"EMINENT DOMAIN FROM START TO FINISH"

CONSTITUTIONAL PROVISIONS

A. Kentucky Constitution

Ky. Const. Section 1: "Rights of life, liberty, worship, pursuit of safety and happiness, free speech, *acquiring and protecting property*, peaceable assembly, redress of grievances, bearing arms."

"All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

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"Fifth: The right of *acquiring and protecting property.* "

Ky. Const. Section 2: "Absolute and arbitrary power denied"

"*Absolute and arbitrary power* over the lives, liberty and *property* of freemen exists nowhere in a republic, not even in the largest majority."

Ky. Const. Section 13: "Double jeopardy; *property not to be taken for public use without compensation.*"

"No person shall, for the some offense, be twice put in jeopardy of his life or limb, *nor shall any man's property be taken or applied to public use* without the consent of his representatives, *and without just compensation being previously made to him.*"

Ky. Const. Section 242: "*Just compensation to be made in condemning private property*; right of appeal; jury trial"

"*Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking*, or paid or secured, at the election of such corporation or individual, before such injury or destruction. The General Assembly shall not deprive any person of an appeal from any preliminary assessment of damages against any such corporation or individual, made by Commissioners or otherwise; and upon appeal from such preliminary assessment, the amount of such damages shall, in all cases, be determined by a jury according to the course of the common law."

B. United States Constitution

Amendment V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or

naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person* be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor *be deprived of* life, liberty, or *property, without due process of law; nor shall private property be taken for public use, without just compensation.*"

Amendment XIV:

Section 1 "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws."

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Section 5 "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

CHALLENGES TO CONDEMNATION BASED ON CONDEMNOR'S LIMITED LEGAL AUTHORITY, QUESTIONS OF "NECESSITY," BAD FAITH, AND ABUSE OF DISCRETION

A. Condemnor Defectively Organized; Failure To Comply With Eminent Domain Act

Bernard v. Russell County Air Board, 718 S.W.2d 123 (Ky. 1986)

Landowners opposed the Air Board's efforts to acquire their land for airport expansion purposes. The trial court and the Court of Appeals held for the Air Board. On appeal, the Supreme Court reversed, holding that the Air Board was not properly formed under the statute from which it derived the right of eminent domain, that it had not complied with the requirements imposed by law on such entities, and that it had not complied with the Eminent Domain Act respecting its initiation of condemnation proceedings.

The Supreme Court enumerated the provisions of KRS 183.132 relating to local air boards, noting the Air Board's numerous deficiencies and "substantial deviation" from its requirements. Among other deficiencies, the Air Board frequently did business without a quorum present as required by statute; it had done so at the meeting at which the plans affecting the landowners' property were approved; the Air Board did not keep minutes for its first meeting as required by statute; insufficient information was available respecting subsequent meetings; and there was no copy of the County Judge-Executive's original appointment of the Air Board. *Id.* at 124-125.

The Supreme Court rejected the contention that the Air Board nonetheless had a de facto existence. The Supreme Court found that the Air Board was not "a wholly independent board" but functioned as an entity subordinate to the County government, and that under KRS 416.560 it could not independently initiate condemnation proceedings. *Id.* at 125-126.

Citing *City of Owensboro v. McCormick*, 581 S.W.2d 3 (1979), the Supreme Court said, "A board comprised of six individuals should not have the power independent of the Russell County government, to take property away from private citizens. *** The board's attachment to the Russell County government indicates that the board should be held responsible to the county government. Thus, we hold that the [Air Board] was not a legally formed entity; it had not followed the requirements of KRS 416.560, and had no authority to condemn movants' property." *Id.*

B. Takings In Excess of Statutory Authority

Sprint Communications Co. L.P. v. Leggett, Trustee, etc., 307 S.W.3d 109 (Ky. 2010)

Sprint decided that the Leggett Family Trust's property would be the best location for its upgraded and expanded "point of presence" facility. Following Sprint's unsuccessful efforts to induce the landowner to sell its property, including statements such as "only" a voluntary sale would "avoid the rigors of contest and associated unpleasantries," and warnings of the "time and legal cost associated with condemnation," Sprint filed a condemnation action under the Eminent Domain Act of Kentucky seeking a permanent easement over the entirety of the Leggett property. Sprint intended

to demolish Leggett's 9,700 square-foot building and construct its own new building. In effect, Sprint's permanent easement would allow Sprint to occupy the entire property in perpetuity.

Leggett responded with a counterclaim for abuse of process, malicious prosecution, and violations of his civil rights under 42 U.S.C. Section 1983. Within a few months, Sprint moved for voluntary dismissal of the condemnation action. The trial court granted summary judgment for Sprint on the malicious prosecution claim and dismissed the abuse of process claim, finding that Sprint was authorized to bring the condemnation action. It also found that Leggett had been afforded due process and dismissed the civil rights claim.The Supreme Court granted discretionary review.

Affirming the Court of Appeals' reversal of the summary judgment on Leggett's abuse of process claim, the Supreme Court rejected Sprint's argument that KRS 278.540(2) allowed it to take by power of eminent domain "a 'permanent easement,' coextensive with an entire tract of land, demolish the principal buildings located thereon, and totally deprive the owner of any use thereof." The powers granted telephone companies in KRS 278.540(2) were limited to the acquisition of a "right of way" for telephone lines only in the manner provided by the Eminent Domain Act of Kentucky. *Id.* at 115.

"We agree with the Court of Appeals that even a cursory reading of the statute reveals that Sprint had no authority to take for its permanent use the entirety of Leggett's land. There is no ambiguity in the language of KRS 278.540(2)." Contrary to the mere "right of way" allowing Sprint to "pass through property owned by another," it was clear that " ... Sprint's intention was to permanently acquire the use of Leggett's entire tract, so it could tear down Leggett's building and erect a new POP facility. Such a taking has all of the significant qualities of fee-simple ownership, leaving Leggett's residual interest in the property worth nothing and of no use." *Id.* at 116.

C. Takings In Excess of Actual Need

City of Bowling Green v. Cooksey, 858 S.W.2d 190 (Ky. App. 1992)

The Bowling Green-Warren County Airport Board negotiated with Roy Cooksey for the acquisition of 24.59 acres of Cooksey's 101-acre farm. Cooksey offered to trade the acreage for an equivalent parcel adjoining his farm. The proposed swap did not occur, and the Air Board voted to condemn Cooksey's land "to establish a safety zone, among other public purposes and uses." The Fiscal Court and Board of Commissioners approved an ordinance and voted to condemn. Cooksey then offered to restrict his use of the land and give the City, County and Board easements prohibiting trees, residential development, and the erection of any structures on the land, up to the airport's restricted building line. Negotiations failed, and a condemnation action was filed seeking the fee simple title of Cooksey's 24.59 acres. *Id.* at 191-192.

The trial court conducted a trial on the right to take. In its findings and conclusions the trial court said "[t]here is no proof that the land in question is needed within the reasonably foreseeable future by the airport to provide use as a public purpose, a safety clear zone, a noise buffer zone, potential development, or any other purpose or cause. The Court finds that a taking of this property would bear an unreasonable relationship to the public interest. *** The Court finds a matter of law

... that there can be no taking of this property." *Id.* at 192.

The Court of Appeals affirmed the trial court, finding that the Kentucky Constitution and the Eminent Domain Act require a taking of private property by the government to be for a "public purpose." The evidence showed that there was no intended public use of the land, and that Cooksey had been willing to give the government an easement and restrict the property's use. The evidence was that the intended actual use of the property was the same: agricultural purposes; and Cooksey would continue to use it as such. Nor was there demonstrated by the government to exist an actual noise or safety problem.

The Court of Appeals turned to the question of necessity for the taking as determined by the government. It acknowledged the implicit requirement of governmental good faith in determining the necessity of a taking of private property. While the question of necessity "is one primarily and almost exclusively for the legislative branch, the question of whether the proposed condemned property is to be used for a 'public' purpose is one to be determined by the judiciary. *** In *McGee v. City of Williamstown*, Ky., 308 S.W. 795, 796 (1957), emphatically our highest Court says: 'It is a general principal of law that the Legislature cannot authorize the taking of property by eminent domain *in excess* of the particular public *need* involved. (Emphasis added.)'" (Citations omitted)

Finding no error in the trial court's findings of fact, the Court of Appeals concluded that it "must observe proper deference to the role of the trial court as factfinder." *Id.* at 193 (Citations omitted).

D. "Bad faith" negotiations as a defense to condemnation

Commonwealth, Transportation Cabinet v. Cooksey, 948 S.W.2d 122 (Ky. App.1997).

The Transportation Cabinet filed suit to condemn part of the Cookseys' property. The landowners admitted the Cabinet's right to take except in cases of bad faith, and counterclaimed for "unfair, false, misleading and/or deceptive acts or practices during the course of negotiations." The landowners requested "modification of the taking order, a jury trial for damages for just compensation, *and* punitive damages." *Id.* at 122.

The trial court found that the Cabinet had the right to take the property and entered an interlocutory order and judgment per KRS 416.610(4). Next, the court continued the case for the filing of exceptions to the commissioners award and for the amount of damages due the ladowner for the Cabinet's alleged bad faith. The Cabinet filed an interlocutory appeal (see *Ratliff v. Fiscal Court of Caldwell County*, 617 S.W.2d 36 (Ky. 1981)), on the ground that the trial erred by not disposing of all claims respecting the right to take before proceeding to the jury trial, and for allowing the bad faith damages claim to go to the jury. *Id.* at 122-123.

A divided Court of Appeals agreed with the Cabinet that the trial court erred by failing to decide all of the right to take issues (including the bad faith claim) before proceeding to the just compensation phase of the case. It also agreed that the Eminent Domain Act does not provide that bad faith or fraud are defenses to the condemnor's right to take. However, the Court of Appeals

conceded that the "exercise of good faith by governmental authority in using its power to condemn" is "implicit," citing a number of cases to that effect. Notwithstanding the non-existence of anti-fraud provisions in the Eminent Domain Act, the Court of Appeals acknowledged that the right to take will be denied where there is "[a] gross abuse or manifest fraud," citing *Kroger Co. v. Louisville & Jefferson Co. Air Bd.*, 308 S.W.2d 435, 439 (Ky. 1957).

Judge Buckingham dissented from allowing the Cabinet's interlocutory appeal to proceed as overextending the rationale of the *Ratliff* case, and concurred on the question of requiring the condemnor to act in good faith throughout. "The condemnor must exercise good faith in using its power to condemn, even though the statute does not clearly so provide. *City of Bowling Green v. Cooksey*, Ky. App. 858 S.W.2d 190, 192 (1992). This good faith requirement includes negotiating in good faith prior to initiating condemnation proceedings in the circuit court. *** I also agree with the majority that there is no separate cause of action against the Transportation Cabinet for bad faith in negotiating an agreement with the property owner, other than the recovery of attorney's fees if bad faith is shown. *Commonwealth, Dept. of Transportation v. Knieriem*, Ky., 707 S.W.2d 340, 341 (1986)."

Caveat: Judge Buckingham's assertion regarding the availability of attorney's fees "if bad faith is shown" should be read with the Supreme Court's discussion of the attorney's fee issue in *Knieriem*. The Supreme Court stated in *Knieriem* that the Cabinet had acted in the good faith belief that its actions in the case were for a "public use." It noted that awards of attorney's fees in cases such as *Knieriem* would only increase the costs of projects to be borne by the public.

E. "Arbitrary and capricious" conduct as a defense under the Eminent Domain Act.

Proffitt v. Louisville and Jefferson Co. Metropolitan Sewer District, 850 S.W.2d 852 (Ky.1993).

Per Stephens, C.J.: "The question we decide today is whether ... a condemnor who has met the two-prong test of necessity and public purpose, must give consideration to the environmental impact of a proposed project in order to avoid acting in an arbitrary and capricious manner."

Proffitt challenged MSD's right to take her property, claiming that MSD's failure to evaluate the taking's potential environmental impacts on her property was arbitrary and capricious. MSD responded that it had "voluntarily performed a survey of the impact of [the project] on the Indiana Bat and the Gray Bat. MSD also conducted a survey to determine the impact on Running Buffalo Clover. These surveys found that there would be no significant impact on the bats or the clover." *Id.* at 854.

Proffitt urged the Supreme Court to follow *Florida Power & Light v. Berman*, 429 So.2d 79 (Fla. Dist. Ct. App. 1983), which held that the utility's failure to consider environment factors was an abuse of discretion. *Id.* The Supreme Court refused, and rejected Proffitt's arguments on the ground that Kentucky's laws contained no requirement respecting environment assessment for a proposed project other than to comply with applicable federal laws; and it was for the legislature, not the courts, to establish the criteria to be followed by a condemning authority. *Id.* at 854-855.

Addressing the issue of MSD's asserted arbitrary and capricious conduct, the Supreme Court wrote: "We refuse to hold that MSD's failure to perform environmental assessments ... is violative of Section 2 of the Kentucky Constitution. States which require environmental assessments do so pursuant to an express constitutional provision or statute requiring such action. See, *** Fla. Const. Art 2, Section 7. *** Following *Berman* would judicially create an exception to the Eminent Domain Act. Not only would this violate Section 28 of the Kentucky Constitution, it would effectively emasculate the Eminent Domain Act." *Id.* at 855.

F. See also discussion of *Decker v. City of Somerset*, 838 S.W.2d 417 (Ky. App. 1992), in "Challenges to Takings for Private Benefit and 'Public Purpose' Redevelopment."

CHALLENGES TO TAKINGS FOR PRIVATE BENEFIT AND "PUBLIC PURPOSE" REDEVELOPMENT

"Taking from A merely to enable B to build a factory or C to construct a shopping center."

A. Taking Not For "Public Use"

1. *City of Owensboro v. McCormick*, 581 S.W.2d 3 (Ky. 1979)

Taxpayers challenged the constitutionality of KRS 152.920, a provision of the Kentucky Local Industrial Development Authority Act, KRS 152.810 *et seq.*, on the ground that it allowed the Authority to condemn private property for the purpose of conveying it to third parties for industrial or commercial development purposes. The trial court upheld the statute, concluding that the term "public purpose" used in Ky. Const. Section 171, which concerns the taxing power, and the term "public use" appearing in Ky. Const. Sections 13 and 242, were synonymous.

On appeal, the intermediate appellate court found the trial court's conclusion to be "an alarming concept" and reversed, saying: "in effect, the legislature has declared that the acquisition of *any* land for the development of a single industrial or commercial establishment constitutes a public purpose. Under the act, the city would have the power to condemn private property for the benefit of the authority so that the authority could in turn convey that land to a private organization for development as an industrial facility." *Id.* at 4, 6. The City and Authority appealed to the Kentucky Supreme Court.

The Supreme Court framed the question before it as, "whether the [Act] constitutes "public use" of the lands of private citizens whose property is condemned by the authority." "The city and the Authority insist that we should regard 'public benefit' to be equivalent to 'public use'. They also urge that we should adopt the expansive definition of 'public purpose' used in our cases concerning the issuance of revenue bonds by a city or county." The Supreme Court noted that it had found no Kentucky case declaring that "either 'public benefit' or 'public purpose' is equivalent to 'public use' in the eminent domain sense." *Id.* at 5.

The Supreme Court acknowledged that the distinctions drawn in its various decisions respecting public and private uses "cannot always be harmonized." Nevertheless, The Court "has always ... consistently recognized the necessity of protecting the rights of the citizen to be secure in his ownership of property. Governmental compulsion to surrender his property must always be accompanied by payment of just compensation and be effected for a public use." *Id.* at 7.

The Court said: "Naked and unconditional governmental power to compel a citizen to surrender his productive and attractive property to another citizen who will use it predominately for his own private profit just because such alternative private use is thought to be preferable in the subjective notion of governmental authorities is repugnant to our constitutional protections whether they be cast in the fundamental fairness component of due process or in the prohibition against the exercise of arbitrary power. Ky. Const. Section 2."

Conflating the "public purpose" provision of Ky. Const. Section 171 with the "public use" provisions of Sections 13 and 242 would allow private property "to be condemned for any purpose for which public funds might be expended." The ease with which such a "public purpose" or "public benefit" taking could be boot-strapped as being for a "public use" was acknowledged in *Chesapeake Stone Co. v. Moreland*, 126 Ky. 656, 104 S.W. 762 (1907), where the Court said,

"'If public use was construed to mean that the public would be benefitted in the sense that the enterprise or improvement for the use of the property might contribute to the comfort or convenience of the public, or a portion thereof, or be esteemed necessary for their enjoyment, there would be absolutely no limit on the right to take private property. It would not be difficult for any person to show that a factory or hotel or other like improvement he contemplated erecting or establishing would result in benefit to the public, and under this rule the property of the citizen would never be safe from invasion.'" *Id.* at 7-8.

The Supreme Court noted that the prohibition did not apply if "the property lies within an area of land which is blighted as defined by statute. The elimination of blight by developing the property according to a proper plan constitutes a 'public use' of the property. *Miller v. City of Louisville*, supra." *Id.* at 13.

The Supreme Court concluded: "We hold as did the Court of Appeals that the [Act] is unconstitutional to the extent that it grants ... the unconditional right to condemn private property which is to be conveyed by the local ... authority for private development ... . In the language used by the Court of Appeals, 'No public use is involved where the land of A is condemned merely to enable B to build a factory or C to construct a shopping center.'" *Id.*, 13-14.

2. *Commonwealth, Dept. of Transportation v. Knieriem*, 707 S.W.2d 340 (Ky. 1986).

The Highway department condemned two strips of land from the Knieriems, one for its highway project and the second to replace in kind the Bluegrass Saddle Club's easement over the Knieriem land, which the first taking had destroyed. The Knieriems challenged the taking and demanded an award of attorney's fees as "costs."

The Supreme Court held that the second taking was void as the taking of private property for the benefit of a private person. As such it was prohibited by Ky. Const. Sections 2, 13 and 242. Citing *City of Owensboro v. McCormick*, it said "Mere convenience is not a sufficient justification for the condemning authority to act as a land broker for private interests." *Id.* at 342.

The Court disallowed the Knieriems' fees demand: "There was no bad faith or unreasonable delay by the condemnor shown here. *** Allowing attorney's fees in a case such as this, where the condemnor has made an effort to take private property for what, in good faith, it thought at the time of the attempt was to be for a public use, would increase the cost to the public of acquiring property. *** We hold that the phrase "all costs" in KRS 416.610(4)(c) does not include an award of attorney's fees."

B. "Public Use" Ceases When The Property Taken Is No Longer Needed.

Miles v. Dawson, 830 S.W.2d 368 (Ky. 1991)

The Transportation Cabinet condemned a fifteen acre tract from Mary Miles for the improvement of I-65. Subsequent design changes reduced the amount of land actually used, and left a remnant of approximately five acres that the Cabinet decided to convey to a church to settle its eminent domain litigation with the church. Miles demanded the right to repurchase the remant under KRS 416.670 and the Cabinet refused. Miles sought declaratory judgment and the Circuit Court granted summary judgment for the Cabinet. The Court of Appeals affirmed.

The Supreme Court reversed, vacated and remanded the case on a vote of 5-2. The Court cited Ky. Const. Section 2, *McCormick*, and *Knieriem* in support of its decision that the Cabinet's proposed transfer of Miles's property to the church would be unlawful. *Id.* at 370-371.

The Supreme Court's decision turned on its interpretation of KRS 416.670, which it held to give Miles, as the "current owner" of the land from which the condemned property was taken, a statutory right of redemption of the condemned land. The statutory right of redemption extended to any remaining part of the condemned parcel. As for the price to be paid by Miles for the remnant, that was merely a "rudimentary" long division calculation. *Id.* at 369-370. Justice Lambert concurred in the majority's opinion because of the Cabinet's stipulation that the remnant was no longer needed for the project meant that the property was no longer held for a "public use." *Id.*

Two justices dissented on multiple grounds, one of which was that the question of necessity for the taking depends on the purpose of the initial taking and not subsequent events. The purpose of the original taking had never been disputed or contested. As for KRS 416.670's purpose, it was "to create a remedy in a situation where a project has been planned, a taking has occurred, and a subsequent abandonment or complete change of a highway development plan has thereafter occurred. *** [T]he statute purposefully fills a gap designed for restoration of the whole property to the original party (landowner) or successor. The statute is in derogation of sovereignity and is to be strictly construed in favor of the state, so that its sovereignity may be upheld ... unless the [legislature's intention otherwise] is expressed." *Id.* at 372-373 (citation omitted.)

C. Challenges to Development or Redevelopment

Defenses to Condemnor's Assertions of Necessity for Taking:

"Abuse of Discretion, Bad Faith and Fraud"

1. *Decker v. City of Somerset*, 838 S.W.2d 417 (Ky. App. 1992)

City proposed to build a 40,000 square-foot conference and exhibit center with an auditorium, theatre, and space for economic development office, to be constructed on condemned property located beyond the City's boundaries. City asserted that the project was for "public purposes," specifically cultural and educational opportunities, and economic development.

Landowners objected to the proposed taking because of the location outside of the City's limits, and because the City had no projection of the revenues to be derived from the project.

The Court of Appeals upheld the project and proposed takings, finding that the proposed uses were for a "public purpose." Although the property was located outside the City limits, it was adjacent to Somerset Community College, which was operated by the University of Kentucky, and there was potential for a future transfer of a portion of the new facility to the University.

That no showing was made of the revenue to be derived from the project was not a valid objection since anticipated revenue was not a criterion for determining the project's public purpose. Benefits from cultural, educational, and economic development were "no less essential to a community than the extension of water lines or sewers."

Quoting from *Commonwealth, Transportation Cabinet v. Taub*, 766 S.W.2d 49 (Ky. 1989), the Court of Appeals said that City's determination of necessity was conclusive of the right to condemn. The right of acquisition "may be defeated only by proof of fraud, bad faith or abuse of discretion, and the landowner opposing condemnation bears the burden of proof." *Id.* at 422-423.

2. *Commonwealth, Transportation Cabinet v. Taub*, 766 S.W.2d 49 (Ky. 1989), *overruled in part on other grounds by Blackstone Mining Co. v. Travelers Insurance Co.*, 351 S.W.3d 191 (Ky. 2010). S*ee also*, *Fischer v. Fischer*, 348 S.W.3d 582, 597 (Ky. 2011).

Taub challenged the legality of Transportation Cabinet proceedings to acquire land for the Toyota Access Road on the ground that the project was for the benefit of Toyota, not the public. The trial court sustained the Cabinet's right to take the property and Taub appealed. The Court of Appeals reversed by a 2-1 margin, finding that the "chronology of events" showed that the Cabinet had acted only as a "rubber stamp" for the Governor and the Commerce Cabinet. Further, the Secretary's Official Order authorizing the project contained errors and false statements; and the project did not appear on the Cabinet's "six-year plan."

The Supreme Court quoted from KRS 177.081(1), which states that "the official order of the bureau of highways shall be conclusive of the public use of the condemned property and the condemnor's decision as to the necessity for taking the property will not be disturbed in the absence of fraud, bad faith, or abuse of discretion." *Id.* at 50.

The Supreme Court noted the trial court's finding that the Cabinet had exercised its discretion: "This court believes the testimony sufficiently indicates that Secretary Dawson properly exercised his own discretion in determining the question of necessity." *Id.* at 52.

Reversing, the Supreme Court held that the Court of Appeals had exceeded the permissible scope of review by engaging in its own fact-finding. It rejected Taub's contention that the condemnations were invalid because of defects and false statements in the Secretary's Official Order, observing that there had been subsequent amended Official Orders that cured any deficiencies. In his concurring opinion, Justice Leibson specifically addressed Taub's argument that the takings were unauthorized for failure to be listed in the "six-year" plan, finding the argument to be without merit.

D. *Kelo v. City of New London, Connecticut*, 545 U.S. 469, 125 S. Ct. 2655 (2005)

From the Summary of the Case:

The City of New London was in a condition of significant economic decline following the federal government's closure of the Naval Undersea Warfare Center, which cost the City over 1,500 jobs. In 1998 the City's unemployment rate was "nearly double" that of the state, and its population of 24,000 at its lowest level since 1920. In 1990 the City was declared a "distressed municipality." The State of Connecticut authorized bond issues to fund the panning activities of a private nonprofit development corporation and support the establishment of Trumbull state park on the City's waterfront. At this point, the Pfizer pharmaceutical company announced that it would build a $300 million research facility near the park.

The City approved a development plan that "(1) according to the Connecticut Supreme Court, 'was projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas'; and (2) involved land that (a) included the state park and approximately 115 privately-owned properties, (b) was adjacent to the pharmaceutical company's facility, and (c) had been designated for a hotel, restaurants, retail and office spaces, marinas for both recreational and commercial uses, a pedestrian riverwalk, approximately 80 new residences, a museum, and parking spaces." *Id.* at 473.

The City, acting through the development corporation, used its eminent domain powers to acquire property in the area. Nine of fifteen private owners in the area, "none of which were alleged to be blighted or otherwise in poor condition," filed suit in the Superior Court alleging that the taking of their properties would violate Amendment V of the U.S. Constitution, prohibiting the government from taking private property for other than "public use." The Superior Court issued a permanent restraining order as to some of the properties.

On appeal, the Connecticut Supreme Court "held that (1) the 'economic development' in question qualified as a 'public use' under federal and state law, and (2) all of the city's proposed takings were valid. (268 Conn. 1, 843 A.2d 500)." The U.S. Supreme Court granted review on writ of certiorari and affirmed the Connecticut Supreme Court by a margin of 5-4.

The majority concluded that the City's overall plan was reasonable, within the scope of its lawful authority, and was entitled to deference.

The City's government was "not confronted with the need to remove blight ... but their determination that the area was sufficiently distressed to justify a program of economic development is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including – but by no means limited to – new jobs and increased tax revenue. To effecuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate ... to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably

serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment." *Id.* at 483-484.

Petitioners sought a "new bright-line rule that economic development does not qualify as a public use."

The majority demurred, saying that "neither precedent nor logic supports petitioners' proposal. Promoting economic development is a traditional and long-accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized. In our cases upholding takings that facilitated agriculture and mining, for example, we emphasized the importance of those industries to the welfare of the States in question, *see*, e.g., *Strickley*, 200 U.S. 527 ... ; in *Berman*, we endorsed the purpose of transforming a blighted area into a 'well-balanced' community through redevelopment, 348 U.S., at 33, ... ; in *Midkiff*, we upheld the interest in breaking up a land oligopoly that 'created artificial deterrents to the normal functioning of the State's residential land market,' 467 U.S., at 242, ... ; and in *Monsanto*, we accepted Congress' purpose of eliminating a 'significant barrier to entry in the pesticide market,' 467 U.S., at 1014-1015, ... It would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests. Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose." *Id.*, 483-485 (Citations omitted)

The majority elaborated on the preceding discussion. "Petitioners contend that using eminent domain for economic development purposes impermissibly blurs the boundary between public and private takings. Again, our cases foreclose this objection. Quite simply, the government's pursuit of a public purpose will often benefit individual private parties. For example, in *Midkiff*, the forced transfer of property conferred a direct and significant benefit on those lessees who were previously unable to purchase their homes. *** The owner of the department store in *Berman* objected to 'taking from one businessman for the benefit of another businessman,' 348 U.S., at 33, ... referring to the fact that under the redevelopment plan land would be leased or sold to private developers for redevelopment. Our rejection of that contention has particular relevance to the instant case: 'The public end may be as well or better served through an agency of private enterprise than through a department of government – or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.'" *Id.* at 485-486 (Citations omitted)

The majority then addressed the evil of taking property from A to give to B or to allow C to use it for C's profit:

"It is further argued that without a bright-line rule nothing would stop a city from transferring citizen A's property to citizen B for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise. They do not

warrant the crafting of an artificial restriction on the concept of public use." *Id.* at 486-487.

Petitioners also objected that takings of this kind should be subject to a requirement of "'reasonable certainty' that the anticipated public benefits will actually accrue." The majority stated that imposing such a requirement would depart from the Court's precedents. "A constitutional rule that required postponement of ... judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans." *Id.* at 487-488.

Notwithstanding its decision to affirm the decision of the Connecticut Supreme Court, Supreme Court pointed to the decisive role of state law in cases such as *Kelo*.

"Nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. *** This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a 'public use' within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek." *Id.* at 489-490.

E. Divergent State Supreme Court Cases In the *Kelo* Era

The following decisions are recommended reading.

1. *County of Wayne v. Hathcock*, 471 Mich.445, 684 N.W. 2d 765 (Mich. 2004) (Although the County's condemnations for economic development were authorized by Michigan statutes, the Michigan Supreme Court concluded that they did not "pass constitutional muster" under the state constitution, particularly its "public use" requirement. Wayne County intended to transfer condemned property to private parties "in a manner wholly inconsistent with the common understanding of 'public use' at the time our Constitution was ratified.")

See also, City of Novi v. Robert Adell Children's Funded Trust, 473 Mich. 242, 701 N.W. 2d 144 (Mich. 2005)

2. *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 853 N.E.2d 1115 (Ohio 2006) ("Economic factors may be considered in determining whether private property may be appropriated; but the fact that appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the 'public use' requirement of ... the Ohio Constitution. *** Courts shall apply heightened scrutiny when reviewing statutes that regulate the use of eminent-domain powers. The use of 'deteriorating area' as a standard for determining whether private property is subject to appropriation is void for vagueness. The use of the term "deteriorating area" as a standard for a taking is unconstitutional because the term inherently incorporates speculation as to the future

condition of the property ... rather than [its condition at the time of the taking.] *** "

F. More reading: Law journal articles discussing developments in takings law.

1. Richard P. De Angelis, Jr. & Cory K. Kestner, *The Revival of Due Process Rights In Redevelopment Takings: Recent Developments in Due Process in State Eminent Domain Case Law,* 42 THE URBAN LAWYER No.3, 581 (2010)

2. Robert H. Thomas, Recent Developments In Challenging the Right To Take In Eminent Domain, 42 THE URBAN LAWYER No.3, 693 (2010)

3. Robert H. Thomas, *Recent Developments In Condemnation Law: Public Use, Private Property*, 43 THE URBAN LAWYER No.3, 693 (2011)

4. Jeffrey Kleeger, *Blight Makes Right: Utilization As Public Use*, 43 THE URBAN LAWYER No.3, 899 (2011)

5. Robert H. Thomas, *Recent Developments In Eminent Domain: Public Use,* 44 THE URBAN LAWYER No.3, 705 (2012)

6. Jeffrey Kleeger, *Kelo's Influence On Keystone Pipeline Asks "Where's The Public Purpose?"* 44 THE URBAN LAWYER No.3, 719 (2012)

CONDEMNATION OF "BLIGHTED" PROPERTY
FOR PUBLIC PURPOSES

A. Early cases.

1. *Spahn v. Stewart*, 268 Ky. 97, 103 S.W.2d 651 (Ky. 1937)

Taxpayers challenged proceedings by the Municipal Housing Commission to clear slums and build low-cost public housing. The trial court sustained a demurrer to the petition, and Taxpayers appealed. The old Court of Appeals (then the state's highest court) affirmed the demurrer, holding that the MHC's actions involved a "public purpose" and the takings of property by condemnation would not be enjoined, provided that "just compensation" was paid to the owners of the condemned property.

The appellate court defined "slum" as "[a] squalid, dirty street or quarter of a city, town or village, ordinarily inhabited by the very poor, destitute or criminal classes; overcrowding is usually a prevailing characteristic."

The appellate court cited a 1933 survey of the City of Louisville including the area selected for condemnation, finding that "conditions existed worthy of consideration and action," including a much higher incidence of tubercular persons, major crimes, "minor derelictions," and juvenile delinquencies. 103 S.W.2d at 655.

The Court of Appeals rejected the Taxpayers' claim that the statute was invalid as "special legislation" for the benefit of a few. It wrote: "The use here proposed, as argued by appellees and admitted by appellants, may be more beneficial in the way of direct aid to a particular class, but it operates to the benefit of the general public and its welfare. This does not brand the purpose as class or special legislation. *** 'The essential purpose of the legislation is ... to protect and safeguard the entire public from the menace of the slums.'" *Id.* at 657 (Citation omitted.)

Addressing the issue of the City's authority to act, the Court of Appeals said that the City's motives and determination of necessity will not be looked into except in "rare cases, where it is manifest that a flagrant wrong has been perpetrated upon the public. *Henderson v. City of Lexington*, 132 Ky. 390, 111 S.W. 318, 323 *** ."

2. *Miller v. City of Louisville*, 321 S.W.2d 237 (Ky. 1959)

Taxpayer challenged the trial court's judgment upholding the validity of the City's bonds issued to fund a comprehensive program of urban development and urban renewal. The Court of Appeals held that the ordinance authorizing the bonds was valid because the uses were for the public's benefit. The uses including acquiring and preparing land for a civic center, one or more projects of urban redevelopment or urban renewal, including "the eradication of slums or blighted or deteriorating areas," among several others. All uses were to be accomplished pursuant to a "master plan" adopted by the "proper planning authorities." *Id.* at 239

The City's brief commented on "the subject of urban development and urban renewal [in] an urban area where rigor mortis is the heritage of streets too narrow, lots too small, access inadequate, sanitation and fire protection unthought of, space too precious to spare, and all the ... deficiencies and unacceptabilities that that grow out of such things. Neglect becomes the pattern, because the owner can have neither the incentive nor the pocketbook to improve in the middle of squalor. *** Bad conditions immediately become worse, and the unwholesomeness becomes a concern of the entire community ... ." *Id.* at 329.

The appellate court agreed with the City: "[W]hen the defined conditions of public evil have been eliminated ... the "public uses" and "public purposes" of the Legislature [KRS 99] will have been accomplished. *** [O]ur attention has been called to no provision of Kentucky law, constitutional or otherwise, which would cause us to conclude that the elimination of slum ... and blight is not a legitimate objective for the exercise of the police power of the state. "Blighted area" is defined by the statute *** as an area which, largely because of faulty layout, cannot be developed into an area of predominately housing uses; it is a step before an area becomes a slum." *Id.* at 240.

B. Urban redevelopment plan based on arbitrary finding of "blight."

1. *Prestonia Area Neighborhood Association v. Abramson*, 797 S.W.2d 708 (Ky. 1990)

The Board of Aldermen of the City of Louisville enacted a series of ordinances incident to the Standiford Field Airport Expansion Project, the purposes of which were "to redevelop the three residential neighborhoods [Prestonia, Standiford and Highland Park] into commercial zones associated with the airport." Redevelopment was to proceed under KRS 99, which was the statute at issue in *Miller v. City of Louisville*. Each of the ordinances contained a finding that the neighborhoods were "blighted" as defined by KRS 99.340(2). The three neighborhoods sought a declaratory judgment that the ordinances declaring them to be "blighted" were unconstitutional and invalid. The City prevailed in the trial court and the neighborhood associations appealed to the Court of Appeals, which affirmed.

On discretionary review, the Supreme Court declared the ordinances unconstitutional and reversed. The Supreme Court began its analysis by noting that the prerequisite for adoption of an urban renewal plan by ordinance was the Board of Aldermen's finding that the area was a "slum area" or that certain other pernicious conditions existed. Among them was that the area was in a "blighted area," and that "the conditions of blight in the area cause or contribute to" an "increase and spread of disease and crime, and constitute a menace to the public health, safety and welfare."

The threshold question for the Court was whether "blight" existed. "The required finding ... is that the neighborhoods are "blighted." "Blighted area" is defined ... as: ... an area (other than a slum area as defined in this section) where by reason of the predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessability, or usefulness, submergance of lots by water or other unsanitary or unsafe conditions, diversity of ownership, tax delinquencies, defective or unusual conditions of title, improper subdivision or obsolete platting, or any combination of such reasons, development of such blighted area (which may include some incidental buildings or improvements) into predominately housing uses is being prevented; ***"

However, the Supreme Court found "little evidence" of record that the predominance of KRS 99.340(2)'s conditions had prevented development of the neighborhoods into "predominately housing uses." "To the contrary, the evidence clearly shows the areas here have already been developed into predominately housing uses, none or few of which are substandard. It is the use of the neighborhoods that the Appellants are attempting to preserve." *Id.* at 710.

Next, the Supreme Court reviewed the ordinances' specific findings that "blight" existed because the area was "adversely affected by both airport and traffic related noise and other environmental conditions which render it unfit for residential use." However, "noise" was not one of the enumerated conditions allowing a determination of "blight." The Court wrote, "[e]ven if we were to assume that noise could reasonably be linked to one of the enumerated factors constituting blight, there is not 'substantial evidence' in the record of a noise problem rising to the level of safety or such that it is preventing the use of the area for housing." *Id.* at 711.

The Supreme Court concluded that the record lacked "substantial evidence" to support the ordinances' findings of "blight." The lack of such evidence rendered the ordinances arbitrary in violation of Ky. Const. Section 2, the Court said, citing *City of Owensboro v. McCormick*, 581 S.W.2d 3, 5-6 (Ky. 1979), and *Chesapeake Stone Co. v. Moreland*, 126 Ky. 656, 104 S.W. 762, 765 (1907).

The Court wrote: "Merely establishing a large administrative and legislative record does not entitle a legislative or administrative agency to declare an apple to be an orange. *** To by legislative fiat declare an object to be something it is not is such an abuse of discretion as to be arbitrary. The ordinances in their declaration of blight are thus arbitrary and violate Section 2 of the Kentucky Constitution in their exercise of arbitrary power though the taking of private property." *Id.* at 712.

INVERSE OR REVERSE CONDEMNATION
AND
REGULATORY TAKINGS

A. In General.

1. What is taking by inverse or reverse condemnation, as opposed to condemnation?

Commonwealth, Natural Resources and Environment Protection Cabinet v. Stearns Coal and Lumber Co., 678 S.W.2d 378, 381 (Ky. 1984):

"A taking is generally defined as the entering upon private property and devoting it to public use so as to deprive the owner of all beneficial enjoyment. Private property shall not be taken without just compensation. *See* 26 Am. Jur. 2d, Eminent Domain, Section 157. This case involves what is referred to in the law as a reverse, or inverse, condemnation. Inverse condemnation is the term applied to a suit against a government to recover the fair market value of property which has in effect been taken and appropriated by the activities of the government when no eminent domain proceedings are used."

2. Requirements for inverse or reverse condemnation claims.

Spanish Cove Sanitation v. Louisville-Jefferson Co. Metropolitan Sewer District, 72 S.W.3d 918 (Ky. 2002). "Under Kentucky law, before a plaintiff can make a claim of inverse condemnation, there must be an actual taking." *Holloway Const. Co. v. Smith*, 683 S.W.2d 248, 249 (Ky. 1984).

Jones. v. Commonwealth, Transp. Cabinet, Dept. Highways, 875 S.W.2d 892 (Ky. 1993). "Ordinarily, the law of eminent domain requires that prior to such a 'taking' occurring that land be condemned. A 'reverse condemnation' action differs from an ordinary condemnation action in that the land has already been taken by the government. Here, appellants seek just compensation after the taking. 'Recovery [is] permitted ... on the theory that when the acts of the state constitute a taking of property, the law [implies] an agreement to pay for it." *Commonwealth, Dept. Highways v. Gilles,* 516 S.W.2d 338 (Ky. 1974) and *Curlin v. Ashby*, 264 S.W.2d 671, 672 (Ky. 1954).

Commonwealth, Dept. Highways v. Davidson, 383 S.W.2d 346 (Ky. 1964). Inverse or "reverse" condemnation occurs "only where there is a taking, destroying or injuring of property by the sovereign, or one acting under authority granted by the sovereign, without any color of right. It does not apply in a case where a road is constructed in accordance with the state's plans and specifications as specified in deeds."

Commonwealth, Dept. Highways v. Widner, 388 S.W.2d 583 (Ky. 1965). Reverse condemnation theory is premised on just compensation guaranteed by Ky. Const. Sections 13 and 242.

Commonwealth, Dept. Highways v. Robbins, 421 S.W.2d 820 (Ky. 1967). "Allegations that there had been a "taking," albeit temporary, and that the damages were a direct result of planned

construction in progress on the property originally condemned, charged a reverse condemnation, thus giving the [court] jurisdiction over the claims against the Commonwealth."

B. Some illustrative cases

Jones v. Commonwealth, Transp. Cabinet, Dept. Highways, 875 S.W.2d 892 (Ky. 1993). As a result of the state's highway construction in 1978-1979, the Department allegedly dumped boulders into and about the banks of a creek, which over time diverted the creek's flow. In 1989, the creek washed away forty feet of plaintiffs' land, a barn, and a chicken house. Plaintiff's reverse condemnation suit, filed in 1991, was not time-barred because their right of action did not accrue until they actually sustained damages.

Commonwealth, Dept. Highways v. Robbins, 421 S.W.2d 820 (Ky. 1967) Highway Department's construction of a ditch on condemned property causing water to gather and stand on plaintiff's remaining land, was a taking.

Commonwealth, Dept. Highways v. Robbins, 496 S.W.2d 345 (Ky.1973) Highway Department's change of the grade level of the road caused damage to plaintiff's abutting land, and was a taking of his property.

Pursifull v. City of Pineville, 298 Ky. 453, 183 S.W.2d 32 (1944), Conditions resulting from construction elevating the road bed damaged landowners' property, and was a taking of their property.

Commonwealth, Dept. Highways v. Corey, 247 S.W.2d 389 (Ky. 1952) In owner's suit for damages to land allegedly cause by state's negligent construction of a culvert, evidence was that its construction and location directly caused injury to the land, amounting to a taking without just compensation, waiving the state's immunity from suit.

Bader v. Jefferson County, 274 Ky. 486, 119 S.W.2d 870 (1938) Landowner was entitled to compensation for taking of private property through a physical invasion or actual damage thereto, resulting from weakening or destruction of lateral support, or diversion of water, or flooding of property, even though the property was not reduced to the County's possession.

City of Danville v. Smallwood, 347 S.W.2d 516 (Ky. 1961). Owner was entitled to compensation where the City constructed storm sewers that caused water to be unnaturally diverted across his yard, severely washing and damaging it, undermining the house's foundation, and causing it damage, and to sag,

Natcher v. City of Bowling Green, 264 Ky. 584, 95 S.W.2d 255 (1936). Evidence showed that dam placed in river was not to promote navigation, but to benefit a water plant; and City could not thereby flood upstream gravel beds without compensating their owners.

Illinois Cent. R. Co v. Ward, 237 Ky. 478, 35 S.W.2d 863 (1931) A railroad's unreasonable obstruction of access to a public road gave farm owner a right to recover compensation from the

railroad.

C. Unusual cases involving Ky. Const. Sections 13 and 242 and "takings" jurisprudence.

1. Annexation of "unsuitable" property disallowed under Section 242.

Chesapeake & O. Ry. Co. v. City of Silver Grove, 249 S.W.2d 520 (Ky. 1952). City sought the annexation of the C & O's railyards, which was denied on grounds of unsuitability. The property was entirely self-sufficient as the railroad had its own utilities, police force, and other services. The City had no conceivable use for the property; and the only apparent benefit to the public from the proposed annexation was the anticipated tax revenue. City could not annex (and tax) property without providing a benefit to the owner

2. Adverse possession by Commonwealth (Sections 13 and 242 inapplicable).

Commonwealth, Dept. of Parks v. Stephens, 407 S.W.2d 711 (Ky. 1966). Department brought quiet title action asserting acquisition of title by adverse possession. Chancery court dismissed the Department's petition on grounds that Sections 13 and 242 prohibited the Commonwealth from acquiring private property with payment of just compensation. The Department appealed. Held: that the Commonwealth could acquire title by adverse possession without regard to the payment of just compensation if the statutory period had expired, rendering the original owner no longer in a position to claim title. However, the Department did not prove its claim to a well-defined and marked boundary or to prove the elements of continuous possession, notice to the owner, and notoriety. *But cf*: *Mead v. Sturgill*, 467 S.W.2d 363 (Ky. 1971) (A private person can acquire title by adverse possession against the Commonwealth).

D. Modern Kentucky inverse/reverse condemnation cases

1. *Monticello Co.* v. *Commonwealth, Natural Resources and Environment Protection Cabinet,* 864 S.W.2d 921 (Ky. App. 1993) Private sewage facilities who were required to connect to comprehensive sewer system of urban county government had no reasonable expectation of continuing indefinitely to sell their services to certain customers so as to establish a takings claim. Facilities were privileged to sell services only insofar as their state permits allowed, and state could deny permits because of requirement that facilities must connect to the comprehensive sewer system. Likewise, no property interest of private sewage treatment systems was taken when they were required to connect. County did not physically occupy their treatment plants or land where situated. The greatest interest the systems had was bare legal title to the mains, subject to the free and unrestricted easement of lot owners.

2. *Commonwealth, Natural Resources and Environment Protection Cabinet v. Stearns Coal and Lumber Co.*, 678 S.W.2d 378 (Ky. 1984).

This is a leading case in Kentucky takings law.

In 1976, Stearns sued the Commonwealth, alleging that the Kentucky legislature's 1972

enactment of the "Wild Rivers Act," KRS 146.210 et seq., and the Cabinet's manifested intention to enforce it, represented by the restraining order subsequently obtained by the Cabinet, inevitably would deprive Stearns Coal of the beneficial use of its property. The trial court agreed, and held the Commonwealth liable to Stearns for taking and damaging its property.

Stearns's lawsuit asserted reverse, or inverse, condemnation by the state on the following grounds: (1) the Natural Resources Department had developed a brochure on fishing and canoeing in the designated Wild Rivers area including the Stearns property; (2) it circulated literature on prohibited activities in the area; (3) it placed signs along the area's streams welcoming the public to the area; (4) it made inspections in the area; (5) it obtained a restraining order against Western Reserves Oil Company for "violations" along Rock Creek; and (6) it proposed amendments to the Act that the Legislature adopted, to become effective in June 1976.

In April 1976, before the amendments became effective, Stearns gave the Department written notice of its intention to begin "a large-scale, multiple use land development, strip mining, clear cutting of timber, construction of vacation and retirement homes, extension of their railway system, oil and gas drilling and new road construction. By this, Stearns would "inaugurat[e] ... every activity that was prohibited in the Wild Rivers area. It was an obvious challenge to the right of the Commonwealth to proceed with the Wild Rivers program."

The Department ordered Stearns to abate its activities pending an administrative hearing. Stearns responded by obtaining a restraining order and temporary injunction in the Franklin Circuit Court. A month later, Stearns filed its inverse condemnation suit. Nearly five years later, in January 1981, the trial court found the Commonwealth liable for taking and damaging the Stearns property in violation of the state and federal constitutions. The Commonwealth appealed.

The Kentucky Supreme Court began by declaring that Stearns's case depended on the existence of a "taking" of its property: "The question of a legal taking is crucial."

The Court wrote, "[a] taking is generally defined as the entering upon private property and devoting it to public use so as to deprive the owner of all beneficial enjoyment. Private property shall not be taken without just compensation. *See* 26 Am. Jur. 2d, Eminent Domain, Section 157. This case involves what is referred to in the law as a reverse, or inverse, condemnation. Inverse condemnation is the term applied to a suit against a government to recover the fair market value of property which has in effect been taken and appropriated by the activities of the government when no eminent domain proceedings are used." *Id.* at 381.

Next, the Court remarked upon the "uncertainty" of U.S. Supreme Court takings law. It said, the Supreme Court "has been unable to develop any definite guidelines for determining when the best interests of justice require compensation for property taken," and cited *Penn Central Transportation Co. v. New York City*, 438 U.S.104, 98 S.Ct. 2646 (1978). *Penn Central* identified several factors as relevant to the question whether a legal taking has occurred.

As stated in *Stearns* they are "(1) the economic impact of the law on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, (3) the

'character' of the governmental action, (4) what uses the regulation permits, (5) that the inclusion of the protected property was not arbitrary or unreasonable, and (6) that judicial review of the agency decision was available." *Id.*

The majority stated that Stearns would have been deprived of valuable rights, experienced "great" interference with its operations and financial interests, and "could" have sustained a taking, if the Wild Rivers Act "had been fully executed." Then Stearns would have been prohibited from engaging in coal mining and timbering. However, "there was no enforcement which deprived Stearns of any valuable right. The only attempts at enforcement were totally thwarted by judicial intervention." 678 S.W.2d at 381.

The *Stearns* majority noted that "the evidence is very strong that Stearns has made substantial beneficial use of the property" and enumerated the following: (1) during the period of the alleged taking, there were continued timber operations, (2) it entered into a five-year oil lease on more than 9,000 acres, (3) it leased 10,000 acres to the Commonwealth for public hunting and wildlife management, (4) it leased 37,000 acres to Western Reserve Oil Company, and (5) "extensive logging operations." Additionally, Stearns sold 12,000 acres to the United States and had to date received about $5.6 million in partial payment. Since the United States obviously was not required to comply with the Wild Rivers Act, and because the land purchased from Stearns could not be condemned by the Commonwealth, the sale offset much of the Stearns's claimed damages. *Id.* at 382.

The Court held by a vote of 4-3 that no compensable taking of Stearns's property had occurred. This holding is interesting in light of the following.

Although the majority characterized the Department's actions towards Stearns as "arbitrary" and implied that its actions were abusive, it adhered to its conclusion that no [legal] taking had occurred. It distinguished the facts of *Stearns* from U.S. Supreme Court cases involving "more serious questions" of governmental action, where "the landowner was subjected to more abusive government intervention than here." 678 S.W.2d at 382.

The majority's earlier statement, that a "taking" of Stearns's property "could" have occurred if the Act had been fully executed, suggesting that Stearns would have been entitled to receive just compensation, is questionable in light of its later statements respecting police power takings. It wrote, "[t]he original law is reasonable and the purpose of the law is within the overall scope of a public purpose. See, *Moore v. Ward*, Ky., 377 S.W.2d 881 (1964). The valid exercise of police power which may result in expense or loss of property is not a taking of property without just compensation. *Blancett v. Montgomery*, Ky., 398 S.W.2d 877 (1966). *** The valid exercise of police power is not unconstitutional merely because it deprives a property owner of the most beneficial use of the property. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S.Ct. 987 (1962)." *Id.*

Justice Leibson's dissent squarely addressed the majority's implicit suggestion that if the taking from Stearns fell within the state's police power, Stearns might not be entitled to compensation.

Justice Leibson wrote: "The decision ... is a miscarriage of justice, an indefensible injury to this property owner and, as a precedent, a serious threat of the abuse of state power against all property owners. It is an inescapable fact that the Kentucky Wild Rivers Act ... substantially deprives Stearns of the commercial use of its property for the benefit of the general public, resulting in a significant diminution in the value of the property. I see no difference between this taking and any other taking for a public easement. *** The only question is whether the taking should be classified as an inverse condemnation or an exercise of the state's police power. Both the nature of the taking and the Act itself answer this question in Stearns' favor: 'Nothing in [the Act] shall be construed to deprive a landowner of the fee simple title to or lesser interest in his property without just compensation.' KRS 146.280(1)" *Id.* at 384.

E. Regulatory Takings in the Federal Courts

"Police power" or "regulatory taking"?

Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S.Ct. 987 (1962), cited in *Stearns Coal* for the breadth of the state's exercise of its police powers, likewise embraces"regulatory takings." Both involve governmental action that deprives the owner of property of rights without requiring the payment of compensation. These materials address the subject of "regulatory takings."

Is the regulatory taking claim ripe?

Before asserting a "regulatory taking" claim in federal court, the plaintiff must first exhaust all available state remedies and have been denied compensation. *Green v. City of Williamstown*, 848 F.Supp. 102 (E.D. Ky. 1994). Where a takings claim is not ripe, the federal court must dismiss it for lack of subject matter jurisdiction. *Bigelow v. Mich. Dept. of Nat. Resources*, 970 F.2d 154, 157-158 (6th Cir. 1992).

A few illustrative regulatory takings cases

1. Depriving the owner of "all economically beneficial uses" of the property

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992), the U.S. Supreme Court granted certiorari to review a developer's claim that South Carolina's Beachfront Management Act prohibiting the construction of "occupable improvements" on two beachfront lots (acquired prior to the BMA's enactment) extinguished the value of the property and effected a "taking" for which he was entitled to just compensation. The South Carolina Supreme Court reversed the Court of Common Pleas, which had held for the landowner and awarded him $1.2 million as compensation for the deprivation.

The U.S. Supreme Court held, 5-4, that where a state seeks to sustain a regulation that deprives land of "all economically beneficial use," the state may resist an asserted right to compensation under the takings clause on the theory that there has been no "taking" only if the "logically antecedent inquiry into the nature of the owner's estate" shows that the proscribed use interests were not part of the owner's title to begin with, "so that the severe limitation on property

use is not newly-legislated or decreed, but inheres in the title itself" under through the restrictions already placed on it by the state's law of property and nuisance. It remanded the case for further proceedings to determine whether common law principles would have prevented the construction of any habitable or productive improvements on the developer's land.

2. *Lucas* confined to those "extraordinary circumstances" where *no* beneficial use is allowed.

Lucas's precedential value as a plaintiff-friendly takings case was cut back in 2002 when the U.S. Supreme Court decided *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465 (2002). *Tahoe-Sierra* held that the holding in *Lucas* must be limited to "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." Henceforth, said the Court in *Tahoe-Sierra*, regulations that merely restrict the uses of property can be takings only if they "go too far," and that courts should conduct a case-by-case analysis of the factors enumerated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978).

3. Does the restriction on the property's use "go too far"?

The "goes too far" statement in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* refers to *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). A Pennsylvania law forbade the owner of the mineral estate to mine coal if it would cause the subsidence of a dwelling house, unless the owner of the mineral estate owned the house also, and the house was more than 150 feet from the improved property of another. As such, the statute made it commercially-impracticable to mine coal, and thus effectively destroyed the value of the mineral rights. Held: the statute was invalid because it went "too far," amounting to a taking without just compensation.