

Legal & Legislative Update

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U.S. SUPREME COURT ALLOWS CONDEMNATION FOR REDEVELOPMENT

Kelo v. City of New London

On June 23, 2005, the United States Supreme Court ruled that local governments may use the power of eminent domain in order to acquire property from unwilling sellers in redevelopment zones, and then transfer the land to private developers. The legal issue decided by the Court is whether such a disposition of condemned property qualifies as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the U.S. Constitution.

Accepting arguments in a "friend of the court" brief submitted on behalf of K. Hovnanian Companies by GH&C attorneys Paul H. Schneider and Afyfa H. Bolton, the Supreme Court rejected a literal requirement that condemned property be put into use for the public. Rather, the Court adopted what it described as "the broader and more natural interpretation of public use as 'public purpose'". The Court determined that local officials, not federal judges, know best in deciding whether a redevelopment project would benefit the community.

Towns throughout New Jersey are increasingly using their authority to adopt redevelopment plans in order to encourage economic revitalization. Redevelopment provides opportunities for new housing and jobs consistent with New Jersey's "smart growth" policies that discourage "sprawl". This decision should effectively preclude any credible claim that the use of condemnation in redevelopment efforts in New Jersey violates the "public use" requirement of the Fifth Amendment.

COURT APPROVES CONDEMNATION TO BLOCK DEVELOPMENT

Mt. Laurel Township v. Mipro Homes

Reversing a lower court decision, the Appellate Division held that a municipality may use its eminent domain power to acquire open space to prevent development.

The facts of this case and the lower court decision were reported in the November/December 2003 addition of the Bulletin Board. Mipro obtained approvals for a 23-lot subdivision on a 16-acre parcel in Mt. Laurel Township. After Mipro obtained initial approvals for the development, the Township adopted a resolution authorizing an application for Open Space Preservation Funding to the Burlington County Board of Chosen Freeholders. In April 2002, the Township Council introduced an ordinance authorizing the acquisition of Mipro's property. The ordinance contained a determination made by the Township Council that the property was "under severe development pressure" and "has been made the subject of a major residential subdivision application." Mt. Laurel instituted a condemnation action.

The lower court recognized that municipalities have broad powers of discretion in exercising the authority to condemn property. However, "a condemnation may be set aside when a public body condemns for an

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authorized purpose, but is motivated by an ulterior, disguised purpose which is not authorized by law.” Such action on the part of a municipality constitutes bad faith. The lower court held that when the real purpose of condemnation is to prevent a proposed development, the condemnation is for an invalid purpose and may be set aside.

The lower court concluded that Mt. Laurel’s real purpose in condemning the property was to prevent Mipro’s residential development, contrary to the stated public purpose of taking the property for passive open space. The Township failed to demonstrate any real need for more open space. Moreover, the statutes relied on by Mt. Laurel did not justify the taking. Those statutes, while establishing a strong public policy encouraging the acquisition and preservation of lands by municipalities, merely act as funding mechanisms to assist municipalities in advancing those policies. The lower court stated that “those laws do not in any way supercede the Municipal Land Use Law and the Eminent Domain Act of 1971. Condemnation cannot replace zoning and planning.”

The lower court also contrasted another decision upholding condemnation where a municipality included an open space and recreational element in its Master Plan which identified the property in question as a potential open-space acquisition site. Here, no such plan existed and Mt. Laurel had not conducted any study to evaluate whether a need for open space or recreational areas existed.

The Appellate Division reversed, holding that a municipality has statutory authority to condemn property for open space and that the selection of properties for open space acquisition in order to stop planned residential developments is not an improper use of the power of eminent domain. The court recited several statutes that allow a municipality to use eminent domain to acquire land for open space preservation. It rejected Mipro’s argument that this power is limited to instances where a municipality has a plan to put the land to active recreational use. The court recognized conservation of land for open space as a public use, and a plan for active use of the land is not required to demonstrate a “need” for the acquisition. “Open space acquisition may serve the public interest not only by setting aside land for potential future recreational uses but also by preventing development.”

The court also rejected the argument that condemnation of the site for open space preservation was impermissible under the statutory authority relied on by Mt. Laurel and the court because the property was not included in an area designated for open space under the Township’s master plan. The court held that even though the master plan did not identify the site for open space, Mt. Laurel had authority to condemn the site for open space because it obtained Green Acres funding for the acquisition. The Green Acres funding process “reflects a finding by the Green Acres Program that the Mipro site is suitable for open space acquisition.”

The court also concluded that the Township’s motive of stopping the Mipro development did not constitute fraud, bad faith, or manifest abuse. Concerns that “residential development would aggravate traffic congestion and pollution problems in the municipality and impose added stress on its school system and other municipal services” are valid public policy considerations according to the Court. The court also stated that a different result may have been reached if the proposed development was not a single family residential development, but a development that implicated other significant public interests such as a multi-family affordable housing development or assisted living facility.

This decision allows townships to utilize condemnation solely as an anti-development tool. Townships may use open space condemnation to target and stop development, although they would be required to pay compensation, but not lost profits, for the taking.

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COURT UPHOLDS AUTOMATIC APPROVAL PROVISION OF COUNTY PLANNING ACT

South Plainfield Properties v. Middlesex County Planning Board

In this case, the Appellate Division upheld a determination that the Middlesex County Planning Board was deemed to have granted subdivision and site plan approval for a Target Store based on its failure to act on an application within applicable statutory time frames. The County Planning Act requires county planning board approval of subdivision and site plan applications that affect county roads or drainage facilities. N.J.S.A. 40:27-6.2. The statute provides that an application for county approval will be deemed approved if the county planning board fails to take action within 30 days of receipt of the application from the municipality. N.J.S.A. 40:27-6.3, 6.7.

Here, the County's failure to act on plaintiff's site plan and subdivision application within the required time frame was found to constitute automatic approval of the applications. The court found that the County Planning Board's adoption of a resolution postponing all action on the applications for a six-month time frame following the plaintiff's refusal to consent to additional adjournments of the County review was the epitome of the "evil" of municipal inaction and inattention that the statute was designed to remedy. The courts have loosely enforced statutory automatic approval provisions. This is particularly true where delay in municipal action is the result of some technical defect or where it involves some strong public interest concern involving the proposed development. But here, the Court "found that the inaction on the part of the county planning board was a 'clear showing of purposeful delay', precisely the conduct that the automatic approval provision was designed to prevent."

This is an important recognition of the enforceability of statutory "deemer" provisions.

DENIAL OF SUBDIVISION REVERSED

Sellick v. Borough of Bradley Beach

An ordinance that lacks any substantive standards improperly grants a municipality with arbitrary enforcement powers in violation of the MLUL.

Plaintiff submitted an application to subdivide her existing residential property into three lots. The application met the municipality's frontage and width requirements, and no variances were required. But the Borough denied the application relying on a "catch-all" parking ordinance governing off-street parking.

The Appellate Division reversed the denial of subdivision approval, finding that the "catch-all" parking ordinance was standardless and improperly granted the Board with unfettered discretion. The "catch-all" provision applied "as specified by the Borough Planning Board." The Court found that the Ordinance lacked standards, was vague and attempted to "improperly imbue the Board with the arbitrary power to dictate parking requirements on an ad hoc basis." By failing to include any standards in the "catch-all" provision, the municipality "failed to give its citizens notice of what is expected" and transferred its police power to the Board. As the Board relied on the standardless ordinance to deny the application, its action was arbitrary and capricious.

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