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### Diminished Just Compensation In Eminent Domain Cases

Redevelopment plans need to be calculated into the value of property

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**W**hen government takes private property under the power of eminent domain to accomplish a redevelopment plan, the property owner learns, usually to his astonishment, that when it comes time to measure the value of his property — his constitutional entitlement to just compensation — the “rules” prohibit any consideration of the newly permitted and typically more valuable uses called for by the redevelopment plan. This “rule” is said to apply even where the owner’s property is physically adapted to the precise development called for by the redevelopment plan without necessity of assemblage to other parcels or area-wide infrastructure improvements.

The notion that the use and bulk provisions of a redevelopment plan — and sometimes any reference to the redevelopment plan — must be entirely excluded from the valuation of property taken under redevelopment is usually supported by citation to dicta in *Jersey City Redevelopment Agency v. Kugler*, 58 N.J. 374 (1971). “The rule supported by the weight of authority in the ordinary condemnation case is that the proper basis of

compensation is the value of the property as it would be at the time of the taking ... disregarding either the depreciating threat of or the inflationary reaction to the proposed public project.”

*Kugler* involved a challenge by a redevelopment agency to the constitutionality of amendments to the Eminent Domain Act (N.J.S.A. 20:3-1) and Blighted Areas Act (N.J.S.A. 40:55-21.10 (repealed and replaced with the Local Housing and Redevelopment Law, N.J.S.A. 40A:12A-1 et seq.)), which required that the value of any property to be acquired by eminent domain be valued at a figure no less than the value as of the date of the declaration of blight.

At that time, it was generally understood that property values inevitably declined in an area designated “blighted.” See, e.g. *Housing Auth. of City of Newark v. Ricciardi*, 176 N.J. Super. 13 (App. Div. 1980). In upholding the constitutionality of the statutory amendments at issue, the Supreme Court held that while the Legislature may not create rules which detract from the constitutional requirement for just compensation, it is free to prescribe a rule of damages more favorable to the landowner than that which would satisfy the minimum requirement of the Constitution. *Kugler* said nothing concerning whether the uses proposed by a redevelopment plan were uniformly within the “ordinary” rule, i.e., were ineli-

gible for consideration in a condemnation valuation.

The *Kugler* dicta was followed by citation to authorities having no relevance to the propriety of consideration of a redevelopment plan in a condemnation valuation, and indeed in the “ordinary” condemnation case, evidence of value which the property owner could never have realized in a typical market are “off the table.” This is saying no more than that value must be determined by what a willing buyer and seller would agree to in an arms-length transaction in a typical market.

Framing the issue in “project” terms — “disregarding the inflationary reaction to the proposed public project” suggests that the existence of any governmental activity — a “project” — is the trigger for exclusion of all value enhancements in any way related to that activity. But it is one thing to exclude from consideration, for example, value attributed to the adaptability of a one-acre parcel for a mile-long highway or a 1,000-acre reservoir — requiring an unlikely assemblage to numerous other nonowned parcels when the government’s project is a highway or a reservoir. *McGovern v. City of New York*, 229 U.S. 363. It is another thing altogether to exclude consideration of the typically more liberal use and bulk provisions within a redevelopment plan where the means and methods available to a municipi-

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pality under the Local Redevelopment and Housing Law (N.J.S.A. 40A:12A-1) were employed merely as an alternative to conventional master planning and rezoning.

A redevelopment plan may or may not deserve to be characterized as a "project" for application of the project enhancement rules. A redevelopment plan may provide for uses which require the creation of large assembled parcels for substantial developments and/or major infrastructure improvements superimposed over an area of existing undersized lots without adequate pre-existing infrastructure necessary to support the development called for by the plan. That plan stands on an entirely different footing from a document, labeled "redevelopment plan," but under which existing property owners, either alone or with a reasonable probability of assemblage to others, might avail themselves of the plan's use and density provisions with little more than as-of-right site plan approval. In the latter case, owners should be permitted to retain and develop their own property or be compensated for the value of the property taking into account the use and density permissions, the redevelopment plan when the property is taken by eminent domain.

Where the use and bulk standards of a redevelopment plan can be satisfied by an owner of property condemned for purposes of the plan without necessity for improbable assemblages to other, non-owned property, or construction of public infrastructure improvements without which development could not occur there is no reason why a municipally designated redeveloper — but not the owner — should garner the value inherent in what is in reality little more than a rezoning. The power and obligation to zone must be exercised in the public interest in all events. The policy bases underpinning the "project enhancement" rules provide no support for a rule which characterizes "redevelopment in lieu of rezoning" as a governmental "project" for purposes of the enhancement doctrine.

An owner is entitled to just compensation upon a taking, usually based upon the fair market value of the property taken at the time of taking. Market value is a price mutually agreeable to a willing buyer and a willing seller, neither being under compul-

sion to act. The owner is entitled to receive fair market value of the property for its current use or for any use which it has a commercial value in the immediate present or in reasonable anticipation in the near future. Accordingly, any evidence which is reasonably probative of fair market value is admissible in a condemnation action.

In sum, the owner is entitled to a value based on the same factors which would enter into a negotiation between a buyer and seller had there been no taking. An element of value will be excluded when it falls out of that paradigm. Thus, the "project" for which the condemned property is taken is always eligible for consideration unless there is a reason why it should, for reasons of policy — fairness — be disregarded.

While the existence and terms of redevelopment plans have on occasion found their way into a redevelopment condemnation valuation, *Jersey City Redevelopment Agency v. Costello*, 252 N.J. Super. 247 (App. Div. 1991), no opinion has yet rejected undiscerning application of the *Kugler* dicta in the redevelopment condemnation context. The dicta (and the doctrine) should be recognized for what it is — a rule applicable to specific fact patterns as opposed to a rule of universal applicability. The fact patterns giving rise to the "project enhancement" rules have nothing to do with the "redevelopment plan as alternative to rezoning" circumstance.

The most common instance of excludable "project" value arises in the case of highways, which cannot be built except through the use of eminent domain. The reason for exclusion of consideration of the condemnor's use in valuation is not because of some ipse dixit rule that "increases in value attributable to the very project for which property is acquired may not be considered in calculating just compensation." The reason is because the highest and best use of the property was never for construction of an interstate highway in the first place. There is no private market in land for construction of new interstate highways. Negotiations between typical buyers and sellers would not involve consideration of its value for that use. And there is no probability of assemblage of the subject property with all the other parcels necessary to

accomplish the use without the power of eminent domain, a power unavailable to the owner. *Yara Engineering Corp. v. City of Newark*, 136 N.J. Eq. 453.

Values reflecting only peculiar governmental need, as opposed to values reflective of a typical market, are also excluded from condemnation valuation. In *United States v. Cors*, 337 U.S. 325, wartime demand for tugboats led to a government requisitioning program for those craft. The acquisition program created a scarcity and an inflationary market for tugboats. When the government later determined to satisfy its need by taking the boats, the government sought to exclude that portion of the value of the craft attributable to its "special need." The Supreme Court explained that, "It is not fair that the government be required to pay the enhanced price which its demand alone has created. That enhancement reflects elements of the value that was created by the urgency of its need for the article. It does not reflect what 'a willing buyer would pay in cash to a willing seller.'"

Additionally, when land is necessary to complete a governmental project which could not be accomplished without the land in question, the owner is not entitled to a "hold-up" value. Where the government has entered the market with a unique demand and, absent the government's activity, there would be no market reflecting that unique demand, value created solely by the government's activity as purchaser or condemnor is "more 'hold-up value' than 'fair market value.'" *United States v. 320 Acres of Land*, 605 F.2d 762 (5th Cir. 1979).

In *United States v. Weyerhaeuser Co.*, 538 F.2d 1363 (9th Cir. 1976), the government had leased a logging road from the owner and later condemned them for a fee. Upon condemnation, the court held that compensation should not include consideration of expectancy of continued government payments for use of the road because there was no market for that use apart from the government's demand. In *United States v. Whitehurst*, 337 F.2d 765 (4th Cir. 1964), the property was adjacent to a naval air station. The government bought extensive amounts of sand from the owner for construction of runways. When it con-

demned the sand pit in order to extend the runways for jet traffic, the owner contended that a portion of his land should be valued as a sand pit. The court found that the only customer had been and would be the government. In ascertaining demand, the requirement of the Government for the project for which the land is taken must be totally excluded.

A redevelopment plan acting as an alternative to rezoning falls far outside the policies excluding these values "to" and "from" the taker. In *Housing Auth., Atlantic City v. Atlantic City Expo., Inc.*, 62 N.J. 322 (1973), a convention center project required a street vacation adjacent to the owner's property. The owner contended that half the vacated street would become available to him when the project commenced and should be included in the valuation of the land taken for the project. That value was excluded. "Improvements or changes contemplated by the condemning authority and undertaken at its expense cannot be taken into account in determining just compensation." The proposed street vacation was an event which would never have occurred in the absence of the "project" — the public improvement. A redevelopment plan which accomplishes little more than a rezoning is simply not of the same character.

Properties outside the limits of a governmental project enjoy an enhancement in value for which these fortunate owners pay nothing. The "scope of the project" line of cases are a subset of the project enhance-

ment rule and precludes consideration of this type of enhancement in the case of properties taken at a later time but which were "probably within the scope of the project from the time the Government was committed to it." *United States v. Miller*, 317 U.S. 369.

*Currie v. Waverly & N.Y.B.R.R. Co.*, 52 N.J.L. 381, is often cited, appropriately, as a source of the project enhancement "rule": "Neither the individual advantages to the party acquiring the land, nor the necessity of its acquisition, can be considered in computing the value of the land to the owner." But *Currie* also demonstrates the limits of the rule. In *Currie*, a railroad took the owner's property for its railroad. The owner contended the property had a special value as a railroad approach to an established center of commerce, which, of course, was the reason the railroad took the property in the first place. The court permitted its value for that purpose to be considered in determining just compensation — the use for which the property was taken by the condemnor was no different from the use for which the property was attractive in the absence of any taking. Back in the railroad-friendly 1890s, the courts were getting it right.

Leaving aside misguided municipal attempts to employ the redevelopment laws respecting nonblighted areas on unsustainable constructions of the redevelopment criteria, see *Gallenthin v. Borough of Paulsboro*, 191 N.J. 344, 924 A.2d 447 (2007), municipalities in this state have far

too frequently employed the redevelopment laws as a substitute for conventional planning and zoning and for only arguably legitimate purposes. These include creating patronage through the power to select developers; "strong-arming" owners into immediate development under the threat of a taking by redevelopment; making tax abatements available to favored developers where none may be necessary; using tax abatements to reallocate tax revenues in a manner favorable to the municipality; lessened public notice and procedural requirements under the redevelopment process as opposed to what are perceived to be more stringent notice and area requirements for a rezoning; and, not the least, minimizing compensation to property owners upon a taking.

Upon condemnation for redevelopment, property owners should not be deprived of value the property would enjoy had the area merely been rezoned in the conventional manner. Relabeling the change a redevelopment plan should not affect the outcome. Until it is recognized that none of the policies underpinning the project enhancement doctrine are offended by allowing compensation with due consideration of the terms of "zoning alternative" redevelopment plans, the risk remains that compensation will be unfairly diminished as noncompensable "project enhancement" when property is taken under authority of the redevelopment laws. ■