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## REAL ESTATE & TITLE INSURANCE

### Takings for Economic Development

Is blight the only basis for eminent domain?

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**K***elo v. City of New London*, which is on appeal to the U.S. Supreme Court from the Supreme Court of Connecticut, raises the question of whether the public use clause in the United States Constitution authorizes the exercise of the eminent domain power in furtherance of a “significant” governmentally authorized “economic development plan.” 268 Conn. 1, 843 A.2d 500 (2004), cert. granted, no. 04-108 (Sept. 28, 2004).

New Jersey’s redevelopment statute cites several circumstances where the use of eminent domain would be authorized — most come under the heading of blight. N.J.S.A. 40A:12A-8. There is no constitutional prohibition on the use of the eminent domain power to acquire land in an area that is blighted. *Forbes v. Township of South Orange*, 312 N.J. Super. 519, 528 (App. Div. 1998), citing *Wilson v. Long Branch*, 27 N.J. 360, 381-382 (1958); see also *Berman v. Parker*, 348 U.S. 26 (1954). Although economic development is not in itself a justification for redevelopment, an area in an urban enterprise zone designated pursuant to the New Jersey Urban Enterprise Zone Act, N.J.S.A. 52-27H-60 et. seq, or a

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specific area consistent with smart growth planning principles, is, according to the statute, an area in need of redevelopment. N.J.S.A. 40A:12-5 Also, the Casino Control Act authorizes the use of the eminent domain power to acquire land in Atlantic City to complete projects for the public good which are approved by the Casino Redevelopment Authority. N.J.S.A. 5:12-182. Similarly, the Hackensack Meadowlands Reclamation and Development Act authorizes the use of the eminent domain power to acquire property for public use in the Hackensack Meadowlands in connection with development projects. N.J.S.A. 13:17-6; N.J.S.A. 13:17-34 and see N.J.S.A. 13:17-1 and N.J.S.A. 13:17-6.2

If an area does not meet the blight conditions, redevelopment solely for economic reasons may be desired.

#### Defining Blight

A section of the Local Redevelopment Law N.J.S.A. 40A:12A-5 substitutes the term “in need of Redevelopment” for the term “blighted” that had been used in prior legislation. *Hirth v. City of Hoboken*, 337 N.J. Super. 149, 155 (App. Div. 2001); N.J.S.A. 40A:12A-6c.

A court’s review of a blight designation is limited to whether the govern-

ment’s determination is supported by substantial evidence. N.J.S.A. 40A:12A-6b(5). The governing body’s decision, therefore, is presumptively valid. *Levin v. Township of Bridgewater*, 57 N.J. 506, 537, appeal dismissed, 404 U.S. 803 (1971); see also *Forbes*, 312 N.J. Super. at 532.

Several cases define blight. One key factor is obsolescence. *Spruce Manor Enterprises v. Borough of Bellmawr*, 305 N.J. Super. 286 (Law Div. 1998), defines obsolescence, the process of falling into disuse, not depreciation or wear and tear. Evidence of obsolescence are vacant buildings, inactivity, reduction of jobs in a previously thriving industrial area, lack of maintenance, under-utilization and inaccessible areas. *Hirth* 337 N.J. Super. at 162; *Forbes*, 312 N.J. Super. at 530. Buildings not being used in a productive manner resulting in economic stagnation is another factor related to obsolescence. *Hirth*, 337 N.J. Super. 164. Other important facts that lead to a determination of blight are the appearance of slums and diverse titles precluding consolidation of properties into adequate-sized lots. *Spruce Manor*, 305 N.J. Super. 292-295; *Sorbino v. New Brunswick*, 43 N.J. Super. 554, 563, 564 (Law Div. 1957).

Other indicia of slum conditions are inhabitability, apartments without living rooms, apartments sharing baths, lack of heat or hot water and overcrowding. *Spruce Manor*, 305 N.J. Super. at 292-293.

The statutory definitions of an area in need of redevelopment that pertain to slum or obsolescent industrial or com-

mercial areas also require a finding of “unwholesome living conditions” or being “untenantable” or being detrimental to the safety, health, morals or welfare of the community.” N.J.S.A. 40A:12A-5a-c.

### Economic Development

Although some “good” properties can be included in the redevelopment area that is otherwise blighted, some areas that a municipality may want to redevelop may not be “blighted.” *Berman*, 348 U.S. 26 (1954); *Forbes*, 312 N.J. Super. 531-532. Therefore, is it constitutionally permissible to expand the definition of an area “to be in need of redevelopment” in N.J.S.A. 40A:12A-5, to include an area that, if redeveloped, would either provide for the general health, safety and welfare of the public through the alleviation of unemployment or otherwise provide for the economic welfare of the state? Also, to what extent is the use of the eminent domain power permissible in urban enterprise zones, smart growth areas, Atlantic City and the Hackensack Meadowlands, when the reason for the use of that power appears to be economic improvement?

Whether economic development is a public use and a valid basis, under the United States Constitution, for the exercise of the power of eminent domain is one of the issues that the U.S. Supreme Court will likely decide in the *Kelo* case. A related issue that the Supreme Court will also likely render an opinion on, assuming economic development is a public use, is whether, with respect to a particular project, the public benefit is incidental and insignificant when compared to the benefit that private entities will receive from the condemnations. Or, in other words, by what standard is an economic development project judged to be a public use (and therefore constitutionally permitted) or a private use (and thus not allowed by the Constitution)?

The Connecticut Supreme Court in *Kelo* had no problem holding that “an economic development plan that an appropriate legislative authority ratio-

nally has determined will promote municipal economic development by creating new jobs (and) increasing tax and other revenues ... ” constitutes a valid public use for the exercise of the eminent domain power under both the federal and Connecticut constitutions. *Kelo*, 268 Conn. at 46. However, *Kelo* does state that the courts of Arkansas, Florida, Kentucky, Maine, New Hampshire, South Carolina and Washington have ruled that economic development is by itself not a public use for eminent domain purposes. *Kelo*, 268 Conn. 47. A similar declaration is stated in *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616 (1981), which approved as a public use (or public purpose) the alleviation and prevention of unemployment through the assistance and retention of local industries, and as a consequence, determined that the use of the power of eminent domain to accomplish this purpose was constitutional. Also, the United States Supreme Court, in *Hawaii Housing Authority v. Midriff*, 467 U.S. 229 (1984), said the power of eminent domain could be used by a state for a purely economic reason. In that case, the economic reason was to change the system of land ownership in Hawaii. Hawaii enacted legislation allowing the use of eminent domain power to reduce the state’s high concentration of fee simple land ownership so that the many lessees of land could acquire title to the lands they lived on which were owned by relatively few landowners.

Because of these precedents, the question the Supreme Court will likely wrestle with in *Kelo* is whether there will be any limitations on the use of the eminent domain power for redevelopment where the reason for the redevelopment is economic improvement. A review of the facts in several cases shows circumstances where eminent domain has been permitted and instances where limitations on its exercise have been imposed. First, in *Poletown*, the redevelopment plan provided for the acquisition of land by eminent domain and its conveyance to General Motors for the purpose of GM constructing an automobile assembly

plant.

In the *Hawaii Housing Authority* case, the purpose of the use of the eminent domain power was to address the economic problems created by severely over-concentrated land ownership that remained as a vestige of the feudal land tenure scheme developed by the original Polynesian settlers. *Hawaii Housing Authority*, 467 U.S. 232-233; *Kelo* 268 Conn. at 37-38.

There are some cases where courts denied the use of the eminent domain power because it found that the overriding purpose for the condemnation was a private one.

Thus, in *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d 1123 (C.D. Calif. 2001), an overriding private purpose and thus a private use was found where the proposed condemnation was the appropriation of a parking lot from an existing store so that it could be sold to another existing store located in a redevelopment district. Similarly, in *Southwestern Illinois Redevelopment Authority v. National City Environmental, L.L.C.*, 199 Ill.2d 225 (2002), the Illinois Supreme Court held that the condemnation of a tract of land occupied by a reclamation facility for the sole purpose of adding parking facilities to an existing redevelopment project — an automobile race track — was a private use. The Illinois Court said economic growth was not a sufficient reason for the use of the eminent domain power. A further reading of the decision shows that the Court was miffed by the fact that the race track did not attempt to increase its parking by other available means, such as building a parking garage on land it already owned.

The New Jersey case of *Casino Reinvestment Development Authority v. Banin*, 320 N.J. Super. 342 (Law Div. 1998), provides some insight. In that case, the proposed condemnation pertained to lands in Atlantic City that would ultimately be used for parking and a park; the park was to be part of a casino development which also included the rehabilitation of a hotel on land already owned by the casino. The court

did not allow the condemnation because the existing loan agreements did not restrict the use of the lands being acquired to parking and park land. Rather, the lands could be used for any casino purpose. Presumably, however, if the loan agreements considered by the court were properly drafted to restrict the lands being condemned to parking and a park area as part of a casino project, the court would have allowed the condemnation.

### Analyses and Conclusions

What themes can be drawn from these cases? First, it seems that where the economic purpose is of an obviously great significance, condemnation carried out for the purpose of advancing the economy is for a public use (i.e., construction of an automobile assembly plant, changing the system of land ownership in a whole state from a feudal system of land ownership, the construction of casinos to revitalize a city). Another theme is that the isolated condemnations of lands located in a redevelopment area and stemming from the desire to transfer lands from one existing business to another existing business for economic reasons are likely insignificant or zero-sum additions to the overall economic well being of an area and thus done for a private, not a

public purpose. Also, if there are other means by which the development goal can be achieved, i.e., building a parking garage instead of acquiring additional land, a private rather than a public use will be found.

However, can the U.S. Supreme Court render in *Kelo* a clear definition of public use to apply where the redevelopment, and thus the use of the eminent domain power, is based solely on economic reasons?

In *Poletown*, the Michigan Supreme Court, commenting on the judicial scrutiny of the exercise of the condemnation power where identifiable private benefits are concerned, said: "Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced." *Poletown*, 410 Mich. at 634-635.

In *Hawaii Housing Authority*, the U.S. Supreme Court, citing *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896), said it would not substitute its judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation."

Using the *Hawaii Housing*

*Authority* test or even applying the heightened scrutiny formulated in *Poletown*, should the Connecticut Supreme Court's result in the *Kelo* case upholding condemnation for economic reasons be sustained where, in an economically depressed city, real estate taxes would be projected to increase two to four times, and more than 1,000 direct jobs would be created, along with hundreds of construction jobs and indirect jobs, but where the land taken would be leased for 99 years to the developer for \$1?

Regardless of the test chosen, will the Court provide benchmarks to gauge whether economic development is significant enough to amount to a public use thus justifying the use of the eminent domain power? Or will the Court leave us with a test for a public use that is the analytical equivalent of Justice Potter Stewart's definition of pornography in his concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), which is "... I know it when I see it ..."?

Developers, state legislators, municipalities and landowners should all be awaiting the Supreme Court's decision in *Kelo* to see to the extent to which the eminent domain power can be employed in redevelopment projects where the only reason for the redevelopment is the improvement of the economy. ■