in both actions with respect to the same property: grant an interest in land, and thereafter reacquire that same interest through eminent domain. When this situation occurs, the government, and any developer working with the government, should be aware of the potential legal pitfalls of such an action and the defenses that could be raised.

Introduction

A landowner may defend against a taking by claiming that the government is breaching the "contract" in which the government granted the landowner the ownership interest in the land.

A government and a real estate developer may enter into a public-private partnership which entails the taking by eminent domain of a previously granted interest in land in order to facilitate a new development.

In such cases, the landowner may defend against the eminent domain action by arguing that the taking is purely for economic development purposes.

And, the landowner may also argue that the real estate developer is liable for tortious interference with a contract by inducing the government to take the property interest.

These arguments were recently litigated in the matter of *Dayton Office Properties v. City of Dayton, et al.*[1]

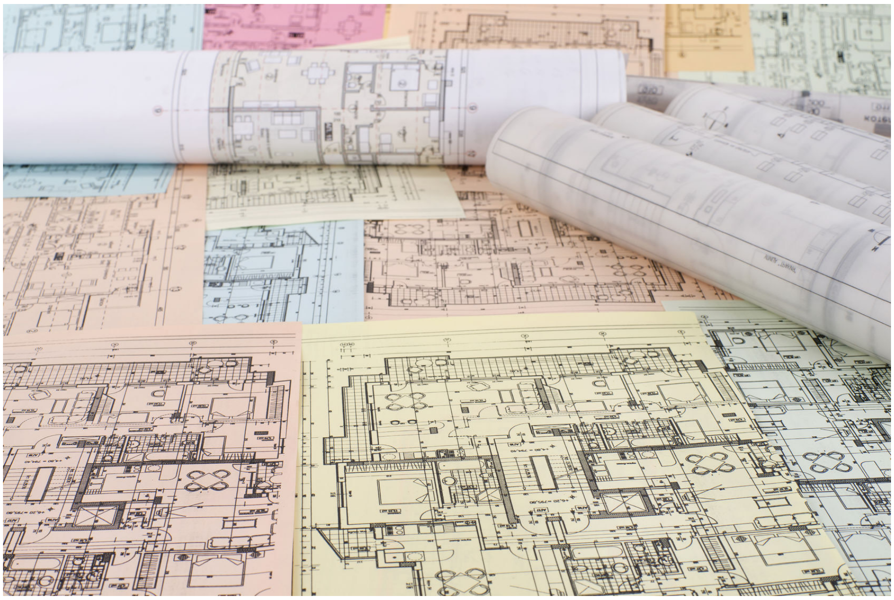
Dayton Office Properties

Dayton Office Properties (DOP) owned land and an office building in downtown Dayton, Ohio. The DOP parcel was originally bisected by a public roadway. In 1996, the City of Dayton executed an easement to the DOP predecessors, for a 90-year term, which closed the portion of roadway bisecting the DOP property.

Under the easement, DOP was permitted to use the closed portion of the road for ingress and egress to its property, but was required to expend monies to landscape and maintain the easement area.

The easement served a purpose for both the City and DOP: the City was able to close a road that created safety concerns at a nearby school, and DOP was able to create a campus-like environment for the tenants in its office building.

Following execution of the easement, DOP expended in excess of $500,000 on landscaping, construction, and infrastructure improvements to close the road and create an entrance to its parking



lot. DOP claimed that its improvements created a park-like setting on its property, and provided a competitive advantage in the downtown office market.

In 2013, 17 years later, the City and a team of developers began discussions to develop vacant land owned by the city that was adjacent to the DOP property. The development was to include office and residential buildings, as well as a new public parking garage that was to be operated by the city.

Part of the discussions included whether the closed road previously running through the DOP property should be reopened and re-connected to a main thoroughfare, as there would otherwise be only one road available to access the development, and traffic would be substantially increased in the area.

The city and the developers then entered into a predevelopment agreement and later a development agreement under which the City would convey to the developers 12 acres of property adjacent to the DOP property, and upon which the developers were to construct a commercial office building, residential units, and a parking garage.

The development agreement required the city to make a good-faith effort to acquire all necessary right-of-ways to complete the infrastructure improvements to the property, which included reopening the closed road which previously bisected the DOP property in order to alleviate the traffic congestion that would be created by the new development.

During the process, the developers approached DOP, seeking to purchase DOP's entire property for incorporation into the new development. However, those negotiations were unsuccessful, and the city eventually notified DOP that it intended to reacquire the easement by eminent domain to reopen the road. The city then enacted zoning ordinances to authorize construction and funding for the project.

The Legal Action

DOP filed a court action against the city and the developers alleging that the city and the developers engaged in a conspiracy to breach the easement and take the DOP property solely for the economic benefit of the development, that the city's threat to use eminent domain was a breach of the easement, and that the developers had tortiously interfered with the easement by inducing the city to breach it.

DOP also claimed that the city had acted improperly in approving zoning ordinances to permit the development.

After the court action was filed, DOP sought a preliminary injunction to prevent the city from instituting eminent domain proceedings and to stop the development from moving forward. DOP argued that, unlike federal law,[2] in Ohio the government cannot use eminent domain to take property from one owner and give it to another for the sole purpose of promoting general economic development, and that there must be a strong public purpose directly benefitting the public.[3]

DOP asserted that the taking of the easement was solely to benefit the project being constructed by the developers, that the taking was in breach of the easement, that DOP had expended substantial monies to improve the area, and that the resulting improvements which had created a unique, campus-like property would be destroyed if the roadway was reopened.

DOP also relied on *Syracuse University v. Project Orange Assoc. Serv. Corp.*[4] In that case, the university had leased land and steam generation plants to a utility provider, with the lease requiring the provider to sell steam power at a reduced rate to the university. When the venture no longer became profitable for the utility provider, the provider attempted to acquire the land and steam generation facilities from the university by eminent domain.

The court held that the utility provider could not use eminent domain to eliminate a contract that it had decided was no longer favorable to its economic interest.

The court commented: "It logically follows that a merely incidental public benefit coupled with a dominant private purpose will invalidate a condemnor's determination. . . [Here, the utility provider] is virtually the sole beneficiary of the condemnation, and this alone is reason to invalidate the condemnation especially where, as here, the public benefit is incrementally incidental to the private benefits of the condemnation."

DOP contended that, like that case, the city was simply using eminent domain to eliminate a contract that it no longer found convenient.

The Judicial Decision and West River Bridge Co.

The court rejected the DOP arguments, denied its request for a preliminary injunction, and dismissed the claims for breach of contract, tortious interference with contract, and civil conspiracy.

In its decision, the court relied on a 19th century decision from the U.S. Supreme Court, *West River Bridge Co. v. Dix*.[5] In that case, the state of Vermont had granted the West River Bridge Company a 100-year contract to operate a toll bridge.

As development in the area increased 40 years later, the town of Battleboro decided that the toll bridge needed to be replaced with an open highway, so Battleboro sought to acquire the bridge by eminent domain.

The bridge company sued, claiming that a taking of the bridge would impair its contractual rights with Vermont to operate a toll bridge, but the U.S. Supreme Court permitted the taking by Battleboro, finding that implied into every contract is a term that its performance could be ended by the exercise of eminent domain.

The Ohio court relied on *West River Bridge* to find that the city was permitted to reacquire the easement by eminent domain, and that its doing so was not a "breach" of the 90-year term of the easement:

> The power of eminent domain "is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise." West River Bridge Co., 47 U.S. at 532. For this reason, "into all contracts, whether made between states and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself" but "are superinduced by the preexisting and higher authority of the laws of nature, of nations, or of the community to which the parties belong." Id. Such conditions "are always presumed, and must be presumed, to be known and recognized by all," are "binding upon all," and "need never, therefore, be carried into express stipulation, for this court add nothing to their force." Id. Every "contract is made in subordination to them, * * *, wherever a necessity for their execution shall occur," and among these "inherent and paramount" conditions "is the right of eminent domain." Id. at 532-533. The invocation of the power of eminent domain "does not impair [any] contract effected by it, but recognizes its obligation in the fullest extent, claiming only the fulfilment of an essential and inseparable condition." Id., at 533.
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> Applying the foregoing to the case at hand, the court finds that the City has not breached the Easement. The City's execution of the Easement was implicitly conditioned on its right to exercise the power of

> eminent domain, and DOP's predecessors in interest are presumed to have known and recognized as much. Given that the City's retention of its power of eminent domain as an implied term of the Easement, the City's exercise of that power would not constitute a breach.

In addition to relying on the decision in *West River Bridge*, the court relied on two other principles: first, a party entering into a contract with a municipality should determine whether the contract complied with applicable statutes and laws, and must include in its negotiations any potential risk that the contract could be later invalidated or eliminated:

> DOP's predecessors in interest bore the burden to account, however practicable, for the possibility that the City might exercise eminent domain over the Property before the term of the Easement expired. In other words, even if the City could have surrendered its power of eminent domain through contract, DOP's predecessors in interest had the responsibility, "at their peril," to negotiate terms in the Easement for that purpose. . . . The Easement's silence regarding eminent domain should concomitantly be interpreted in favor of the City's reservation of the right to invoke it.

Second, a legislature's actions can only be deemed to bind future legislatures where there is a clear intent to do so, and here, there was no intent expressed in the easement that the city intended to waive its rights to acquire the easement by eminent domain:

> [A]ssuming hypothetically that the City could have waived its right to exercise eminent domain over the Property through its execution of the Easement, any purported waiver would be effective only if the Easement memorialized the City's clearly stated intent to bind future City governments.

Final Judicial Considerations

Finally, the court rejected the DOP argument that the city was improperly attempting to use eminent domain proceedings because the reacquisition of the easement was strictly for economic development purposes.

The court noted that the city was not acquiring the easement in order to transfer the road directly to the developers. Rather, the city intended to retain the property in order to open a street to the public—a valid public purpose justifying a taking through eminent domain proceedings. This conclusion was true even though the city would have an ownership interest in a public garage being constructed as part of the project.

Summary and Conclusion

Dayton Office Properties v. City of Dayton offers insight for developers and governments on how to successfully defend against claims for breach of contract, tortious interference or civil conspiracy when the government seeks to reacquire previously granted interests in land to support a future development.

This case also demonstrates the importance of being knowledgeable regarding how the applicable state law treats the taking of property for economic development purposes.

While each state has a different approach regarding takings, there is an important precept to remember: where an interest in land is being taken by the government and transferred directly to a private developer, there will be higher risk that a court will find that the taking is prohibited because it lacks a valid public purpose and is merely for general economic development.

However, where the taking is merely to support the development and not being used to transfer property to private parties for development, courts, such as the one in *Dayton Office Properties*, are much more willing to find the taking to be proper.

Notes:

1. Dayton Office Properties v. City of Dayton, et al., Montgomery County, Ohio, No. 2014 CV 02554.
2. Kelo v. City of New London, 545 U.S. 469 (2005).
3. City of Norwood v. Horney, 110 Ohio St.3d 353 (2006).
4. Syracuse University v. Project Orange Assoc. Serv. Corp. 897 N.Y.S.2d 335 (N.Y. 2010).
5. West River Bridge Co. v. Dix, 47 U.S. 507 (1848).

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