Recent Developments in the Law of Eminent Domain "Economic Redevelopment" as a Public Use or Purpose?

Joseph W. Grather

New Jersey residents living in urban, suburban, and even rural "areas in need of redevelopment"[1] were buoyed by the recent decision in County of Wayne v. Hathcock, 684 N.W. 2d 765 (Mich. 2004). There, the Michigan Supreme Court overruled its 1981decision in Poletown Neighborhood Council v. Detroit, 304 N.W. 2d 455 (Mich. 1981), which allowed the City of Detroit to take an entire neighborhood under the aegis of "economic redevelopment" in order to turn the land over to General Motors for construction of a jobs-creating automobile plant.

In Hathcock, a Michigan statute allowed takings "necessary for a public improvement" or "for public purposes."[2] The County of Wayne interpreted this grant of authority to permit condemnation to assemble land for what would ultimately become a private industrial park. The Hathcock court held that the proposed taking for "economic redevelopment" was a statutory public purpose, but was not a constitutional public use, a prerequisite for takings under the Michigan Constitution.[3] Hathcock may be relied upon to challenge strictly "economic development" condemnations.

While the Michigan statute at issue in Hathcock did not require a finding of objective blight conditions as required by the New Jersey Local Redevelopment and Housing Law, (N.J.S.A. 40A:12A-1, *et seq.*), Hathcock may nevertheless provide persuasive support to challenge redevelopment efforts based solely on a municipal desire to promote "economic development" as opposed to correction of objective "blight" conditions. The New Jersey constitutional provision authorizing takings to effectuate redevelopment[4] has been upheld on the basis that the enabling legislation contains objective "blight" or "in need of redevelopment" criteria.[5]

In the Poletown case, General Motors threatened to withdraw from the Detroit area unless it was provided with sufficient land (400-500 acres) to build an automobile plant. Given the scale of the project, it could not be accomplished without involuntary acquisitions. The City determined to take the necessary lands pursuant to Michigan's Economic Development Corporations Act, a law which did not require a finding of objectively-determined "blight" or "in need of redevelopment" criteria. Residents whose homes would be taken in the name of "economic development" objected. The Michigan Supreme Court, in a terse four-page *per curiam* opinion allowed the Poletown condemnation to go forward.[6]

Twenty-five years later, Michigan government officials again sought to take private property on the promise of economic benefits in the form of the "Pinnacle Project," a proposed industrial park adjacent to the Metropolitan Airport, which was expected to create thirty thousand jobs and add $350 million in tax revenue. The County asserted that the benefits could only be realized through the exercise of eminent domain. Given the Poletown precedent, the objectors argued that while the project would concededly benefit the public, such benefits were substantially outweighed by the benefits to private parties, i.e. not a "public use." The objectors' prevailed.

The Hathcock court explained that the benefits to be realized by "economic redevelopment" (i.e. redevelopment of private property for a purported higher and better use), could not justify the taking of private property through eminent domain. Every business, every productive unit in society, does . . . contribute in some way to the commonwealth. To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. *Poletown's* "economic benefit" rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity. After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, "megastore," or the like.[7]

The rejection of Poletown signals the need for closer scrutiny of "economic development" rationales for redevelopment designations. N.J.S.A. 40A:12A-5(e) allows an area to be declared in need of redevelopment if the area in question suffers from "[a] growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or *not fully productive* condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare." (emphasis added). This section of the statute has been employed by some redevelopment entities to justify redevelopment designation of areas solely to achieve assertedly higher and better uses, i.e., for "economic redevelopment."

A similar issue is now before the United States Supreme Court. On September 28, 2004 the Court granted *certiorari* to the Connecticut Supreme Court in Kelo v. City of New London, 843 A. 2d 500, 507 (Conn. 2004).[8] The principal issue in Kelo was "whether the public use clauses of the federal and state constitutions authorize the exercise of the eminent domain power in furtherance of a significant economic development plan that is projected to create in excess of 1000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." The Connecticut Supreme Court decided that "economic development" was a public use

The Morris Lawyer
A Publication of the Morris County Bar Association and the Morris County Bar Foundation
April, 2005

Unprofessional Demeanor

Douglas Brierley
Chairman - MCBA Professionalism Committee

The following article is the third in a series addressing some of the more common lapses by attorneys appearing in our courts. Members are encouraged to comment on these articles and suggest other topics to cover.

The most commonly experienced problem area reported by our judges in the recent judicial survey is "unprofessional demeanor," which includes lack of courtesy, rudeness, arguing with the court staff, pushiness, and arrogance. In the courtroom, it usually occurs between opposing counsel, who engage in *ad hominum* attacks, bicker, and interrupt each other. Several judges noted that this conduct appears motivated by counsel who believe, albeit misguidedly, that it furthers their client's cause. In other cases, counsel may be drawn into such unbecoming conduct by an adversary who acts in the same fashion. Such conduct, however, is not only unprofessional, but interferes with the resolution of the case and the interest of the client.

The Morris County Bar Association Code of Professionalism addresses this problem area in several rules. For example, Rule 4 of the Code states that an attorney "will treat opposing counsel ... and members of the court's staff with civility and courtesy." Rule 8 of the Code requires that, in the conduct of litigation or negotiations, an attorney will "comport [him/her]self with ... dignity and refrain (a) from conduct meant to harass the opposing party ... and (d) from engaging in other practices designed merely to harass ... or that are rude or disrespectful." The Code further provides in Rule 10 that, "While I will be a vigorous advocate, I will always be mindful that I am also an officer of the court and that I have an obligation to conduct myself with respect for my ... adversary."
Moreover, it is no excuse that one's client is insistent that counsel act rudely toward an adversary. Indeed, it is incumbent upon an attorney to "counsel [his/her] client ... that civility and courtesy to others during the course of representation are virtues upon which our system of justice is founded" (Rule 3) and to take the initiative where necessary and "communicate to [his/her] client that courtesy is a professional responsibility and is entirely compatible with vigorous advocacy and zealous representation." Rule 4. These precepts are also recognized in the ABA Guidelines For Litigation Conduct (August 1998), Lawyers' Duties to Other Counsel, No. 1 ("In our dealings with others we will not reflect the feelings of our clients.") and No. 2 ("We will not, even when called upon by a client to do so, abuse or indulge in offensive conduct directed to other counsel, parties, or witnesses.").

These Rules regarding professional demeanor reflect a simple mandate -- be civil toward everyone. Your professional reputation and your client's cause depend upon it.

MOCK TRIAL COMPETITION ENDS IN VICTORY FOR KINNELON HIGH SCHOOL

The eleventh annual Morris County Bar Foundation regional Mock Trial Competition, held in conjunction with the State Bar Foundation's Vincent J. Apruzzese Mock Trial Competition, ended recently with a victory for the team from Kinnelon High School. Steven S. Vahidi (Porzio, Bromberg & Newman) served as Chairman for this year's county-wide event.
The following attorneys participated as team advisors: Charles Murray, Paul Woodford, William Marshall, Gina Graham, Loren Speziale, Jason Meisner, Lee March Grayson, William Connelly, Shawn Burks, Ivan Wittenburg, Naomi M. DeSilva-Rothenberg and William Purdy.

The following attorneys served as judges during the competition: Allan Iskra, Art Raynes, Michael Mullen, Randall Bush, Jamie Zogby, Michael Zogby, Bill Krais, Mike Troisi, Roseann Latore, Shannon Ryan, Peter Gilbreth, Larry Morgan, Connie Matteo, David Ironson, Jeffrey Advokat, Darren DiBiasi, Jerome Gallagher, Jr., Sheryl Schwartz, Mike Pelletier, Peter Petrou, Mira Peck, Douglas Ehrenworth, and Marcy McMann. The Honorable B. Theodore Bozonelis, AJSC judged the final round.

(Grather article continued)
under *both* the Connecticut Constitution and the federal Constitution. The Connecticut Supreme Court's holding suggests the primary appeal issue:

We conclude that economic development projects created and implemented pursuant to chapter 132 that have public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use clauses of the state and federal constitutions.[9]

The Connecticut statute at issue in Kelo permits acquisitions for strictly economic redevelopment, without the antecedent purpose of "blight" clearance or, in the language of the New Jersey redevelopment statute, correction of "in need of redevelopment" conditions. [10] The Connecticut court's interpretation of the statute represents a more expansive notion of what constitutes a "public purpose" than simple blight removal.[11] If the U.S. Supreme Court rejects the notion that the public use clause of the federal constitution is so broad as to encompass strictly "economic redevelopment" takings, the holding will have widespread ramifications affecting New Jersey redevelopment efforts.

New Jersey's Constitution grants express authority for the exercise of eminent domain - one of the "most awesome powers of government"[12] – to accomplish redevelopment of blighted areas:

The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired.[13]

Thus, blight clearance, etc. is a public use and purpose under the New Jersey Constitution. Therefore, in contrast to a strictly "economic development" taking (like Hathcock) where a property owner might challenge whether the taking was for a public use, designation of an area as "in need of redevelopment" based on existence of blight conditions is constitutionally authorized in New Jersey. However, where the Legislature establishes a redevelopment criterion that is not a proper constitutionally contemplated "blight" condition (or where a criterion is interpreted by a redevelopment agency to encompass strictly the promotion of economic development, as often attempted through criterion "e") the potential to defeat such attempted redevelopment takings remains. Criterion "e" is, in practice, employed by redevelopment agencies as a "catch-all" provision justifying "in need of redevelopment" designation where the governing body is attempting to achieve nothing more than a "higher and better use" for property that does not otherwise meet a reasonable interpretation of "blight" as reflected in the objective statutory criteria.

While there are many cases interpreting government's broad authority to redevelop blighted areas, there is no New Jersey case that interprets the first sentence of Art VIII, § 3, ¶ 1 in a manner similar to the interpretive analysis conducted by the Michigan Supreme Court in Hatchcock. Moreover, there is no New Jersey Supreme Court precedent that squarely confronts the issue of whether "economic redevelopment" - meaning redevelopment of private property to obtain a more economically productive use thereof – fits within the framers intent of what constitutes "blight" under the New Jersey Constitution. As noted, the circumstances of Hathcock do not directly parallel the New Jersey redevelopment statute. Yet, the underlying rationale of the Hathcock decision – that the taking of private property to achieve what are perceived to be higher and better uses is *un*constitutional – should drive the analysis of some future New Jersey case in limiting the exercise of redevelopment to true cases of blight clearance, etc.[14] If not, New Jersey property owners – no different from Michigan's – "could be subjected to the most outrageous confiscation of property for the benefit of other private interests without redress."[15]

If the United States Supreme Court's review of Kelo determines that a taking to accomplish "economic redevelopment" of non-blighted areas is not a "public use" under the federal Constitution, New Jersey courts will be called upon to determine whether "in need of redevelopment" designations and consequent takings based more on a desire for economic development than on a finding of constitutionally-recognized blight conditions should be upheld. In the meantime, the Hathcock decision is another helpful precedent in constructing a successful challenge to a strictly "economic redevelopment" taking in New Jersey.

(Footnotes)
1 See N.J.S.A. 40A:12A-3, -5.
2 M.C.L. § 213.23.
3 Hathcock, 684 N.W. 2d at 784.
4 N.J. Const. Art VIII, § 3, ¶ 1.
5 Wilson v. City of Long Branch, 27 N.J. 360 (1958).
6 304 N.W. 2d at 459.
7 684 N.W. 2d at 787.
8 See 125 S.Ct. 27 (2004). The Kelo argument is scheduled for February 22, 2005.
9 843 A. 2d at 520.
10 See Berman v. Parker, 348 U.S. 26, 31-32 (1954) (finding a constitutional public purpose where condemnation was used for slum clearance).
11 But, the Kelo court did condition its broad holding: "Applying this standard to the present case, we conclude that the trial court's finding that the takings were not primarily intended to benefit a private party, namely, Pfizer, is not clearly erroneous." 843 A. 2d at 542.
12 City of Atlantic City v. Cynwyd Investments, 148 N.J. 55, 73 (1997).
13 N.J. Const. Art VIII, § 3, ¶ 1.
14 See Cynwyd, supra, 148 N.J. at 73 ("Generally, when the exercise of eminent domain results in a substantial benefit to specific and identifiable private parties, 'a court must inspect with heightened scrutiny a claim that the public interest is the predominant interest being advanced.'" (*quoting Poletown*, supra, 304 *N.W.*2d at 459)).
15 Poletown, supra, 304 N.W. 2d at 461-62 (Fitzgerald, J., dissenting).

LAWYERS IN THE NEWS

Thank you to the following attorneys who volunteered on behalf of the MCBA Special Civil Part, Settlement Conference Program: Peter Petrou, Bob McAndrew, Leigh Walters, Jennifer Jacobus, Matt Fedor, Jeffrey Master, Fred Iskowitz, Gary Rosenberg, Larry Del Rossi.

Thank you to the following attorneys who spoke at the Housing Patnership First Time Home Buyer Seminars: Martin Liberman, Raquel Romero, Ira Ginsburg, and Ken Sauter.

Elizabeth H. Smith, former Trustee of both the Morris County Bar Association Foundation, Co-chair of the Criminal Practice Committee and member of the Professionalism Committee will be honored by the Zonta Club of Morristown as 2005 Woman of the Year.

Local not-for-profit active in Morris County and based in Short Hills is seeking an attorney with knowledge of contracts, employment and real estate to join its Board. Please contact Jim Lynch at 973-994-9494 or email jim@sobel-cpa.com if interested or for additional information.

Solo Practice Committee Organizational Meeting

April 20 at 5:30 p.m.
Porzio, Bromberg & Newman
100 Southgate Parkway
Morristown

Please email Laurie Fierro at lmfierro@prodigy.net

LRS ENROLLMENT

Enrollment for the Morris County Bar Association Lawyer Referral Service for March 1, 2005 through February 28, 2006 is now underway. Current participants received renewal notices in January. There is a need for attorneys who speak a foreign language. There is also a need for attorneys with experience in the areas of civil service, education, patents, veteran's/military law and for attorneys with experience in civil rights with regard to police misconduct and false arrest.

The annual enrollment for participation in the LRS is $150. Interested attorneys are encouraged to call Lucy Luttenberger, LRS Administrator, at 973-267-6089.