

Supplementary Material

Chapter 11: The Contemporary Era – Individual Rights/Property/Takings

---

**Board of County Commissioners of Muskogee County v. Lowery, 136 P. 3rd 639 (OK 2006)**

---

*Edward and Mary Lowery were land owners in Muskogee County, Oklahoma. In 2002, the Board of County Commissioners of Muskogee County sought to exercise the power of eminent domain in order to build a water pipeline across the Lowery property for the benefit of Energetix, a private company that supplied electrical power to the area. The Lowery's objected to the condemnation on the ground that Muskogee County had no authority under the state constitution to give condemned land to a private party for economic development, even when government officials paid fair compensation for the land taken. The trial court declared the condemnation constitutional, but that decision was reversed by the Court of Civil Appeals. The county commissioners appealed that decision to the Supreme Court of Oklahoma.*

*The supreme court of Oklahoma ruled that the condemnation was unconstitutional. Justice Lavender's opinion held that economic development was not a sufficient reason under the Oklahoma Constitution to exercise the power of eminent domain. He recognized that the Supreme Court of the United States in *Kelo v. City of New London* (2005) reached a different result when interpreting the takings clause of the Constitution of the United States, but Lavender insisted that the takings clause of the Oklahoma Constitution placed additional limits on governing officials. Why did Justice Lavender reach that conclusion? Do differences in the language justify different interpretations of the constitution of Oklahoma and the Constitution of the United States? Were the original intentions different? Do Oklahomans place greater emphasis on private property than other Americans?*

JUSTICE LAVENDER, delivered the opinion of the Court.

...  
Article 2, § 23 [of the Constitution of Oklahoma] provides as follows:

No private property shall be taken or damaged for private use, with or without compensation, unless by consent of the owner, except for private ways of necessity, or for drains and ditches across lands of others for agricultural, mining, or sanitary purposes, in such manner as may be prescribed by law.

Our Constitution further generally provides “private property shall not be taken or damaged for public use without just compensation.” That constitutional provision additionally states “[in] all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question.” The law is clear that “[p]rivate property may not be taken or damaged by the condemning agency unless the taking or damage is necessary for the accomplishment of a lawful public purpose.” . . . [W]e have used the terms “public use” and “public purpose” interchangeably in our analysis of our state constitutional eminent domain provisions, and we therefore view these terms as synonymous. . . .

. . . In determining whether economic development alone constitutes a “public purpose,” . . . we are guided by the longstanding general rule of strict statutory construction of eminent domain statutes. . . . Further, as a general rule, we construe our state constitutional eminent domain provisions “strictly in favor of the owner and against the condemning party.” Additionally, Oklahoma eminent domain statutes must conform to the restrictions placed on the exercise of such power by the Oklahoma constitutional

eminent domain provisions. . . . We adhere to the strict construction of eminent domain statutes in keeping with our precedent, mindful of the critical importance of the protection of individual private property rights as recognized by the framers of both the U.S. Constitution and the Oklahoma Constitution. If we were to construe “public purpose” so broadly as to include economic development within those terms, then we would effectively abandon a basic limitation on government power by “wash[ing] out any distinction between private and public use of property—and thereby effectively delet[ing] the words ‘for public use’ from [the constitutional provisions limiting governmental power of eminent domain.]” *Kelo v. City of New London* (2005) (O’Connor, J., dissenting). In our view, the power of eminent domain should be exercised with restraint and we therefore construe the term “public purpose” narrowly specifically in this context.

...  
Considering the fact that the proposed Eagle Pipeline would be solely dedicated to the purpose of serving a private entity to enable its construction and operation in energy production, it is clear that the County in this case urges a broad interpretation of “public purposes.” While arguing the construction of the plant will serve a public purpose by significantly enhancing the economic development of Muskogee County through increased taxes, jobs and public and private investment, County urges our adoption of a rule, which has been applied in other jurisdictions that the exercise of eminent domain for purposes of economic development alone (in the absence of blight) satisfies the constitutional “public use” or “public purpose” requirement. We recognize that the U.S. Supreme Court recently upheld a city’s exercise of eminent domain power in furtherance of an economic development plan, holding that economic development satisfied the “public use” restriction in the Fifth Amendment’s Takings Clause and finding the city’s economic development plan served a “public purpose.” *Kelo*.

... [W]e hold that economic development alone does not constitute a public purpose and therefore, does not constitutionally justify the County’s exercise of eminent domain. Pursuant to our own narrow requirements in our constitutional eminent domain provisions . . . , we view the transfer of property from one private party to another in furtherance of potential economic development or enhancement of a community in the absence of blight as a purpose, which must yield to our greater constitutional obligation to protect and preserve the individual fundamental interest of private property ownership.

To the extent that our determination may be interpreted as inconsistent with the U.S. Supreme Court’s holding in *Kelo v. City of New London*, today’s pronouncement is reached on the basis of Oklahoma’s own special constitutional eminent domain provisions, Art. 2, §§ 23 & 24 of the Oklahoma Constitution, which we conclude provide private property protection to Oklahoma citizens beyond that which is afforded them by the Fifth Amendment to the U.S. Constitution. In other words, we determine that our state constitutional eminent domain provisions place more stringent limitation on governmental eminent domain power than the limitations imposed by the Fifth Amendment of the U.S. Constitution. We join other jurisdictions including Arizona, Arkansas, Florida, Illinois, South Carolina, Michigan, and Maine, which have reached similar determinations on state constitutional grounds. . . .

While the Takings Clause of the U.S. Constitution provides “nor shall private property be taken for public use without just compensation,” the Oklahoma Constitution places further restrictions by expressly stating “[n]o private property shall be taken or damaged for private use, with or without compensation.” That constitutional provision additionally expressly lists the exceptions for common law easements by necessity and drains for agricultural, mining and sanitary purposes. The proposed purpose of economic development, with its incidental enhancement of tax and employment benefits to the surrounding community, clearly does not fall within any of these categories of express constitutional exceptions to the general rule against the taking of private property for private use. To permit the inclusion of economic development alone in the category of “public use” or “public purpose” would blur the line between “public” and “private” so as to render our constitutional limitations on the power of eminent domain a nullity. If property ownership in Oklahoma is to remain what the framers of our Constitution intended it to be, this we must not do.

JUSTICE OPALA, concurring.

. . . When the government proposes to take a person's property to build streets, jails, government buildings, libraries or public parks that the government will own or operate, the anticipated use is unquestionably public. If the government proposes to take property and then convey it to private developers for private commercial use, a significant question is presented by the intended disposition of the property to be taken. The Oklahoma Constitution requires that the anticipated public benefits substantially outweigh the private character of the end use so that it may truly be said that the taking is for use that is "really public". The state constitutional requirement which limits the exercise of eminent domain power to "public use" is satisfied only when the public benefits and characteristics of the intended use substantially predominate over the private value of that use. . . . The essential element of predominance is absent from this record.

...

JUSTICE TAYLOR, concurring in result.

. . . Because Muskogee County's exercise of eminent domain is not authorized by [Oklahoma statute], it is unnecessary to resort to a constitutional analysis.

Article 2, Section 23 provides: "No private property shall be taken or damaged for private use. . . . The test under this provision is whether the primary reason for the exercise of the power of eminent domain serves a public purpose. If so, the condemnation complies with this provision of article 2, section 23 of the Oklahoma Constitution, even if an ancillary private benefit enures. On the other hand, if the primary reason for the exercise of the power of eminent domain is to serve a private interest and the public purpose is incidental, then the taking of private property is constitutionally invalid. . . .

The primary reason for Muskogee County's condemning plaintiffs' property is to benefit Energetix which is a private use. Any benefits to Muskogee County are ancillary.

. . . This Court has recognized that freeing an area of blight serves the public purpose necessary for the legitimate exercise of eminent domain powers. The benefit to private interest in the condemned property after the elimination of undesirable conditions is incidental to the public purpose.

Likewise, these facts are not analogous to a municipality or a rural water district taking private property for waterlines for its waterworks system. . . . In the case of a municipality or a rural water district exercising the power of eminent domain for waterlines as part of its waterworks system, the municipality and the rural water district retain control of the waterlines' use and, if they choose, can utilize the waterlines to supply water to other customers. . . . This case is more akin to a county condemning private property for the benefit of a private entity who wants to improve the property to increase the entity's income, and, as an ancillary benefit, taxes increase.

The plaintiffs would have us believe that this is a case of a wealthy corporation which "wants the land of his poorer neighbors and influences local power to force the neighbors to sell or be forced off their land." In fact, Muskogee County seeks a thirty-foot easement next to a county road, the waterlines would be underground, the plaintiffs would be compensated for the easement, it appears the easement would have very little impact on the plaintiffs' use of their land, and there is little danger in harm occurring from the waterlines. Muskogee County has a legitimate interest in bringing new business to the county and, thereby, increasing taxes and jobs. However, this interest does not legitimize Muskogee County's exercise of its power of eminent domain to primarily benefit Energetix.

...

JUSTICE EDMONDSON, dissenting and joined by CHIEF JUSTICE WINCHESTER

...

In Oklahoma, our State Constitution extends greater protection to private property than does the Federal Constitution, as the majority opinion ably demonstrates. It also mandates that no private property be taken without just compensation.

However, I do not believe our greater measure of safety for private property was intended to deny non-riparian neighbors access to state water resources; particularly when the water is abundant, access can be achieved merely by taking an easement and is essential to the neighbor's survival, and the purpose is, as here, to expand electrical power resources in an economy in which energy is in critically short supply.

No one should be denied access to public water resources unless it is demonstrated that the access would impair the welfare of the public itself. New generation of electrical power is legislatively favored though it be by a private company and marketed directly to a private consumer, because it contributes to the national energy pool and to the ultimate benefit and security of the public.

...



OXFORD  
UNIVERSITY PRESS