

"Federation Corner" column
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Intrusive construction activity violates property rights

by Robert Wipfler
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I have worked with youngsters my entire career. The first sentence in anything one of them ever wrote was "It all started when..."

It all started when, in December of 2011, without any warning, a bulldozer appeared in the right-of-way green space adjacent to my Bethesda home, where I have lived for forty years with my wife, Alice, and raised our three children. The dozer pushed dirt around and made a pathway from the paved edge of Clarendon Road to my back yard fence. Soon thereafter that path became the main dumping ground for pavement debris, collected by trucks from Metra Construction out of New Jersey, which had petitioned the county for a permit of eighteen months duration as part of a project to replace water mains throughout the area.

Last month, The Sentinel published a Federation Corner column about the situation (*How much noise can people stand?*, April 18, 2013), written by a neighbor, Jim Humphrey. In that column Jim wrote "I suppose that what I and my neighbors are suffering from is noise-induced stress."

Right after the construction activity began I started to feel the stress Jim spoke of and I started complaining to both Metra and the county government. The Metra guy just shrugged his shoulders, insisting he had looked everywhere and found the spot twenty eight feet from my house was "the only available staging grounds in all Montgomery County."

So, what happened next? We asked for a meeting of Metra bosses, the WSSC guys, and representatives of the county Department of Permitting Services (DPS). Unfortunately, I was not able to be there, but Alice met with four people in our back yard early in spring of 2012. At that meeting, the Metra employee stated:

1. "If we are still here three months from now, that means we are not doing our job."
2. "The worst of it has already passed. Within a couple of months, we will be gone from your area." (Some fourteen months later, a large mound of tar, dirt, rusty pipes, and God only knows what other poisonous junk still lies at my doorstep, just 28 feet from my kitchen dining nook.)
3. "I am so sorry that that dump truck slammed its gate. That will not happen again."
4. "Yes, we will not spew dust and other particles into your yard."
5. "Our workers are trained to be sensitive to the neighbors."

"Sorry you have to bear the brunt of the burden," was the faux apology extended by the DPS representative. My reply was that there is a difference between the "brunt" of anything and a preponderance of an intrusion on one's personal property. The disruptive construction activity continued unabated for the ensuing year. Just last Friday, having lost my temper for the umpteenth time, I hollered at the bulldozer guy to "hurry up and get the heck out of here." His response: laughter. See Number 5 above.

Forever the student myself, I have drafted a hypothetical petition to the Supreme Court, seeking redress of the violation of my rights. As Plaintiff, I ask the court to consider that:

- 2) My Procedural Due Process was violated in that no public hearing was held by Montgomery County to give me and other residents of the area an opportunity to express our concerns regarding the location and impact of the construction staging grounds.

b) By virtue of granting a permit to the private construction company Montgomery County had, in effect, "taken" property from me without just compensation.

Regarding claim (a) above, the Supreme Court took on the question of procedural due process in *Mathews v. Eldridge* (1976). In this case, the court ruled that procedural due process comes down to a three part balancing test following a determination by the state that a citizen may suffer a loss of some sort due to its governance. Before acting, it must ask itself if its intended action may deprive a person of his life, liberty or property. If the answer to any of those is "yes," or even "maybe," the following balancing test is required:

1. The state must measure the nature of the private interest affected.
2. It must then take into consideration other procedures that would have a better result.
3. It must measure the degree of the burden placed on itself by number (1) and (2) above.

Montgomery County effectuated none of the above with regard to issuing the Metra permit. It failed to ascertain that many citizens would be more than "merely inconvenienced," and that some would potentially face a "deprivation of property," as a consequence of its action. Officials should have been foreseen that so locating the staging site would create a general nuisance to me, if not an effective trespass on my property.

It is inconceivable the county would so wantonly dismiss the idea of a public notification or hearing prior to granting Metra's permit. Citing *Mathews*, "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'." In all due process cases, administrative burden on the government may be a factor. But in this case it would have required minimal effort on the part of officials to hear citizens' concerns before granting the permit.

As to deprivation of property, in *Lucas v. South Carolina* (1986) it was determined that a South Carolina zoning law, while it did not constitute a *de jure* (legal) "taking" of Lucas's property, produced a similar consequence. Hence the term "temporary taking" was coined. Any such time-related obstacle to a person's use of his property constitutes a "*de facto* taking" and carries the same weight as legal takings with regard to governmental obligations to its citizens.

Failing to recognize the above issues before granting the permit, Montgomery County abrogated one of its major duties of governance, which is to "inform" the citizenry. That my government would condone such a colossal intrusion on its citizens without so much as a blush shocks the conscience.

The views expressed in this column do not necessarily reflect formal positions adopted by the Federation. To submit an 800 to 1000 word column for consideration, send as an email attachment to montgomerycivic@yahoo.com