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in public policy, the focus is not on the government agency's subjective intent in exercising the discretion conferred by statute or regulation. Rather, the focus is on the nature of the actions taken and on whether these actions are susceptible to policy analysis.

The Eighth Circuit declared that a government agency's day-to-day decisions made in furtherance of policy will be protected under the exception from tort claims, especially when the decisions relate to the extent to which the agency must supervise the safety procedures of private individuals. Such supervision is neither feasible nor practical in light of an agency's staffing or funding. The Eighth Circuit affirmed the district court's conclusions on the FTCA tort claim exception.

The district court concluded that the VA's policy under its housing loan program was to sell acquired property quickly and at the best attainable price. To further this policy, the VA hired a management broker who would clean the grounds and building and minimize the risk of loss from theft, vandalism, and the elements. The district court found the VA's actions as a seller of property to be discretionary and not subject to statutory or regulatory requirements mandating it or its assignees to inspect for asbestos. Thus, the district court determined that the VA fell within the FTCA tort claim exception. The Eighth Circuit agreed with the district court's decision.

CERCLA Does Note Apply to a "Consumer Product in Consumer Use"

The Eighth Circuit next considered the Kanes' CERCLA claim. The district court stated that, under CERCLA: (1) those persons who owned or operated facilities when the hazardous substance disposal occurred, and (2) owners of the hazardous substances who arranged for disposal or treatment of those substances at a facility are liable for costs incurred in response to the release of hazardous substances. 42 U.S.C. Sections 9607(2) and 9607(3). Both CERCLA sections require the release or the disposal of a hazardous substance at a "facility."

The Eighth Circuit interpreted the meaning of "facility" under CERCLA. The definition of 42 U.S.C. Section 9607 (a)(9) includes any building, structure, installation, equipment, or any site where a hazardous substance has been deposited, stored, disposed of, or placed or otherwise come to be located. The definition, however, does not include any "consumer product in consumer use."

The Eighth Circuit noted that while other courts have held that a "facility" could include building materials into which the asbestos was disposed, as well as asbestos-filled buildings, Congress intended to provide recovery under CERCLA only for releases or threatened releases from inactive and abandoned waste sites, not releases from useful consumer products contained in the structure of buildings. Applying this reasoning, the Eighth Circuit held that the asbestos in the Kanes' residence was a consumer product in consumer use and therefore exempt under CERCLA.

Thus, the Eighth Circuit, in affirming the district court's dismissal of claims based on the FTCA and CERCLA, held that the VA was not liable for damages resulting from the presence of asbestos in property acquired and sold under the administration of its housing loan program. ❖

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City of Lansing May Not Allow Cable Television Franchisee Mandatory Access to Private Property

In *City of Lansing v. Edward Rose Realty, Inc.*, 502 N.W.2d 638 (Mich. 1993), the Supreme Court of Michigan invalidated a Lansing city ordinance allowing mandatory access to private property by a cable provider that had been granted a city franchise. The court held that the claimed public purpose of the ordinance was subject to heightened scrutiny because the ordinance benefitted a private interest, and this private interest predominated over the public interest. After applying heightened scrutiny, the court concluded that the ordinance was unreasonable. The Michigan Supreme Court also determined that the mandatory access granted by the ordinance exceeded Lansing's authority to exercise its power of eminent domain. Although the state law authorized Lansing to condemn private property for any public use within the scope of its powers, no state statute identified mandatory access to private property by a city-franchised cable operator as a public use or purpose. The court found the "public purposes" that Lansing asserted were insufficient to overcome a property owner's right to exclude others from her property.

Ordinance 753

In 1974, the city of Lansing entered into a franchise agreement with Continental Cablevision. The agreement gave Continental the nonexclusive right to operate its cable system in Lansing. Continental agreed to provide nine designated access channels, universal service, and an emergency override system. It also agreed to pay 3 percent of its gross franchise revenues to Lansing.

In 1980, owners of two apartment complexes entered into a private agreement with Continental. That agreement gave Continental the exclusive right to install and operate its cable system in the apartments. But in 1986, Rose Realty, Inc., the new owners of the complexes, notified Continental that it would not renew Continental's contract when it expired in 1987. Rose also declared its intent to install a private cable system that would provide apartment tenants with similar cable service.

In response to Rose's action, Continental submitted a proposed ordinance to the city of Lansing that would prohibit apartment owners from interfering with a tenant's choice to receive cable service from the city's franchisee. In 1987, Lansing adopted Ordinance 753, which provided the following:

> No owner, agent or representative of the owner of any dwelling shall directly or indirectly prohibit any resident of such dwelling from receiving cable communication installation, maintenance and services from a Grantee operating under a valid franchise issued by the City.

If an owner refused access by the franchised cable service, the cable service could request that Lansing begin proceedings to condemn the property. Ten days after Ordinance 753 was adopted, Continental asked Lansing to begin condemnation proceedings on the Rose properties.

The Lansing City Council passed a resolution that declared Continental's services to be in the public interest. It found the services to constitute "a public use, a public purpose, and a public necessity." The resolution also authorized the city attorney to take steps to acquire Rose's properties. These steps included offering to purchase the properties from Rose. If an agreement for purchase could not be reached, the city could file a complaint in which it would ask the court to determine a fair price to be paid for the properties.

When the city of Lansing and Rose could not agree to a purchase, the city filed two complaints for condemnation. The two cases were consolidated for a bench trial at which the judge upheld the validity of the condemnation proceedings.

The Michigan Court of Appeals reversed the trial court's decision. It found that the primary beneficiary of the property taking was Continental, not the public. In addition, the court found the condemnation to be an attempt by Continental to use Lansing's taking powers to obtain what it could not acquire through negotiations with Rose. The court held that the proposed condemnation exceeded the city's authority to take private property through its power of eminent domain. The city of Lansing was granted leave to appeal to the Supreme Court of Michigan.

Power of Eminent Domain Must Be Specifically Conferred

In its analysis, the Supreme Court of Michigan noted that municipalities have no inherent power to condemn property even for public benefit or use. Therefore, municipalities' power of eminent domain must be specifically conferred by the Michigan constitution, by statute, or by necessary implication from delegated authority.

The supreme court examined several potential sources of eminent domain. First, the court considered both the Michigan and U.S. Constitutions. Both constitutions provide only that private property is not to be taken for public use without just compensation. Next, the court examined the Michigan Uniform Condemnation Procedures Act (UCPA), under which Lansing began its condemnation proceedings. The court stated that this act merely "provides standards for the acquisition of property by an agency, the conduct of condemnation actions, and the determination of just compensation." It concluded that the UCPA does not itself confer the power of eminent domain upon Lansing.

In order to use UCPA procedures, a city must be authorized by constitution or statute to exercise its power of eminent domain. The city of Lansing argued that the Michigan Home Rule Cities Act, as well as a general statute applicable to acquisitions by state agencies and public corporations, granted it eminent domain in the present case. The court found these statutes to authorize Lansing to condemn private property for any public use within the scope of its powers.

The court found that no state statute exists, however, which identifies mandatory access to private property by a city-franchised cable provider as a public use or purpose. The court articulated that ordinances passed under a city's general authority to condemn property are valid only if they are reasonable and not oppressive.

Court Examines Questions with Heightened Scrutiny

The Michigan Supreme Court proceeded to analyze whether Ordinance 753 was reasonable and served a public purpose. Noting that this case included an issue of first impression in Michigan, the court first examined legislation and decisions in other states. Some states require a tenant to request cable service before a cable operator must be allowed access to residential property. The court noted that these statutes, however, are unlike Ordinance 753.

In finding these statutes and holdings to be inapplicable to the current case, the Michigan Supreme Court noted that unlike New York and New Jersey, Michigan does not extensively regulate its cable industry. The Michigan Legislature has not announced that city-franchised cable operators have mandatory access to all rental properties, and it has made no pronouncement of the public benefits of franchised cable services.

In announcing its refusal to defer to the city of Lansing's determination that Ordinance 753 served a public purpose, the court recognized that the ordinance was directed to and benefitted a single private entity, Continental. It held that "where a proposed government action confers a benefit on a private interest, unless that benefit is merely incidental, a reviewing court will inspect with heightened scrutiny the assertion by the governmental entity of a public purpose."

In finding that Continental would receive more than an incidental benefit from Ordinance 753, the supreme court explained that the ordinance would permit Continental to offer its full array of services to Rose's tenants, in addition to allowing access for public, education, and government (PEG) channels, and emergency override. Moreover, Continental could receive substantial revenue through subscription payments and the increased market value of its system. Heightened scrutiny, the court held, was appropriate in this case.

To support its claim that Continental's service constituted a public use, the city of Lansing offered its requirements that Continental provide universal service, PEG channels, and emergency override. In response, the supreme court examined the merits and functions of each of these services. It agreed with the appellate court's finding that the requirement of universal service is not in and of itself a public purpose. The universal service requirement acts as a restraint on cable operators by preventing them from refusing service to poorer communities. However, it does not authorize the operator to demand access to every dwelling if the owner does not desire the service.

Turning to the other services which Lansing required of Continental, the court found that a cable operator's emergency override capacity duplicates that provided by commercial television stations. It held that this capability does not entitle the city to invade private property for the benefit of a franchisee. The court also recognized the political and educational benefits that PEG channels could provide. Nonetheless, it found that in light of the countervailing private benefits conferred by the mandatory access ordinance, the primary beneficiary of the ordinance was still Continental, not the public.

Lansing asserted three purposes for allowing mandatory access by Continental: (1) it would encourage Continental's growth, development, and responsiveness; (2) it would encourage Continental to provide the widest variety of information; and (3) it would promote competition and minimize unnecessary regulation that could impose undue economic burdens on the cable system. Because Continental had such an extensive private interest, however, the court found these rationales insufficient to overcome Rose's right to exclude others from its property.

The supreme court also stated that the city of Lansing failed to explain its first two "public purposes." The city did not delineate how mandatory access to Rose's properties would encourage Continental's growth, development, and responsiveness. Nor did it explain how mandatory access would encourage Continental to provide the widest possible variety of information to its subscribers.

Addressing the third argued purpose, the court dismissed Lansing's contention that the proposed Ordinance 753 would promote competition within the cable system. It found several benefits of Ordinance 753 to be exclusively Continental's. Because the ordinance allowed mandatory access only by the franchised cable operator, Continental would be the only cable system with rights to initiate condemnation proceedings. Also, Continental would be guaranteed the right to compete with private cable systems where it chose to compete, but other cable systems would not have the same right. Finally, no person or entity could initiate condemnation proceedings to ensure competition of cable systems. The court noted that even if other cable systems were allowed to compete, 90 percent of the market was already secured by Continental.

Finally, the court examined the legislative history of the 1992 Cable Act, 47 U.S.C. Section 521, and found that although Congress considered adopting a mandatory access provision, it deleted the provision before the Cable Act was passed. The court interpreted this action as evidence of a congressional desire not to provide for mandatory access. In view of such intent, and in view of the finding that Continental, not the public, was the primary beneficiary of Ordinance 753, the court held that the proposed mandatory access requirement would regulate cable service beyond established state or federal limits. In doing so, the city of Lansing would exceed its authority to exercise the power of eminent domain.

Dissent Finds Public is Primary Beneficiary

The dissent found that the proposed condemnation was for the primary benefit of the public cable user. It disagreed with the majority's conclusion that the public benefit of cable television service failed to outweigh the private benefit conferred upon Continental. Additionally, it argued that the majority failed to consider the scope of services offered through PEG channels. Such channels, the dissent stated, provided political programming, college courses, and forums for citizens who normally had limited access to avenues for the dissemination of ideas.

The dissent also disagreed with the majority's interpretation of the universal service requirement as a restraint on the franchised cable operator which precluded Continental from refusing to serve poorer communities. It interpreted this requirement as a fundamental recognition by Continental that the benefits of cable service should be realized by all segments of the community. ❖

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