MUNICIPAL RELATIONSHIPS WITH PRIVATE ENTITIES

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MUNICIPAL RELATIONSHIPS WITH BOTH PUBLIC AND PRIVATE PARTNERS

The City of Dublin is an innovator in creating partnerships with both private and public entities. This paper outlines three (3) specific and highly successful partnerships that the City of Dublin has developed: (1) Dublink (a telecommunications conduit facility), (2) the Chiller (an ice rink), and (3) Ballentrae Golf Course. This paper also outlines a "public/public" relationship between the City of Dublin and the Dublin City School District to jointly construct service facilities and busing garages. Finally, included in this paper is a detailed analysis of Ohio law on public/private joint ventures and eminent domain—the "taking" of private property for public use. While each state has its own law on this subject, you may find our analysis of Ohio law a helpful analogue for your state.

INTRODUCTION

One of many goals facing a City Manager is the development of an infrastructure and facilities that the city can offer its residents and businesses without burdening the city with debt. As every City Manager knows, there is never enough money to go around. The City of Dublin has met this goal through successful "private/public" and "public/public" partnerships through which it has improved the services it offers its residents and developed its communications systems, while simultaneously attracting business and income to the City. Other City Managers may find the following types of partnerships viable in their own cities.

Private/Public Partnerships

In order to improve its communications system, the City of Dublin partnered with a private company to build "Dublink", the conduit system that the private company now owns pursuant to a twenty five year franchise granted by the City. The system currently includes 12 miles of conduit with six competitive local exchange carriers (CLEC's) leasing capacity in it. The major plus is that the City of Dublin has attracted many major businesses to locate to the City because these companies want to utilize the Dublink system. The only negative to date has been litigation initiated by one CLEC alleging Dublink was a barrier to entry and discriminated against it. This lawsuit is on hold pending that CLEC's recent bankruptcy filing.

Two more examples of private/public partnerships that have brought great social and economic benefits to the City of Dublin are the Chiller Ice Rink and Ballentrae Golf Course. In each project, the City partnered with a private group to build the facility on land owned by the City, and then entered into a long term lease with the developer, with the City receiving the property free and clear at the end of the lease period. Both facilities are run as private enterprises, but Dublin residents receive preferred access and rates at the ice rink, and a 25%

discount on all course fees at the golf course. This partnership benefits everyone: the private companies running the facilities, the Dublin residents, and the City itself.

Public/Public Partnerships

Public/public partnerships have also been advantageous for the City of Dublin. The City entered into joint purchase agreements with the Dublin City School District to buy land upon which they jointly built service centers and garages for the District's school buses and the City's maintenance vehicles. This partnership enabled the City of Dublin and the Dublin City School District to share land, gas pumps, and storages areas, which greatly reduced costs for both. The City of Dublin also entered into a joint park project with a nearby Township in which it traded land for parks. It partnered with this same Township to build a water tower from which the City of Dublin gets its water, and the Township gets storage facilities. These public/public partnerships have been successful money saving ventures for the City.

Legal Concerns

City Managers using private/public and public/public partnerships must ensure that these ventures comply with state law. In Ohio, court decisions interpreting the state's Constitutional provisions explain the requirements a city must follow in order to lawfully engage in commerce with a private or public entity as its partner. City Managers must be aware of these standards, which vary by state, and take all necessary steps to ensure that these private/public and public/public partnerships comply with state law. When they do, these partnerships provide many advantages with only minimal disadvantages. The City acquires new jobs and businesses, increasing both the services available to its residents and the income coming into the City, while at the same time the City Manager meets his or her goal of providing societal benefits and infrastructure to the City without the City having to pay for them.

DUBLINK

As early as 1994, the City of Dublin recognized that a key issue for municipal development was the creation of telecommunications facilities. Much as canals and railroads were important in past centuries, and more recently superhighways and airports, the construction of telecommunications infrastructure, in Dublin's opinion, was a key issue for the development of the City. However, in 1996, the City of Dublin had a dilemma: it had recently appropriated $96 million for street improvements over the next 5 years, but Dublin, a rapidly growing edge city, was also confronted with difficult traffic problems. How could the City of Dublin encourage the deployment of fiber optics and other high speed telecommunication services while simultaneously preventing this deployment from unnecessarily interfering with an already difficult traffic situation?

Dublin assembled a team to confront this challenge made up of a telecommunications attorney, a telecommunications engineer, and the City Service Director. After a series of meetings, the team narrowed the possible options down to a handful of ideas: (1) a publicly owned telecommunications utility to provide finished telecommunications services (*i.e.*, telephone and data services like those provided by a telephone company); (2) a public/private partnership to provide finished telecommunications service; (3) no government regulation whatsoever; or (4) a private/public partnership to provide conduit but not telecommunications services. Of these four ideas, the "no regulation" idea was thrown out because it failed to meet the City's goal of preserving its expensive right of way improvements, even though the absence of any regulations would likely lead to rapid deployment of telecommunications services. The idea of a publicly owned telecommunications utility was also discarded because Dublin lacked the expertise needed to operate a complex telecommunications service. The City was willing to

take some risk, but unwilling to assume the financial risk of owning and operating a municipal telecommunications company. In any event, it was difficult to fashion a regulatory scheme that prevented private companies from operating in the City's right of way that did not violate the Telecommunications Act of 1996 (TA 96) or anti-trust laws. This left only the two private/public partnership concept. After some exploration, the team decided the conduit system idea was better alternative.

As initially conceived, the conduit plan was for the City, or a private entity, to build a conduit system throughout the high density business district in the City of Dublin where virtually all the demand for competitive phone services would arise. This system would be designed in the most usable fashion for modern communications systems, with conveniently placed manholes, a ring design, and redundant building entrances off the manholes. This way, telecommunications companies would not be permitted to cut streets and build in the right of way, but would be forced to lease space in the conduit system. The City put together a request for information ("RFI") asking for input on how such a system would be designed, the potential costs, and what sort of leasing or sale arrangement would be utilized. In response, the Fishel Company (“Fishel”) in Columbus, Ohio, proposed to build a concrete-protected, large conduit system (large 4" conduits) that Fishel would then lease at a rate allowing it to recover its investment plus a reasonable profit.

The City of Dublin's team then began an extensive series of information gathering sessions with competitive local exchange carriers ("CLEC's") certified to serve Dublin and the existing incumbent phone company, Ameritech. The CLEC's took a variety of positions in these discussions, but were united on one point: the CLEC's did not want an expensive "bells and whistles" conduit system, but preferred a no frills, less expensive conduit system. Some CLEC's

were initially in favor of this “no frills” concept, which allowed them to deploy their facilities quickly. Others were opposed to it because they did not have customers in some parts of Dublin where the conduit system was to run, and they would then be forced to purchase conduit space to serve these customers without having an offsetting revenue stream.

Ameritech, the incumbent phone company, maintained that as a carrier of last resort, it needed freedom to build its facilities when and where it wanted. It also argued that its existing facilities should be grandfathered and exempted from the Dublink scheme. From a legal standpoint, the Dublink team knew it needed to address the incumbent’s concerns about grandfathering its facilities without violating the non-discrimination sections of TA96. It was also important that leasing rates for the conduit system be low enough that no CLEC could complain that these rates were a barrier to entry, as prohibited by TA96.

After months of industry input, the City of Dublin elected to begin negotiations with Fishel to determine if Fishel under what terms and conditions it would build and operate the conduit system. With assistance from Fishel and the telecom carriers, the City passed a right of way control ordinance to establish the "Dublink" district, which encompassed the entire business district of the City of Dublin. All telecommunications construction in the District was banned, and carriers wishing to deploy facilities in the district were forced to utilize the Dublink conduit. Subsequently, a deal was struck with Fishel to build the conduit system, which Fishel would then own pursuant to a 25 year franchise granted to it by the City of Dublin. Fishel redesigned the conduit system to exclude the "bells and whistles" and reconfigured its financial plans so that it could lease conduits for shorter runs, which allowed the CLEC's to limit the amount of conduit they leased thereby reducing their exposure.

The City also took a chance when it agreed to buy the conduit system from Fishel at book value in the event the regulatory scheme was declared unconstitutional or violative of TA96. Fishel was given the ability to "put" the system to the City if a court determined that the Dublink scheme was violative of the Telecommunications Act. A compromise of sorts was also reached with Ameritech. Ameritech's existing facilities were grandfathered and exempted from the Dublink regulations. As a further accommodation to the telecom industry, the City of Dublin agreed that if any carrier, including the CLEC's, wanted to build facilities in places where Dublink facilities were unavailable, that carrier could build the facilities as long as it allowed Dublink to utilize the trench and pay only the incremental costs of widening the trench for placement of the Dublink facilities.

A few of the CLEC's opposed the Dublink system arguing that the expenses involved in leasing conduit were too high, and that they could build the system less expensively by constructing facilities as necessitated by demand. The City of Dublin rejected this argument because the CLEC's were proposing to do precisely what Dublin sought to prevent, the "willy nilly" cutting of streets and expensive right of ways by companies with extremely short planning horizons. On December 14, 1998, the official franchise was awarded to Fishel; thirty days later construction began.

By 2001, the Dublink system had expanded to include 12 miles of conduit with six (6) CLEC's leasing capacity in the system. The CLEC's servicing the City of Dublin have come to rely on this system, and have leased enough of its capacity to make the system economically viable for Fishel. According to Fishel, even if the Dublink regulatory scheme was found to violate TA96, it would not be inclined to "put" the system to Dublin at cost. Dublink has proven to be extremely effective in reducing the number of street cuts and thereby protecting the City's

enormous investment in right of way improvements. This was the expected result. What was not expected was the tremendous impact Dublink has had as on the City's economic development. Airtouch now has a headquarters facility in Dublin, citing the Dublink system as a primary motivator for its location. Last year, Nationwide Insurance moved 8,000 jobs to a number of different campuses in Dublin, again citing Dublink as the primary motivator. Nationwide, in fact, plans to connect its various campuses via the Dublink conduit system, thereby providing campus-wide phone service and internet access at a fraction of its normal cost. Other major developers such as Duke Weeks are working with Dublin to see if they can utilize conduit capacity of the Dublink system to connect the eight (8) buildings they lease in Dublin.

The only downside for Dublin in its deployment of the Dublink system has been a lawsuit filed by a competitive local exchange carrier, ICG Communications, alleging that, among other things, the Dublink system is a barrier to entry and discriminates against ICG. ICG has subsequently filed for federal bankruptcy protection and its lawsuit against Dublin is now on hold pending determinations by the bankruptcy court.

Dublin has been very pleased with its Dublink system. Dublin was able to rapidly deploy a telecommunications network offering a wide array of services at reasonable prices, while simultaneously protecting the large investment in its right of way. As an added bonus, the business community has fully embraced the potentials of this conduit system. Dublin is currently exploring the possibility of deploying high speed broadband services to its residents outside of the Dublink area. Even if "Dublink II" does not become a reality, Dublin will stay in the forefront of the telecommunications revolution.

THE CHILLER (ICE RINK)

The City of Dublin purchased a number of acres from a private citizen in Dublin for the purpose of creating a public/private partnership. The City paid full price for the acreage and, after a request for proposal ("RFP") process, contracted with a private group to build an ice rink complex. The ice rink was built on property owned by the City of Dublin, and the City entered into a long term, thirty-five year lease with the developer for a minimal amount. The ice rink is run as a private enterprise. At the end of the lease period, the City of Dublin receives the facility free and clear. All upkeep, maintenance, landscaping, and other costs are borne by the developer.

The City of Dublin and its residents receive specific allotments of critical times for ice usage, and City groups and skating clubs tied to the school district have preferred access to the ice at preferred rates. The leasehold interest is subordinate to a City of Dublin approved bank lien. The result of this unique arrangement is a win/win agreement for Dublin residents, the developer, and the community in general.

BALLANTRAE GOLF COURSE

The City of Dublin recently entered into a more sophisticated public/private partnership to develop a public golf course. A land developer assembled approximately 700 acres of land, annexed that land to the City, and then deeded approximately 200 acres of that land to the City free and clear. The City then entered into a third-party arrangement with another private company, which builds and operates golf courses. This third party golf developer then constructed a high-end public golf course on the 200 acres owned by the City. The land developer then turned the remaining 500 acres into a high-end residential development.

The City entered into a lease arrangement with the golf course developer. Like the Chiller deal, this leasehold interest is also subordinated to a bank loan so that the developer could borrow the money to build the golf course. Similarly, at the end of the lease, the golf course becomes the property of the City of Dublin. The golf course is run privately, with Dublin residents receiving a 25% discount on all course fees. The developer is also building numerous parks as part of this golf development and enhancing an area in the City that had serious redevelopment needs. Both the ice rink and golf course projects took approximately one year to put together due to the complex private/public partnerships, contract bidding and other issues.

OTHER PROJECTS

Dublin has completed other successful public/public partnerships wherein the local school district and the City have entered into joint purchase agreements for land to build a complex for the City service center and a maintenance facility for district buses and City vehicles. The two entities share development costs and access to gas pumps and other facilities. These have worked very well and have saved both the residents of the school district and the residents of the City numerous dollars.

OHIO LAW ON PUBLIC/PRIVATE VENTURES

I. INTRODUCTION

In the 1830's, the state and local governments in Ohio shifted to a policy of financing turnpike, canal and railroad companies by lending credit or purchasing stock. They put the state's money and credit at risk in business schemes that were often risky. The legislature's and local bodies' willingness to finance construction in this manner was an open invitation for private interests to dip into public funds.[1]

Although the framers of the Constitution believed that it was advantageous for municipal corporations to have the power to provide public-utility services to their inhabitants, they clearly intended to limit the municipalities' power to furnishing services to their *own* inhabitants, and to prevent the municipalities from entering into the general public-utility businesses outside their boundaries in competition with private enterprise.[2] Pursuant to this notion, Article VIII §6 of the Ohio Constitution was created.

II. ARTICLE VIII § 6 OF THE OHIO CONSTITUTION

The full text of this section reads as follows:

> No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association: provided, that nothing in this section shall prevent the insuring of public buildings or property in mutual insurance associations or companies. Laws may be passed providing for the regulation of all rates charged or to be charged by any insurance company, corporation or association organized under the laws of this state, or doing any insurance business in this state for profit.

[1] See *C.I.V.I.C. v. City of Warren*, (2000), 88 Ohio St.3d 37.

[2] See *Wilson v. Hance* (1959), 169 Ohio St. 457.

Since its adoption in 1851, this provision of the Constitution has been the storm center of much litigation. One of the main purposes for adopting this provision was to prohibit political subdivisions of the state from aiding in the construction of railroads and similar enterprises.[3] In *Walker* v. *City of Cincinnati*,[4] the court noted, "[i]n no project originated by individuals *with a view to gain*, are the municipal bodies named permitted to participate in such manner as to incur pecuniary expense or liability."

General Interpretation Of Article VIII §6

With regard to this constitutional provision, the Ohio Supreme Court has articulated that it not only prohibits a "business partnership," which carries the idea of a joint or undivided interest, but it goes further and prohibits a municipality from being the owner of part of a property that is owned and controlled by a corporation or individual. A union of public and private funds or credit, each in aid of the other, is forbidden by the Constitution.

However, the provisions of Ohio Constitution Article VIII § 6, do not prohibit a subdivision from issuing securities for the financing of a corporation organized and operated for a *purpose* within the powers of the division. Where a subdivision issues bonds in anticipation of the collection of assessments for the costs of a public improvement constructed upon the petition of property owners, and wholly at their cost, there is no violation of this provision.

[3] See *Speeth v. Carney* (1955), 163 Ohio St. 159.

[4] *Walker v. City of Cincinnati*, (1871), 21 Ohio St. 14.

III. EXCEPTIONS TO ARTICLE VIII §6

An exception that has been carved out of § 6, Article VIII is § 13. Section 13, Article VIII of the Ohio Constitution provides for the suspension of the prohibitions of § 6 with some limitation.

Article VIII §13 of the Ohio Constitution

Section 13 of Article VIII was later amended into the Ohio Constitution to carve out exceptions to § 6. Article VIII §13 reads, in pertinent part, as follows:

> To create or preserve jobs and employment opportunities, to improve the economic welfare of the people of the state, to control air, water, and thermal pollution, or to dispose of solid waste, it is hereby determined to be in the public interest and a proper public purpose for the state or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, to acquire, construct, enlarge, improve, or equip, and to sell, lease, exchange, or otherwise dispose of property, structures, equipment, and facilities within the State of Ohio for industry, commerce, distribution, and research, to make or guarantee loans and to borrow money and issue bonds or other obligations to provide moneys for the acquisition, construction, enlargement, improvement, or equipment, of such property, structures, equipment and facilities. Laws may be passed to carry into effect such purposes and to authorize for such purposes the borrowing of money by, and the issuance of bonds or other obligations of, the state, or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, and to authorize the making of guarantees and loans and the lending of aid and credit, which laws, bonds, obligations, loans, guarantees, and lending of aid and credit shall not be subject to the requirements, limitations, or prohibitions of any other section of Article VIII, or of Article XII, Sections 6 and 11, of the Constitution, provided that moneys raised by taxation shall not be obligated or pledged for the payment of bonds or other obligations issued or guarantees made pursuant to laws enacted under this section.

Essentially, § 13 allows a public and private entity to engage in commerce as partners if the relationship furthers a public purpose. In *State, ex rel. Bd. of Commrs. of Preble Cty., v.*

Mong (1984),[5] the Court turned to the lexicographers for assistance in defining the common and ordinary meanings of the terms "commerce" and "industry." In holding that farming constituted commerce and industry under § 13, the Court relied upon the generally accepted definition of "commerce" as "the buying and selling of goods" and "industry" as "the commercial production of goods." Today, courts look to the broader definitions of those terms to include the service industries. "Commerce" is defined as "[t]he exchange of goods, productions, or *property of any kind*" (emphasis added),[6] and "industry" defined as "the commercial production and sale of goods and *services*" (emphasis added).[7, 8]

As stated in paragraph two of the syllabus of the *Gordon case*: "[t]he determination of what constitutes a public municipal purpose is primarily a function of the legislative body of the municipality, subject to review by the courts, and such determination by the legislative body will not be overruled by the courts except in instances where that determination is manifestly arbitrary or unreasonable."[9]

The *Bazell* Court concluded that a charter municipality may construct a stadium that is designed to accommodate large crowds at athletic and other exhibitions, and may rent that stadium to private persons who will provide exhibitions. The municipality may do so even though such private persons will derive profits from those exhibitions. In connection with the construction and operation of the stadium, the municipality can also develop a portion of that land for automobile parking and derive a profit. The municipality may also construct and

[5] *State, ex rel. Bd. of Commrs. of Preble Cty., v. Mong* (1984), 12 Ohio St.3d 66.

[6] Black's Law Dictionary (6 Ed. 1990) 269, n7.

[7] American Heritage Dictionary (1981) 672.

[8] See Board of County Commissioners of Lake County v. Zupanic (1991), 62 Ohio St.3d 297.

[9] See *Bazell v. City of Cincinnati* (1968), 13 Ohio St.2d 63.

maintain a scoreboard and derive revenue from the sale of advertising space. Although §13 is used to avoid the application of §6, other provisions have also been added to the Ohio Constitution to limit the scope of §6.

Article VIII, §14 of the Ohio Constitution

Section 14 allows the state to issue bonds for multi-unit housing for persons over the age of sixty-two, and for single-family, owner-occupied dwellings.

Article VIII, §16 of the Ohio Constitution

Section 16 permits the state and political subdivisions to make grants, loans, subsidies to loans, loans to lenders, purchase of loans, and guarantees of loans to aid the housing industry in Ohio, and permits the state to issue bonds for that purpose.[10]

IV. *C.I.V.I.C. v. CITY OF WARREN*

In *C.I.V.I.C. v. City of Warren*,[11] the Ohio Supreme Court reviewed the public-private financing dynamic. In *Warren*, the issue was whether the City of Warren had established ordinances that were unconstitutional under Article VIII §6 of the Ohio Constitution. A sub-issue was whether those ordinances were protected under Article VIII §13.

Facts

Silverlands North, Inc. ("Silverlands") and Crossbar Realty Company ("Crossbar") owned a tract of land in Warren, Ohio. The land was being developed as a residential subdivision. The developers received the City's assistance in the construction of new streets, sewers, water lines, and other improvements to the property. The City passed several ordinances with regard to this project. The first ordinance, Ordinance 10937/96, authorized the City to advertise for bids and to contract for the construction of the streets and other improvements. The

[10] See Board of County Commissioners of Lake County v. Zupanic (1991), 62 Ohio St.3d 297.

[11] *C.I.V.I.C. v. City of Warren* (2000), 88 Ohio St.3d 37.

ordinance provided that the private developers would be responsible for eighty percent of the construction costs. Another ordinance, Ordinance 11035/97, provided for the issuance of certain bonds and promissory notes for the purpose of raising $300,000, to be used for the construction. Tax revenue was pledged to pay the notes on the bonds. The City entered into a reimbursement agreement with Silverlands and Crossbar in conjunction with the passage of Ordinance 10937/96. Citizens Involved in the Community ("C.I.V.I.C."), a private association comprised of over three hundred residents, taxpayers, and property owners, filed suit against the City of Warren, arguing that the ordinances were unconstitutional.

Court's Analysis

After reciting a brief history of Article VIII § 6, the Court concluded that cases construing § 6, Article VIII have found that it forbids the union of public and private capital or credit in *any* enterprise. The Court then proceeded to find that the ordinances and agreement in question violated § 6, Article VIII. Specifically, the Court stated:

> The usual course of business, when developing a residential subdivision, requires the private developer to put in the streets and utilities, and recover the cost in the price of each lot in the development. The property owners are in effect assessed when the property is sold. Here, however, there is no assessment, and the developers still plan to realize the profits on the lots. Moreover, the city is paying twenty percent of the construction bill and financing the remainder of the private developers' costs. The city is also paying advertising costs, permit fees, legal expenses, and a portion of the engineering costs. These actions by the city "raise money for" and "loan its credit or in aid of" private corporations.

The City, however, argued that § 6 was not implicated because the street and other improvements were dedicated for public use and were City property. Moreover, the City contended that the construction of streets and utilities were valid governmental functions.

The Court did not agree. Even though the Court recognized a municipality's ability to construct streets and improvements, the Court did not find any security for the public funds being

used in this agreement. The Court held that under a normal financing plan, the new owner would be responsible for the special assessments, thereby ensuring "that in case of a nonpayment, the municipality has a method to recover its costs." In this case, however, if the Court were to agree with the City, an insolvent bankrupt corporation could leave the City without a remedy to collect on outstanding debts. The Court concluded that this method of repayment places taxpayers' funds at risk. The Court stated "[i]f the project fails, the taxpayers are saddled with the debt. This is what § 6, Article VIII was intended to prevent."

The City also attempted to argue that the financing arrangement was exempt from §6 by way of §13.[12] In making this determination, the Court reviewed one of its prior decisions. In *Lake Cty. Bd. of Commrs., v. Zupancic,*[13] the Court held that the §13 exception enabled the construction of for-profit, multi-unit, low and moderate income rental housing. In *Zupancic*, the Court held that the rental housing fit the definitions of industry and commerce, thus establishing an exemption under §13. In the case at bar, however, the Court distinguished the agreement in question from *Zupancic*. The Court held that the construction of a "street containing two cul-de-sacs and related improvements does not meet the definitions of industry and commerce. Once construction is complete, no one is benefited except the residential property owners."

Based on the forgoing, the Court held that when a City contributes funds for the financing of a residential subdivision development project, the City is taking action "to raise money for" and "loan its credit to" private corporations in violation of §6, Article VIII of the Ohio Constitution. In addition, the Supreme Court of Ohio found that the City's actions did not fall within the exception contained in §13, Article VIII of the Ohio Constitution. As a result, the

[12] The City's attorney, however, conceded in oral arguments that the lower court "went to far in finding that Section 13 applied."

[13] *Lake Cty. Bd. of Commrs., v. Zupancic* (1991), 62 Ohio St.3d 297.

Court held that the City's financing of the construction of the street and reimbursement agreement and its enabling ordinances were unconstitutional.

The Dissent

Three Justices dissented.[14] The dissenting Justices argued that the street and other improvements that the City wished to finance would be owned by the City and not by the private developers. If §6 were applicable, however, the Justices believed that §13, Article VIII applied and the proposed activities came within the exception for commerce and industry. The dissenting Justices stated:

> Although the streets and appurtenances themselves will not be a source of industry and commerce, the residential development and sale of the residential homes certainly will. These sales clearly satisfy the *Zupancic* definitions of industry commerce. Thus, §13 of Article VIII of the Ohio Constitution is consistent with the construction ordinance in the instant case."

V. ***Citizens Word v. Canfield Township***

In *Citizens Word v. Canfield Township,*[15] the Court of Appeals of Ohio reviewed the public-private financing dynamic. The issue there was whether Ohio Constitution Article VIII, §6 barred a township from lending its credit to a private entity.

Facts

A private developer contacted the Township about developing a parcel of land. The Township then made an agreement with Mahoning County for the Township to assume control over the parcel to be developed. The Township agreed to pay to install the water lines so long as it was guaranteed total reimbursement. The Township passed a resolution ordering improvements on the road, and the Trustee agreed to approve the resolution so long as the funds

[14] Pfeifer, Cook, and Lundberg Stratton.

[15] *Citizens Word v. Canfield Township* (2003), 152 Ohio App. 3d 252.

for the extension of the water lines were completely reimbursed to the Township, the reimbursement would occur within six years, and the Township would receive a sufficient guarantee of payment. Citizens Word (Wanting Only Responsible Development) then filed a complaint seeking a permanent injunction. The trial court held that the actions of the Township violated Article VIII, §6 of the Ohio Constitution because it was lending its credit to a private entity. The Township appealed this decision.

Analysis

The Court of Appeals cited the language of Article VIII, §6 and then discussed its purpose. They noted that the *C.I.V.I.C.* court held that "when a city contributes to the payment for and financing of a residential subdivision development project, the city is taking action 'to raise money for' and 'loan its credit to, or in aid of,' private corporations in violation of Section 6, Article VIII of the Ohio Constitution." Therefore, in *C.I.V.I.C.* the city was directly financing the improvements to the property of residential development. But the Court of Appeals said that *C.I.V.I.C.* did not answer whether a governmental entity could constitutionally finance an improvement on its own property where that improvement would benefit a private developer.

The Court of Appeals held that a governmental entity can improve its own property, regardless of whether it will benefit a private developer. The Court considered the ownership and control of the lands to be improved to be the critical factor, which distinguished *Citizens Word* from *C.I.V.I.C.* The Court of Appeals mentioned that in *C.I.V.I.C.* the city was lending its credit to a developer by constructing improvements on the developer's land and only receiving reimbursement for eighty percent of the costs, while in this case the improvements to be financed by the government were on the Township's land and not on the land of a private developer. Thus, the Court of Appeals said that the Township was acting under its authority when it placed

water lines on property under its control and, therefore, the Township's placement of water lines did not result in raising money or lending credit to the developer.

The Court of Appeals pointed out that the Township was to be reimbursed within six years for the amount it expended on the construction of the water lines on its own property. Additionally, the only fees that the Township would not recoup would be the advertising costs, permit fee costs, legal expenses, and portions of the engineering costs. The guaranteed reimbursement indicated to the Court of Appeals that the Township neither lent its credit nor raised money for private investment. The Court decided that the trial court's reliance on *C.I.V.I.C.* was misplaced because the facts in this case were distinguishable. For these reasons, the Court of Appeals held that the Township neither lent its credit nor raised money for private investment, and that the trial court erred in granting a permanent injunction based on that reasoning.

VI. CONCLUSION

It is clear that courts will subject any business relationship between a public and private institution to strict review. Based on *C.I.V.I.C.*, if a City contributes to payment for and financing of a residential subdivision development project, the City is taking action "to raise money for" and "loan its credit to" private corporations in violation of §6, Article VIII of the Ohio Constitution. In order to fall under the exception contained in §13, Article VIII the Court will focus on the "activities that would occur once construction was complete." For the relationship to pass Constitutional muster, the City must, following construction, receive a benefit for its actions in the relationship. If, following construction, a benefit to the City exists, the §13, Article VIII exception will apply. If however, the Court fails to find a benefit, the Court "will not stretch the narrow exception found in Section 13, Article VIII."

EMINENT DOMAIN:

TAKING PRIVATE PROPERTY FOR PUBLIC USE

A. Eminent Domain Procedures

Article XVIII § 3 of the Ohio Constitution grants the power of eminent domain to municipalities. All appropriations of real property are made pursuant to Ohio Revised Code Sections 163.01 to 163.22. The Ohio Constitution provides that, except in time of war or great public exigency or for streets that are open to the public without charge, private property may not be taken for public use unless a compensation is first made in money or secured by a deposit of money, and that the amount of compensation must be determined by a jury.[16] The Fourteenth Amendment's due process clause is violated when a municipality takes private property without paying for it.

A municipality may only take private property by eminent domain when such taking is necessary for a "public use." Public use includes the public health, safety, interest, convenience or welfare. Decisions about the taking of private property, and the appropriateness of the public use, are for the legislature whose actions will be judicially reviewed under the "abuse of discretion" standard.[17]

Ohio Revised Code Sections 715.01 and 717.01 are the general provisions giving a municipality the power to acquire property by appropriation for any authorized public purpose. Another Ohio Revised Code Section[18] lists specific purposes for which a municipality may appropriate real estate, such as for the provision of hospitals. If a charter or ordinance does not

[16] Ohio Const. Art. I § 19.

[17] *State ex rel. Gordon v. Rhodes* (1951), 156 Ohio St. 81, 100 N.E.2d 778.

[18] R.C. 719.01.

set forth the proceedings by which the power of eminent domain may be exercised, a municipality must strictly follow the procedures set forth by general law.[19] It appears that a charter municipality is permitted to delineate its own procedure for eminent domain proceedings.

1. Resolutions and Notice to Property Owners

The first step in an appropriation proceeding is the passage of a resolution declaring the necessity and intent of appropriating the property, defining the purpose for which it is to be taken, and setting forth a description of the land and the estate or interest to be appropriated.[20] This resolution must be served on all property owners, including those persons owning chattels, and those persons operating their medical practices at affected hospitals.

Once the resolution of necessity and intent has passed, the municipality must direct written notice to be given to the owner of, the person in possession of, or the person having an interest in, the property to be appropriated in the same manner required for the service and return of summons in a civil action.[21] If the person to whom notice must be given cannot be found, notice must be given by publication once a week for three consecutive weeks in a newspaper of general circulation.[22] Council may then pass an ordinance directing the appropriation to proceed.

2. Court Proceedings for Appropriation

Prior to the commencement of any litigation, a municipality must enter into good faith negotiations with the property owner. An appropriation can only be made if the municipality is unable to agree, for any reason, with the property owner on the amount of compensation to be

[19] *State ex rel. Sun Oil Co. v. Euclid* (1955), 164 Ohio St. 265, 130 N.E.2d 336.

[20] R.C. 719.04.

[21] R.C. 719.05.

[22] *Id.*

paid and the terms of the taking.[23] A court proceeding for appropriation begins by filing a petition in either the court of common pleas or probate court.[24] Typically, these proceedings are filed in courts of common pleas. The petition must contain:

- a description of each parcel of land or interest or right therein to be appropriated such as will permit ready identification of the land involved;
- a copy of the resolution and ordinance to appropriate;
- a statement of the purpose of the appropriation;
- a statement of the estate or interest sought to be appropriated;
- the names and addresses of the owners so far as they can be ascertained;
- a statement showing inability to agree with the owner or that for one of the reasons set forth in R.C. 163.04, such inability is not necessary; and
- a prayer for the appropriation.[25]

The municipality must notify the owners of the property to be taken as to the filing of the petition for appropriation.[26] When the residence of the owners is known and is within this state, notice of the filing of a petition must be given to all such owners by serving a summons and a copy of such petition in the manner of service of summons in civil actions. When the residence of the owners is unknown or the owners live out of state, notice is to be given by publishing the substance of the petition, a statement of the date of the filing, and the date the matter may be heard, once a week for two consecutive weeks, in a newspaper of general circulation in the county, or shall be given by registered mail.

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[23] R.C. 163.04.

[24] R.C. 163.05.

[25] R.C. 163.05.

[26] R.C. 163.07.

Any owner may file an answer to the petition.[27] This answer must be verified and must contain a general denial or specific denial of each material allegation not admitted. Unless specifically denied in the answer, the municipality's right to make the appropriation, the inability of the parties to agree, and the necessity for the appropriation will be resolved by the court in favor of the municipality. However, when the property is taken in time of public exigency, an answer may not deny the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation.

If no answer is filed and no settlement is made, a court shall declare the value of the property taken and the damages, if any, to be as set forth by the municipality.[28] When an answer is filed, it must be filed in accordance with Civil Rule 12, and the court must schedule a time to hear the questions raised by the answer. This hearing must be held not less than five or more than fifteen days from the date the answer was filed.[29] The hearing would address the property owners' answer challenging the municipality's right to make the appropriation, the inability of the parties to agree, or the necessity of the appropriation. The burden of proof is upon the owner of the property. If answers are filed on behalf of fewer than all the named owners, the court shall set the hearing or hearings at such times as are reasonable under all the circumstances, but in no event later than twenty days after the issues are joined as to all necessary parties or twenty days after rule therefore, whichever is earlier.

The resolution of Council is *prima facie* evidence of the necessity of the appropriation in the absence of proof showing an abuse of discretion by the municipality.[30] If the court

[27] R.C. 163.08.

[28] R.C. 163.09.

[29] *Id.*

[30] *Id.*

determines the questions in favor of the municipality, it must set a time for the assessment of compensation by the jury within twenty days from the date of the journalization of such determination. If the court finds against the municipality on any questions raised by the answer, the appropriation cannot go forward. If the municipality has taken possession prior to such order, the municipality must restore the property to the owner in its original condition or pay damages.[31]

If no answer is filed by a property owner and the municipality has made no determinations of the value of the property taken and the damages, so that a quick take is not involved, the court must set a time within twenty days from the date that the answer should have been filed for the impaneling of a jury for the assessment of compensation.[32] Similarly, if an answer is filed, but no specific denials are made, the court must set a date for trial within twenty days after the answer is filed.[33] If an answer is filed specifically denying the inability of the parties to agree, the necessity of the appropriation, or the right of appropriation, and such issues are found in favor of the municipality, the court must set a date for trial that is within twenty days after the journalization of the determination by the court.[34]

3. Determining Compensation for Property Owners

The Fifth Amendment to the United States Constitution requires "just compensation" for the taking of private property. Just compensation means the full monetary equivalent of the

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[31] *Id.*

[32] R.C. 163.09.

[33] *Id.*

[34] *Id.*

property taken.[35] The Ohio Constitution also requires that compensation be made in money for the taking of private property. That term is given the same meaning as the term "just compensation" under the U.S. Constitution. It means the sum of money that will compensate the owner for the property actually taken, that is the fair market value of the property.[36]

The compensation that must be paid to a property owner from whom property is taken consists of two components: (a) compensation for land actually taken; and (b) damages for any injury that may result to the remaining lands, or "residue," by reason of the taking.[37] The "residue" of the property includes every element that can fairly enter into the question of value, and which an ordinarily prudent business person would consider before forming a judgment and making a purchase.[38] When a building or other structure exists on the property, the jury must include the value of these structures as part of the compensation. Title to the structure then vests in the municipality.[39] The verdict must be signed by at least three-fourths of the members of the jury. The general rule is that the property in an appropriation trial is valued as of the date of trial. However, if the municipality has taken possession prior to trial, the date of valuation is the date of such possession.[40]

Expert testimony may be introduced to show the fair market value of the property before and after the taking. There are several accepted methods for appraising the fair market value of

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[35] *U.S. v. Reynolds*, 397 U.S. 14 (1970).

[36] *Masheter v. C.H. Hooker Trucking Co*. (1969), 19 Ohio App.2d 169, 250 N.E.2d 621.

[37] R.C. 163.14; *Wray v. Parsson* (1995), 101 Ohio App.3d 514, 655 N.E.2d 1365.

[38] *Sowers v. Schaeffer* (1951), 155 Ohio St. 454, 99 N.E.2d 313.

[39] *Id*.

[40] *Director of Highways v. Olrich* (1966), 5 Ohio St.2d 70, 213 N.E.2d 823.

property, including the cost of reproducing the property less depreciation and the market data approach, utilizing sales of comparable property.

Upon payment or deposit of the amount assessed by the jury, the municipality may take possession of the property appropriated if it has not already done so under a quick take proceeding. Usually, the municipality deposits the amount assessed with the court. The claimants to the money deposited may file a motion for distribution and have their rights fully determined in the same proceeding.[41] The court must make an order as to the distribution.

4. Quick Take Proceedings

In most cases, a jury must assess compensation before any property can be taken. This process could take one to two years depending on the court's docket. However, when the appropriation is in time of a public exigency, the taking can occur first with compensation assessed at a later date. In quick take proceedings, a municipality deposits with the court the value of the property appropriated together with the damages, if any, to the residue, as determined by the municipality, and thereafter can enter and take possession of the property appropriated.[42] The right of possession upon deposit does not extend to structures.

In the context of, and as qualified by Ohio Const. Art. I, § 19, a "time of public exigency" permitting the immediate seizure of private property for public use without compensation therefore having first been assessed by a jury and paid, or secured to be paid, is an occasion of unavoidable urgency and suddenness compelling or insistently calling for immediate action or remedy.[43]

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[41] R.C. 163.18.

[42] R.C. 163.06.

[43] *Biery v. City of Lima* (1969), 21 Ohio App.2d 154, 255 N.E.2d 855.

In quick take proceedings, compensation for the taking must still be determined by a jury. If the municipality deposits the amount it determines to be the value of the property with the court, the landowner may apply to the court to withdraw the deposit. This sum will then be deducted from the final verdict or award.[44]

[44] R.C. 163.06.