VIRGINIA'S PROPERTY OWNERS ARE NOT SAFE FROM *KELO*-STYLED ECONOMIC TAKINGS

by Joshua E. Baker[*]

> *"No person shall be deprived of his . . . property without due process of law;" which requires that private property not be "taken or damaged for public uses, without just compensation."*[1]
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> *"The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."*[2]

In the spring of 1999 Jay and Stephanie Burkholder purchased 3.88 acres at 217 Reserve Avenue in Roanoke, Virginia. At the time they were relocating their flooring installation company, Surfaces, Inc., to its newly purchased home, the Burkholders had no idea that their property would become ground zero for a case heralded a decade later by the national and statewide media as "Virginia's Kelo."[3]

In 1999 the Burkholders knew that Carilion Health Systems, one of their largest clients and the largest employer in the Roanoke Valley, was expanding along the Reserve Avenue corridor. It made sense to the Burkholders to purchase the 3.88 acres because the tract provided 1) a home for their business and 2) an opportunity for future development as a retirement investment near what was becoming Carilion's center of operations.

The Burkholders' intuition was confirmed when the Carilion Biomedical Institute was announced in late 1999 and its location in the Reserve Avenue corridor was announced in May of 2000. It appeared as though the Burkholders had taken a risk that would be rewarded.

Unbeknownst to the Burkholders, the City of Roanoke was making a deal with Carilion Health Systems in the fall of 1999 to acquire 110 acres of property, including the Burkholders' tract. The City was pledging to make the property available to Carilion without having to navigate the free market.

The City first committed to take property in February of 2000.[4] Writing to Carilion officials, Roanoke City Manager Darlene Burcham stated that the City had "developed a conceptual plan (shaded area in attached map) to answer the needs of both the CBI, Carilion, technology based business, and the city."[5] The shaded areas on this map became the boundaries of the 110-acre South Jefferson Redevelopment Plan.

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[1] VA. CONST. art. 1, § 11.

[2] *Kelo v. City of New London*, 545 U.S. 469, 503 (2005) (O'Connor, J., dissenting).

[3] *See, e.g.*, Fox & Friends Interview (Dec. 17, 2009); *Craftily Taken: A Roanoke Couple get Kelo'd*, FREDERICKSBURG FREE-LANCE STAR, Dec. 4, 2009; *Roanoke's Eminent Domain Shame*, WASHINGTON TIMES, Oct. 18, 2009; A. Barton Hinkle, *Roanoke: Eminent-Domain Case Looks Like Kelo Redux*, RICHMOND TIMES-DISPATCH, Sept. 29, 2009. These articles and interviews, along with many others, are available at www.emdomain.com.

[4] Letter from Darlene Burcham, Roanoke City Manager, to Thomas L. Robertson, President and CEO Carilion Health System (Feb. 15, 2000).

[5] *Id.*

Before ever directing the Roanoke Redevelopment and Housing Authority (RRHA) to determine whether the area qualified for redevelopment using the eminent domain power under the Housing Authorities Law (VA. CODE § 36-1 *et seq.*) the City pledged that it would "rezone the redevelopment plan area for the Carilion Biomedical Institute, Carilion, and future technology based companies . . . Once the parcels in the redevelopment area are acquired by RRHA, they will be made available for purchase by Carilion/CBI."[6]

But first the City needed a reason to seize the property with its eminent domain power.

ECONOMIC DEVELOPMENT BECOMES A "PUBLIC USE" FOR AN ECONOMIC TAKING

A purported "public use" justifying the use of eminent domain was created when the City directed the RRHA to prepare a study finding "blight" in the area shown on the February 2000 map. But the Plan and the City Council's authorizing resolution stated that the "primary goal of the Redevelopment Plan is to provide for private reinvestment and economic growth through redevelopment by private enterprise."[7]

Meeting notes, correspondence between experts and memos between experts and lawyers for RRHA all document that the very persons who were publicly engaged to render an objective opinion regarding blight in the Area understood that their job was to generate data to support a finding that the 110-acre Area was blighted and sought direction on how to legally defend their findings.[8] Perhaps the clearest expression of this understanding came from the environmental firm used by RRHA, Huggins, Faulkner & Flynn. Their letter to RRHA's lawyers stated: "We are well aware of the importance of the blight determination, and the timing, in the overall funding of the project and we feel that our work can greatly support this effort. It is critical that our work be carefully scrutinized so that we can reliably defend our positions down the road."[9]

The Housing Authority's experts were able to find "blighting influences" to justify the taking of private property by including such things in their reports as weeds growing in parking lots, cracks in sidewalks, chipped paint on buildings, cracked cement floors inside buildings and a host of other characteristics typically cured with routine maintenance. Storing chemicals in locked cages within locked warehouses, but which warehouses were in a floodplain, qualified numerous acres as "blighted."

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[6] *Id.*

[7] 110-Acre South Jefferson Redevelopment Plan at 7 [herenafter cited as "Plan"]; Roanoke City Council Resolution No. 35248-031901 (Mar. 19, 2001) (stating the primary purpose is to provide "private reinvestment and economic growth through redevelopment by private enterprise").

[8] Numerous of the experts engaged by the RRHA produced documents during discovery, which included statements such as: "I get the impression that our main task is to prepare a study that will justify declaring the area as a redevelopment area, so that everything else can fall into place;" "some additional targeted inspections of properties that are likely to support the blight determination are warranted;" "we feel confident that as we collect more evidence and documentation in support of these issues, we will be able to maintain at least a level of 50% blighted acreage within the redevelopment area;" "I remain confident that we can still justify the greater than 50% total blighted acreage. However, I would be prepared to make some adjustments to the boundaries of the redevelopment zone by cutting out some of the undeveloped and recently developed acreage in Area 2 north of 581 and near the Community Hospital)."

[9] Letter from Andrew T. Flynn, Principal, Huggins, Faulkner & Flynn to Daniel F. Layman, Jr., Woods Rogers, Attorneys for RRHA 4 (Sept. 29, 2000).

The Plan included as "blighted areas" rights-of-way owned and controlled by the City—seemingly an admission that the City was contributing to the blighting of the area. The Plan also included property owned by railroads that could never be taken by eminent domain. The inclusion of these areas artificially inflated the percentage of area that could be considered blighted.

Throughout the process, the Burkholders' property was never deemed blighted. But because it was in a "blighted area," their property was deemed eligible for acquisition through eminent domain. On March 19, 2001, the Roanoke City Council adopted the Plan, empowering the RRHA to acquire property through the use of eminent domain.

For the Burkholders, the City Council's approval meant that in less than a year their retirement investment had been turned into a looming question mark. Though a plethora of questions now confronted the Burkholders, they never hesitated in their resolve to fight for their constitutional right to private property ownership. And fight the Burkholders did.

TAKING ON THE TAKING

The Burkholders did not want to forfeit their property and the opportunities that were available when they purchased it. They were determined to contest the taking of their property as an improper use of eminent domain. For six years after the Plan was adopted in 2001, the RRHA acquired property all around the Burkholders' and transferred it to Carilion for development or resale.

In 2007 the General Assembly amended the VIRGINIA CODE to require that when eminent domain is used to take property for reasons relating to blight the property taken must itself be blighted.[10] If applied to the Burkholders' case, the new law would prohibit the RRHA from taking the property because it had never been found to be blighted.

The Burkholders believed that the General Assembly's action guaranteed their property would remain their own. But the new law didn't take effect until Monday, July 1, 2007. Unfortunately for the Burkholders, the RRHA filed its petition for condemnation on Friday, June 29, 2007 – the last possible day it could seize the property and avoid complying with the General Assembly's new law strengthening private property rights.

After the condemnation was filed, the Burkholders contested the jurisdiction of the City of Roanoke Circuit Court to hear the eminent domain case on several grounds. Chief among them was that the RRHA lacked the statutory authorization to condemn property for economic development reasons. The Burkholders took literally the Plan's statement that the "primary goal of the Redevelopment Plan is to provide for private reinvestment and economic growth through redevelopment by private enterprise."[11]

Virginia law is clear that the statutes conferring the power of eminent domain and prescribing the procedure for using the power are to be strictly construed against the condemnor and that the power of eminent domain may not be used if the reason for which the power is being exercised is not a public use recognized by the statutes.[12]

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[10] VA. CODE § 1-219.1 was adopted to prohibit under the Virginia Constitution what the United States Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), permitted under the Federal Constitution, the transferring of private property to a preferred private owner for economic development.

[11] Plan, *supra* note 7, at 7.

[12] *See, e.g., Hoffman Family, L.L.C. v. City of Alexandria*, 272 Va. 274, 283, 634 S.E.2d 722, 727 (2006) (stating "The statutes confirming the power of eminent domain must be strictly construed, and a locality must comply fully with the statutory requirements when attempting to exercise this right.") (citations omitted); *C and C Real Estate v. Norfolk Redevelopment and Housing Authority*, 272 Va. 2, 15-16 (2006) (finding that "[t]he plan must be consistent with the *grant of authority* set out in the statutes

The Burkholders argued that using eminent domain to make private property available to private enterprise for redevelopment should only be an incidental feature of a redevelopment plan, not its primary purpose. The Burkholders claimed that:

> under the provisions of the 1946 Act authorizing 'Redevelopment Projects' (Code, § 36-48 *ff.*), the primary purpose is the elimination of blighted or slum areas, and the provision in Code § 36-53, *making property available for redevelopment by private enterprise is merely incidental to such main purpose*. The Act contemplates that in the course of a large slum clearance operation there will be some sections which are not needed or suitable for long-range public use, and that after being purged of their unwholesome characteristics they will be returned to a restricted private use.[13]

The Burkholders averred that because blight removal was not the purpose of the Plan, the RRHA was not authorized to use its power of eminent domain to take the property. Where a plan "contains authorization for acts beyond those delegated, such authorization is invalid." *Norfolk Redevelopment and Housing Authority v. C and C Real Estate, Inc.*, 272 Va. 2, 15-16 (2006).

The Burkholders also argued that the public use requirement is not satisfied merely because the person to whom the state gives the property will devote it to a more profitable use, such as a use that will generate increased tax revenue or more jobs. "The public interest 'must dominate any private gain.'"[14]

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and, if the plan contains authorization for acts beyond those delegated, such authorization is invalid") (emphasis added); *Bristol Redevelopment and Housing Authority v. Denton*, 198 Va. 171, 178, 93 S.E.2d 288, 293 (1956) ("It should be remembered that statutes conferring the power of eminent domain are strictly construed and every reasonable doubt is to be resolved adversely to the right. The power can only be exercised for the purpose, to the extent, and in the manner provided by law.") (citations omitted); *Charles v. Big Sandy & C.R. Co.*, 142 Va. 512 (1925) ("[S]tatutes conferring the power of eminent domain are strictly construed and the authority conferred in such statutes must be carefully observed and followed."); *City of Richmond v. Carneal*, 129 Va. 388 (1921) (Finding unconstitutional an enabling ordinance that permitted condemnation of land to be made available to private entities the Court stated that "[t]he Legislature is forbidden to enact 'any law whereby private property shall be taken or damaged for public uses, without just compensation,' which in effect carries out the *fundamental law of England and America that private property cannot be taken for private use*, with or without compensation, but can only be taken for a public use;" and later that "in the construction of statutes conferring the power of eminent domain, every reasonable doubt is to be solved adversely to the right; that the affirmative must be shown, as silence is negation; and *that unless both the spirit and letter of the statute clearly confer the power, it cannot be exercised*") (emphasis added); *City of Richmond v. Childrey*, 103 S.E. 630, 631 (1920) (The "one claiming the power [of eminent domain] must bring himself strictly within the grant, both as to the extent and manner of its exercise"); *Core v. City of Norfolk*, 99 Va. 190, 37 S.E. 845 (1901) (holding that the Norfolk City Council acted illegally to authorize the condemnation of property where the City Council could not affirmatively show compliance with the procedural requirements for exercising the power of eminent domain, which are to be "regarded as in the nature of conditions precedent, which are not only to be powers to deprive the owner of his land, but the party instituting such proceedings must show affirmatively such compliance."); *City of Charlottesville v. Maury*, 96 Va. 383 (1898) ("There is no better settled rule of law than this, that statutes which encroach on the personal or property rights of the individual are to be strictly construed; and this is especially the case where it is claimed that the statute delegates to a corporation, whether municipal or private, the right of eminent domain,–one of the highest powers of sovereignty pertaining to the state itself, and interfering seriously, and often times vexatiously, with the ordinary rights of property.").

[13] *Hunter v. Norfolk Redevelopment & Housing Authority*, 195 Va. 326 (1953) (emphasis added).

[14] *Town of Rocky Mount v. Wenco of Danville, Inc.*, 256 Va. 316, 322, 506 S.E.2d 17, 21 (1998); *accord Phillips*, 215 Va. at 547, 211 S.E.2d at 96; *Rudee Inlet Auth. v. Bastian*, 206 Va. 906, 911, 147 S.E.2d 131, 135 (1966); *Mumpower v. Housing Auth. of Bristol*, 176 Va. 426, 448, 11 S.E.2d 732, 740

Specifically, the Burkholders argued that an incidental public benefit of removing some blight does not satisfy the "public use" requirement when the overwhelming benefit is economic gain to a known private entity and is not authorized under the Housing Authorities Law of Title 36.

> The salient consideration is not whether a public benefit results, but whether a public use is predominant. *'Public use' and 'public benefit' are not synonymous terms.' Richmond v. Carneal*, 129 Va. 388, 393, 106 S.E. 403, 405 (1921). It is of no importance . . . that the public would receive incidental benefits, such as usually spring from the improvement of lands or the establishment of prosperous private enterprises: *the public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it.*[15]

The Burkholders also argued and presented evidence over three days in the summer of 2009 that the area found to be blighted was not actually blighted, but that the inclusion of a host of minor maintenance problems, City controlled land, railroad property that could not be taken by eminent domain and the description of properties as blighted simply because they were in a floodplain were all tools specifically used to generate a finding of blight where actual blight did not exist.

In its letter opinion, the Court found that it was "certainly clear that the City had an interest in seeking redevelopment of an area that was acceptable to Carilion" and that:

> B&B produced documentary evidence of correspondence between the City Attorney's office and RRHA clearly suggesting that the City was pressuring RRHA to come up with findings that would correspond with the terms the City had reached with Carilion. There is also correspondence between RRHA's counsel and the firm doing the environmental impact studies that suggest that a sufficient proportion of the target area could be designated as 'blighted' by changing the quantity of properties under review. This conduct clearly suggests to the Court that the City was responding to pressure from Carilion in trying to direct the conclusions that RRHA would reach. This overreaching, coupled with the City's participation in status meetings, gives substance to B&B's accusation that the blight conditions found by RRHA did not exist.[16]

However, the Court was not persuaded that these considerations ultimately drove the finding that the Area was blighted because there was evidence "that, if believed, justified a finding that the majority of the properties that were ultimately included in the Plan area actually suffered from blight." Because the Court found that reasonable experts could disagree as to their interpretation of the evidence, it was not persuaded by "clear and convincing proof that the facts found by RRHA were invalid or that the Plan's adoption was arbitrary or capricious."[17]

(1940); *Nichols v. Central Va. Power Co.*, 143 Va. 405, 415-16, 130 S.E. 764, 767 (1925). *See also Ottofaro v. City of Hampton*, 265 Va. 26, 32 (2003), *cited approvingly in Hoffman Family, L.L.C. v. City of Alexandria*, 272 Va. 274, 286, 634 S.E.2d 722, 729 (2006).

[15] *Ottofaro v. City of Hampton*, 265 Va. 26, 31-32 (2003) (citations omitted) (emphasis added).

[16] *City of Roanoke Redevelopment and Housing Authority v. B&B Holdings, LLC*, Case No. CL07-1348, letter op. at 5 (Roanoke Cir. Ct. Va. Nov. 12, 2009).

[17] *Id.* at 9. The Court went on to note that "the Court might have weighed that evidence differently than RRHA upon a *de novo* consideration of the matter. . . . This Court is not free to substitute its own findings of fact as to the condition of the properties . . ."

The Court disagreed with the Burkholders that blighting conditions had to pose a "menace to the health, safety, morals and welfare of the residents of the Commonwealth," to permit the use of eminent domain,[18] but that the conditions of the property only need to be "detrimental to the safety, health, morals or welfare of the community."[19]

The Court's ruling permitted RRHA to take the Burkholders' property.

Within weeks of the Court's ruling, Carilion's spokesman told the ROANOKE TIMES that it did not want and had no plan for the property.[20] At the same time RRHA's counsel confirmed that there was "no firm plan that's been approved for what's to be done with that property."[21] These statements contradicted ten years of documents and facts learned in discovery, as well as the public record.

These revelations prompted the Burkholders to move for the evidence to be reopened. In so moving, they argued that the RRHA's condemnation of the "property without a plan to further the Plan's goal of removing blight and blighting influences, as found by this Court, is arbitrary and capricious and is devoid of a rational basis for action." Their motion was denied and the case moved forward to a just compensation trial.

SEEKING JUST COMPENSATION

Before the Burkholders could appeal any of the jurisdictional issues relating to the validity of the Plan, there had to be a just compensation trial, in which five jurors would determine the just compensation owed to the Burkholders for the taking of their property. In March 2010 a just compensation jury decided that RRHA's original offer of $1,025,000 was insufficient as a measure of just compensation by a factor of two and awarded the Burkholders $2,200,000 for the taking of their property. The Burkholders are presently considering their options for an appeal of the jurisdictional issues.

CONCLUSION

The Burkholders' case has been properly compared to the economic development taking in *Kelo*. The postscript in *Kelo* is that the homes taken for Pfizer are now vacant weed lots, and the planned economic development has been abandoned. Given the public statements by Carilion and the RRHA that there is no use planned for the property, the comparisons to *Kelo* are also prescient of the likely result in Roanoke.

The Burkholders' case, like all condemnations for economic development, illustrates how the rights of ordinary citizens can be subrogated to the desires of the politically connected class who can corrupt and bend the government's power to their will. When local governments force ordinary citizens to compete in a distorted marketplace, the fundamental right of private property ownership demonstrably is not guaranteed by the VIRGINIA CONSTITUTION.

The Burkholders' case shows us that the definition of "public use" in Virginia is only as strong as our General Assembly's commitment to define it narrowly in the statutes. The time has come for the

[18] *Id.* at 6, *quoting* VA. CODE § 36-48.

[19] *Id.* at 7, *quoting* VA. CODE § 36-49.

[20] Laurence Hammack, *Roanoke couple's land condemned – but why?*, ROANOKE TIMES, Dec. 2, 2009 (quoting Carilion spokesman Eric Earnhart as saying, "Carilion does not need the land and has not requested it from anybody.").

[21] *Id.*

General Assembly to pass a constitutional amendment that will ensure that Virginians' property cannot be taken and given to a preferred private owner for economic development.

Virginians must once again take seriously George Mason's recognition that all men "have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."[22]

[22] VA. CONST. art. 1, § 1.