

**THE CITY OF KENT, OHIO
COMMUNITY DEVELOPMENT COMMITTEE
WED., AUGUST 1, 2007**

This meeting of the Community Development Committee of Kent City Council was called to order at 9:50 p.m. on Wed., August 1, 2007 by William Schultz, Chair

ROLL CALL: MR. BARGERSTOCK, MR. DELEONE, MR. FERRARA, MR. HAWKSLEY, MR. KUCHAR, MS. OSWITCH, MR. SCHULTZ, AND MR. WILSON

ALSO PRESENT; J. FENDER, MAYOR; D. RULLER, CITY MANAGER, E. FINK, ASS'T LAW DIRECTOR, AND L. COPLEY, CLERK OF COUNCIL

ABSENT: MS. GAVRILOFF, COUNCIL
J. SILVER, LAW DIRECTOR

Chair Schultz said the first item on their agenda dealt with the reallocation of CDBG funds.

MOTION TO AUTHORIZE THE REALLOCATION OF CDBG FUNDS.

Motion made by Mr. Hawksley, seconded by Mr. Wilson, and carried by a voice vote of 7-0-1, with Mr. Schultz abstaining.

Chair Schultz said the next issue on their agenda was a presentation on eminent domain. **Dave Ruller, City Manager**, said the Law Director has been working with Squires, Sanders, and Dempsey. He said this presentation was in response to some eminent domain issues and the next steps, as requested. He said Mr. Schultz made the motion for referral.

Eric Fink, Assistant Law Director, introduced **Jim Tatola**, who works for Squires, Sanders, and Dempsey.

Mr. Schultz said his question had to do with issues of eminent domain for the Right Dimensions project and whether it fits the criteria. Mr. Ruller said that Mr. Silver was working with Mr. Tatola.

Ms. Oswitch called a point of order at this time. She asked if this should just be a presentation on the general discussion of eminent domain and not a specific property

The Clerk said it is listed as eminent domain, and at the July 18 meeting, the referred the issue of eminent domain of *Right Dimensions* for discussion. Ms. Oswitch asked if this was just a presentation on eminent domain, and Mr. Schultz said he requested discussion of Right Dimensions. Mr. Bargerstock reminded them of the Sunshine Statute.

Mr. Fink said the motion he saw was discussion on the issue of eminent domain and Right Dimensions. He said they need to know how eminent domain works with respect to the Right Dimensions project. Ms. Oswitch asked if the agenda was incorrect, and the Clerk said it reflected what was requested by the Law Director.

Mr. Bargerstock wanted the record to show, for reasons dealing with the Sunshine Statute, that he personally objects to this discussion, as he believes it violates the Sunshine Statute. He wanted the record to note that he objected to the Law Director's ruling.

Jim Tatola, Squires, Sanders & Dempsey: Mr. Tatola said one of his main areas of practice deals with representing government entities, like Councils and School Boards, with eminent domain. He said, for clarification, in discussions with Mr. Fink and Mr. Silver, he understood he was present to answer questions that members had with respect to the process of how a legislative body prepares for acquiring

property through eminent domain and to answer/present the functional steps of those requirements that need to be in their mind and taken into consideration when acquiring a property through eminent domain.

Mr. Schultz asked him what the current criteria are in order to implement eminent domain.

MOTION TO AUTHORIZE EXTENDING BEYOND 10:00 P.M.

Motion made by Ms. Oswitch, seconded by Mr. Ferrara, and carried by a voice vote of 6-0-1, with Mr. Schultz abstaining. Mr. Wilson was out of the room during the vote.

Mr. Schultz said they cannot use eminent domain “willy nilly,” and Mr. Tatola said there are three primary requirements that must be met before Council can acquire property by eminent domain. The first, and most important, is if they do not have to use eminent domain, they should not use it. He said a public body must engage in good faith negotiations, with the property owner, to purchase or acquire it through some other mechanism, without the need for eminent domain.

Mr. Tatola said there is a new eminent domain statute that was signed by the governor on July 10, taking effect on Oct. 10, and will change some of the functions.

Mr. Tatola said in addition to good faith negotiations, if they chose to begin the eminent domain process, there must be a public purchase for the land. He said traditional examples would be the need of a new fire station or a school needing additional property. He said the appropriation of property is limited to the statutory property of the acquiring agency to acquire land. He said schools only have certain purposes, and Councils have more than twenty reasons that are considered to be a public purpose.

Mr. Schultz asked if one is to remove blight, and Mr. Tatola said it is acceptable if it is part of a proper Urban Renewal Plan. He said it is a public purpose by which a City can acquire property.

Mr. Tatola said the definition of blight has been changed with the new statute. He said the elimination of blight conditions, as found by an appropriate study, like one approved by the Council in the recent past, is an acceptable public purpose. He said they must first exhaust good faith negotiations with the property owner. He said it means they have an identified piece of land, identified with a price, which is based on an analysis of the property. He said it means it is an appraisal by a competent real estate appraiser, and was done in the two prior years.

Mr. Tatola said the legislative process must be satisfied. He said Council must consider the public purpose for which it needs to acquire the property. He said he understood on this property, it was the elimination of a blight condition. He said it is a two-step process. Mr. Tatola said that after discussion, the Resolution of Intent and Necessity, which is a finding by Council that there is a public purpose, must be passed. He said it explains Council’s intention to acquire the property by eminent domain. He said he has always included a provision in the Resolution that state that negotiations with the property owner shall continue, but in the event that those negotiations are continually unsuccessful, the Council approves acquisition through the Ohio Eminent Domain Act.

Mr. Tatola said any time they are going through the procedure, they have to be sure they have identified everyone having a property interest, including bank loans, mortgages, and easements, that equal the whole pie. He said this is done through a judicial title report, and is done by a title company who makes sure that all entities with some ownership interest have been identified.

Mr. Tatola said after they have identified the owners, it is good practice to have an appraisal done. He said if they have one that is less than two years old, it would be sufficient as a fair estimation of the Fair Market Value of the property. He said once the title search is done, and know the property owners, they need a reasonable and fair estimation of the Fair Market Value of the property. He said it is good to then extend an offer for a specific parcel at a specific price. He said there are portions of the Ohio Revised Code passed in 2002 that are not mandatory, but are a good practice effort. He said they can invite the property owner to accompany the appraiser onto the property while the appraiser looks over the property. He said there are three ways to identify the value of property, and they include comparable sales,

replacement value, and the income potential. He said an appraiser often analyzes all three of those issues to determine a fair market value.

Mr. Tatola said there are practices where they would work with the property owner to be sure the property owner has their say in the appraisal. He said they make a value on comparable sales, and if the owner received an offer, they can state it to the appraiser. He said if not, the appraiser is likely to look through real estate records for similar properties in similar communities. He said the #1 goal is to find a similar property sold recently, and that is an ultimate comparable sale at an arm's length transaction.

Mr. Tatola said that once an appraisal is done, and they were unable to acquire the property without the use of eminent domain, they would pass a Resolution of Intent and Necessity. He said it would be Council's consideration and finding that it was necessary to acquire the property and that it is the intent of Council to use its statutory and constitutional power of eminent domain to acquire it.\

Mr. Tatola said that once the resolution is passed, the next functional step of that Resolution, as certified by the Clerk of Council, would need to be served by registered mail or by hand, upon the property owner, giving them notice of the legislative decision. He said under Ohio's statute, Council needs to use a two-step process, with the previously mentioned process being the first step. He said the second step, assuming there were further negotiations, if the negotiations fail, and the City Believes eminent domain is necessary, is an ordinance directing the filing of a petition of appropriation with the Portage County Common Pleas Court. He said the jurisdiction is either the General division or the Probate division of the County Court. He said in Cuyahoga County, all eminent domains go to Probate Court, but it is his understanding that they go before the Common Pleas Court judge once filed.

Mr. Tatola said that in the process of acquiring property by eminent domain, there are three grounds for a "quick take." He said he did not believe any of those existed in this case. He said they are because it was a time of war; to get rid of a health and/or public nuisance; or the widening and/or construction of public roads. He said in the more traditional sense, the property owner answers the complaint and the ultimate resolution is a trial in front of a jury to determine the fair market value. He said in the answer by the property owner, there are only three defenses allowed. He said that the answer cannot argue that the statute is unconstitutional. He said there are only three affirmative offenses. He said those offenses include a Council not passing the appropriate legislation stating the necessity; that good faith negotiations did not take place; or that there is no public purpose for the acquisition. He said those three reasons are addressed right away by the court, and that is to be done within fifteen days from the filing of the answer. He said the Court held a hearing to see if those three issues had been resolved, including proper steps, good faith negotiation and a recognized public purpose, and makes a finding that the power of eminent domain and/or appropriation of property is acceptable. He said the next step is that the case is set for trial to determine the fair market value of the property. He said that often involves hiring a second "check" appraiser. He said the property owner is entitled to hire their own appraiser. Mr. Tatola said the trial becomes a battle of the appraisers. He said another phrase often used is "highest and best use." He said if a property is a farm, lying in the middle of the City, and is feasible, practical and reasonable to develop, the appraiser can give a fair market value. He said the fair market value should be an objective ideal, not necessary something subjective.

Mr. Tatola said one additional step to be added. He said after the answer is filed and the determinations of the three preliminary issues are decided in favor of the City, the case proceeds to trial. He said there is no immediate interlocutory appeal. He said that will change with the new statute. He said under the current statute, if the three issues are resolved, it is set for trial. He said other issues go into it, and some have to do with abandonment. He said if they acquire property by eminent domain, and a jury felt it was worth \$9 million, the City Council does not have to pay that amount. He said they can say "No, thank you," and walk away. He said if the case went to trial, and Council walked away and did not pay the fair market value price, consequences could include the legal tab of the property owner becoming property of the Council.

Ms. Oswitch asked, with the list of the twenty reasons, if it is a concern that there has been a lot of discussion about the redevelopment in that area. She asked if it plays a factor. She acknowledged it

may be blighted, but asked if it looks unfavorably that there has been that discussion, and Mr. Tatola said if the land is truly blighted, and part of an urban renewal program to remove the blight, the practical reality to clear a blighted area is often for some development. He said the property must be blighted, and the public purpose is the removal of blight. He said that the fact there is development is in contemplation of the removal of blight. He said in the famous court case, it was held that if property was purely held for economic development without being blighted, it was ruled out. He said Ohio's had to do with the definition of blight, but the U.S. Supreme Court dealt with the acquisition of property that was not blighted, just being acquired for economic development. He said one example would be an existing residential area being turned into an office park. He said if the property is not blighted, that would not work, as pure economic development has been ruled out by the Supreme Court.

Ms. Oswitch said they have already ruled it blighted so, they have covered their butts with it already being blighted. Mr. Tatola said the removal of blighted property must be independent of economic development. He said the removal of property for the sake of economic development used to be a more questionable issue.

Ms. Oswitch asked if she understood after the three reasons are proven that there is no chance the jury will not deny the acquisition and it is strictly for the monetary value, and Mr. Tatola said it is the judge's decision, only, as to the satisfaction of the three reasons.

Mr. Kuhar asked what happens if they have a property they are considering for eminent domain that was previously purchased in the concept of economic development with other properties. He asked if, once purchase, the property became blighted and if that was an argument for the person holding the property against eminent domain, and Mr. Tatola said that blight is blight, whether bought for an amusement park or economic development. He said the fact is that the property is in disrepair within the statutory definition of blight. He said the purpose it was held for previously is independent on whether or not it was blighted. He said it is that condition of blight, adding it is the alleviation of the blight that is the public purpose.

Mr. Kuhar asked if the public entity and the private entity were working together for an economic development project, and it did not happen, if that would set a precedent for economic development for the property, and Mr. Schultz said that was answered. He said Mr. Tatola said if a property is blighted, it is blighted even if there is that type of partnership.

Mr. Bargerstock called for a point of order, and said the attorney should answer the questions, not the Chair. Mr. Schultz said that since he was the Chair, he would dismiss Mr. Bargerstock's point of order.

Mr. Bargerstock said if it continues, he would call for a vote from Council.

Mr. Tatola said if it was intentionally blighted, it may be an issue. He said if it is a question of whether it meets the definition of blight, an argument in court is an argument.

Mr. Kuhar asked what would happen if the City blighted the property, and Mr. Ruller said the definition of a blight was years before that situation.

Mr. Ferrara asked once the legislative process is established how long until the City acquires the property, and Mr. Tatola said there are steps. He said the first step would be for a Council meeting, where they passed a resolution of intent and necessity. He said the second step would be the ordinance passed at the next meeting. He said that the ordinance initiating eminent domain proceedings sets off the filing of a complaint in court. He said it is the function of the Court's docket at that time.

Mr. Ferrara asked what he sees as the average time frame, and Mr. Tatola said it is a couple of months. He said the statute calls for twenty days, and that is seldom met. He said in Cuyahoga County, he would estimate six months from the date of filing to the determination of the fair market value. He said in Ottawa County, it took three to four months.

Mr. Ferrara asked the average in legal fees, and Mr. Tatola said if it runs "clean," it would cost \$25,000 to \$50,000. He said that most of the constitutional issues have been played out. He said in the case of the city of Norwood, that number is gone. He said a thumbnail guess is around \$50,000. Mr. Tatola said they can videotape their experts, and that helps economically.

Ms. Oswitch said he alluded to some changes in October, and asked if they will make it worse or better. Mr. Tatola said that some has to do with the functional process. He said the definition of blight, itself, will change. He said it would probably be a new blight study. He said the process has to do with the notice to the property owners and negotiations. Mr. Tatola recommended that as of October 10, when the new statute passes, that they have the appraisal in hand, tendering the same to the property owner becomes a requirement. He said the failure is defective. He said they currently do not need an appraisal in hand. He said if there was a six-year-old appraisal, they can now estimate, and it is in good faith. He said there is a specific form of notice that specifically tells the property owner the possibility, and what the eminent domain process can entail. He said it is their right, like Miranda. He said a lot of the formal aspects of the notice to the property owner have been codified as a requirement, rather than a good faith practice. He said he has always recommended an appraisal. He said there are some technical changes that deal with the burden of proof. Mr. Tatola said that currently, the burden of proof is on the property owner, but now the new legislation puts the proof on the City to prove they have met the three requirements. He said the City should be prepared.

Mr. Bargerstock said they talked a lot of about the process of good faith negotiations. He asked about a situation where a potential property might hold a property subject to eminent domain, if they were involved as a recent purchaser under the premise of economic development, and those negotiations failed, and the City was negligent and caused damage to the property, would Mr. Tatola think it was good faith or a potential breach if the City decided on eminent domain, and Mr. Tatola said he is not comfortable to speak on good faith negotiations on a specific situation. He said good faith negotiation is the City finding a need for the property and makes a fair offer for the fair market value. He said it is done more by the objective value given. Mr. Tatola said the court will look to whether the property owner was offered a fair market value. He said the purpose does not matter.

Mr. Bargerstock asked if it was declared blighted, and the property owner cured the blight by rasing the structures, returning the land to its original state, or redeveloped the property, does that cure the blight. He asked if it creates an issue. Mr. Tatola said he would take a deferral on that question. He said he did not know if he could answer the question.

Mr. Bargerstock said an entity was involved with the city in a contractual way to cure the blight, but the contract never consummated. He said the party continued to emphasize they were attempting to cure the blight. He said the public entity negligently did answer to the property.

Chair Schultz pointed out that Mr. Tatola had said he could not answer that question. Mr. Tatola said he is not comfortable giving his opinion on a scenario.

Mr. Bargerstock asked if he was familiar with the Gateway Complex case, and Mr. Tatola said he was not specifically familiar. Mr. Bargerstock said it was about determining property values based on appraisal standards. Mr. Schultz said that Mr. Tatola said he was not specifically familiar. Mr. Bargerstock started to explain his question, and Mr. Schultz said they were not getting it to that discussion.

Mr. Bargerstock apologized for wasting Mr. Tatola, and said the City has been wasting his time. Mr. Tatola said he was present to answer questions, and Mr. Bargerstock said he could only ask what the Chair allows.

Mr. Kuhar asked if they have a blighted property, knock it down, and plant grass, whether it is still considered a blight. Mr. Tatola said the City needs to own it before knocking it down. Mr. Kuhar asked if the owner knocks it down and plants grass if it was still blighted property, and Mr. Tatola said without the specifics of the expertise, the fact is it is within a blighted area. He said that area is a blighted area, adding he did not know the effect that a small change would make to do a difference. He said that is the

function of those who conduct blight studies. Mr. Tatola said his expertise is with the litigation through the process, adding it comes with the assumption that the property is blighted. He said if the questions are about what constitutes and qualifies blighted property that is for the expertise of those who perform blight studies.

Mr. Schultz said the area was already found to be blighted.

Mr. Kuhar asked if the whole area is blighted, would they need to take the whole area by eminent domain or just one piece, and Mr. Schultz said they can pick and choose. Mr. Tatola agreed. He said the land acquisition has to do with the City's finances. He said if they acquire them piece meal, that is how it is done. He said the only time there is a requirement is if they needed 3/4 of the house and all of the garage, they would be required to take the whole property because it would not have any economic use.

There were no comments from the audience at this time.

MOTION TO SCHEDULE FURTHER DISCUSSION ON AUGUST 15, INCLUDING THE ADMINISTRATIVE RECOMMENDATION TO USE EMINENT DOMAIN FOR THE RIGHT DIMENSION'S PROPERTY.

Motion made by Mr. Hawksley, seconded by Mr. DeLeone.

Mr. Wilson asked if it was to be scheduled after Council, and Mr. Hawksley suggested it be the same night.

Mr. Hawksley said that Mr. Ruller has asked them to support moving forward with eminent domain action through the passage of a resolution of necessity. He said that due to the lateness of the hour, they will not have to discuss it.

The motion carried by a voice vote of 7-1-1, with Mr. Bargerstock dissenting and Mr. Schultz abstaining.

Hearing no further business before this Committee, Chair Schultz adjourned this meeting at 10:40 p.m.

Linda M. Copley, Clerk of Council

ACTION RECOMMENDED:

- 1) TO AUTHORIZE THE REALLOCATION OF CDBG MONIES
- 2) TO SCHEDULE FURTHER DISCUSSION ON AUGUST 15 ON THE ISSUES OF EMINENT DOMAIN AN THE ADMINISTRATIVE RECOMMENDATION TO USE EMINENT DOMAIN FOR THE RIGHT DIMENSION'S PROPERTY.