

SUPREME COURT OF NEW JERSEY

Docket No. _____

BOROUGH OF SEASIDE PARK,

Plaintiff/Respondent,

vs.

SHREE JYOTI, LLC,

Defendant/Petitioner.

SUPREME COURT OF NEW
JERSEY

ON APPEAL FROM
APPELLATE DIVISION
DOCKET NO. A-1915-22

SAT BELOW:

Hon. Patrick DeAlmeida, Hon. Maritz
Berdote Byrne; Hon. Avis Bishop-
Thompson

**PETITION FOR CERTIFICATION AND APPENDIX ON BEHALF OF
DEFENDANT/PETITIONER
SHREE JYOTI, LLC**

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I

STATEMENT OF THE MATTER INVOLVED

This Petition involves the effort of the Borough of Seaside Park (Borough) to acquire by eminent domain, a fifty one unit ocean front motel owned by Shree Jyoti, LLC (Shree).

Originally, in October of 2021, the Borough initiated a taking process under the Redevelopment Act. N.J.S.A.40A:12A-1 et seq. , the Planning Board held a hearing and recommended condemnation under the Redevelopment Act. However, on April 19, 2022, the Borough changed horses and adopted Ordinance 2022-08(Da20) purporting to authorize the taking of the subject motel pursuant to the Local Land and Buildings Law, N.J.S.A.40A:12-1, et seq. However, regarding the proposed use of the property, the ordinance said only “...the acquisition is in furtherance of a public use and purpose...”. Accordingly, there was no legislative designation of any use for which the property was being acquired.

Shree moved to dismiss the first amended complaint on grounds that the complaint was not supported by an appropriate ordinance authorizing the taking because no use was specified for the property proposed to be taken. That motion was granted on September 30, 2022. (Da15)On the same date, the Borough filed a new complaint adding Paragraph 4 which states:

Plaintiff has determined to acquire the fee simple interest...for public use, including, but not limited to a public parking lot together with electric charging infrastructure. (Da17)

On November 28, 2022, the trial judge denied the motion to dismiss in an oral opinion (1T12-5 – 13-7) and entered an order appointing commissioners.

Thus, the grant of the judgment appointing commissioners constitutes a final judgment finding that the condemnor is duly vested and has exercised its authority to acquire property without the benefit to any legislative determination as to the use for which the property was acquired pursuant to N.J.S.A.20:3-8. Such a result is not consistent with the legislative intent that the condemnor must be acting according to law, including the constitutional requirement that the taking be for a public use. If the ordinance under N.J.S.A.40A:12-5(a) does not require a legislative determination as to the use for which the property is being acquired there is no way to assure that the ultimate use or disposition of the property will ultimately be for the public benefit. See CRDA vs. Banin, 320 N.J. Super. 342,345 (Law Div. 1998) The formal requirements of notice and a public hearing of the ordinance procedure are intended to provide for the transparency and public participation required to assure the accountability of municipal officials.

There must be a legislative determination as to a use for which the property is being acquired in order to determine whether there is a reasonable foundation or whether the proposed use is based upon reasonable necessities. This court has held that when private property is being taken, the taking must be limited to the reasonable necessities of the case. Texas Eastern Trans. Cop v. Wildlife Preserve, 48 N.J. 261, 269 (1966).

The Appellate Division cites Twp of West Orange v. 769 Assocs. 172, N.J. 564,571 confirming that eminent domain is a power based upon the law of necessity which cites, Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 1045 S. Ct 2321, 81 L. Ed 186 (1984) to the effect that the US Supreme Court will not substitute its judgment for a legislature's judgment as to what constitutes a public use, unless the use be palpably without reasonable foundation. But, the holding of the Appellate Division opinion is that neither the enabling statute, N.J.S.A.40A:12-05(a), the Eminent Domain Act of 1971 nor R.4:73-1 requires the disclosure of a use for which the property is being acquired. Accordingly final judgment authorizing the taking can be obtained without the governing body deciding upon a use for the property. Such a procedure does not pass constitutional muster.

II

QUESTION PRESENTED

WHETHER THE LEGISLATIVE INTENT OF N.J.S.A.40A:12-5(a) IS TO REQUIRE THAT THE ENABLING ORDINANCE AUTHORIZING A MUNICIPALITY TO ACQUIRE REAL PROPERTY BY EMINENT DOMAIN, SET FORTH THE PUBLIC USE FOR WHICH THE PROPERTY IS BEING ACQUIRED.

Shree Petitions this Supreme Court to grant Certification on grounds that this appeal does squarely present a question of general public importance that should be settled by the Supreme Court because in the ordinary course of events every municipality that finds it necessary to acquire real property by condemnation typically relies upon this enabling Act, N.J.S.A.40A:12-5(a).

While it is true, that courts have allowed wide latitude as to what constitutes a public use the reasoning is that the court will not substitute its judgment for a legislative judgment as to what constitutes a public use, unless such “use is palpably unreasonable or arbitrary in the terms of the specifics of the case.” Midkiff, supra.

For a municipal taking by eminent domain such as presented here, the New Jersey legislative scheme is that the Eminent Domain Act of 1971, N.J.S.A.20:3-1 et seq covers the procedure to be followed once the condemnor is authorized by law to use the power of eminent domain under N.J.S.A.40A:12-5(a). Only after the adoption of an appropriate ordinance does the Eminent

Domain Act control to determine the authority to exercise the power of eminent domain under § 20:3-5, the procedure for the commencement of the action under §20:3-8, and the denial of the authority to condemn §20:3-11. In fact, the Eminent Domain Act governs all actions to acquire property by municipalities except the condition precedent of an appropriate ordinance under N.J.S.A.40A:12-5(a), an appropriate ordinance must include the legislative determination of the use for which the property is being acquired in order to assure that the taking satisfies the constitutional requirement of public use and necessity.

All issues to be decided in an eminent domain action, except damages and value including the right to challenge the plaintiff's right to take by eminent domain must be presented to and decided by the court before it enters judgment appointing commissioners. Iron Mountain v. City of Newark, 405 N.J. Super. 599 (App. Div 2008), modified 202 N.J. 74.

When the right to take is challenged under N.J.S.A.20:3-11, as in this case, Petitioner asserts that the fundamental question for the Court is whether there is specific statutory authorization for the taking which sets forth a clear public purpose for the taking? If not, the taking would be unconstitutional as the municipality is not bound to any public purpose use.

The fact that the State Legislature requires an ordinance under N.J.S.A. 40A:12-5(a) in order for a municipality to take private property by eminent domain means that such is not a ministerial function. The Constitution of New Jersey, Art. 1, Sec. 20, requires that private property can only be taken for a public purpose.

Under a Mayor-Council form of government, as in the Borough, the legislative power is in the Borough Council. N.J.S.A. 40:69-36. The mayor does not have any legislative authority. Forester v. Palmer, 401 N.J. Super 286 (App. Div. 2008). An ordinance is a distinctly legislative act. Resolutions of a governing body are ministerial.

¹ When the legislature requires an ordinance, presumably it deems the exercise of authority to be significant enough to be accompanied by the formality and public involvement that the adoption of an ordinance requires. Reuter v. Borough Council of Ft. Lee, 328 N.J. Super 547, 553 (App. Div. 2000).

Contrary to the implication contained within the Appellate Division opinion there is nothing in the record to suggest that at the public hearing on the ordinance there was any discussion of the use for which the property was to be put at all.

The clear intent of the statutory scheme is that a legislative determination as to the proposed use of real property to be acquired by eminent domain must

¹ Cite Inganamort v. Borough of Ft. Lee, 72 N.J. 412, 417 (1977)

be established through the ordinance process as a condition precedent to commencement to an action under the eminent domain act of 1971.

The Appellate opinion which holds that N.J.S.A.40A:12-5(a) does not require the enabling ordinance to specify a public use for which the property is being acquired, also adds that N.J.S.A.20:3-50 similarly does not require the condemning authority to specify a public use or purpose to which the property will be put in the authorizing ordinance.

We agree that the Eminent Domain Act of 1971 provides for uniform procedures for condemnors, but what triggers the Act and what does the Act say that bears on the instant issue?

The court's opinion cites Hillsborough v. Robertson, 260 N.J. Super. 37 at 41 (Law Div 1992) which states:

“In order to trigger the provisions of the Act, [the Eminent Domain Act] the condemnor must be acting pursuant to law. In other words, the Legislature's conferment of the authority to condemnor is a condition precedent to the institution of a condemnation proceedings pursuant to this Act.”(emphasis added)

In fact, N.J.S.A. 20:3-8 requires that:

“the action shall be instituted by the filing of a verified complaint ... and shall demand judgment that the condemnor is duly vested with and has exercised its authority to acquire the property being condemned (emphasis added in Robertson, supra)”

Shree's appeal to the Appellate Division was denied in its opinion delivered May 29, 2024 saying on pg 12 of the Slip Opinion:

We have carefully reviewed Shree's arguments in light of the authorizing statute and the legal precedents and find no basis on which to reverse the trial court order. N.J.S.A.A:12-5(a), the statute that established the mechanism for the Borough's exercise of its eminent domain authority, does not require that the ordinance authorizing the condemnation specify the public use and purpose to which the municipality intends to put the property. (emphasis added).

Hillsborough v. Robertson, supra, makes clear that the Eminent Domain Act of 1971 is not an enabling act, but rather provides a uniform procedure to be followed by all entities that have the power to condemn. It is not intended to provide authorization for a taking. It requires a prior legislative authorization pursuant to law.

The local lands and buildings law, N.J.S.A. 40A:12-4, et seq., provides the authority for a municipality to provide for the acquisition of any real property by ordinance. Contrary to the appellate opinion, the enabling statute clearly intends that the taking ordinance specify a public use.

In Twp. of Millburn v. Pitt 68, N.J. 424 (1975), the Supreme Court observed that:

N.J.S.A. 40A:12-5 addressed itself in three subsections (now four since 1992 amendment) to the acquisition

and disposal of real property subsections (a) and (c) dealing with acquisition and disposal require that municipal action take the form of an ordinance. Subsection (b) treating conversion from one use to another, sets forth no formal requirement as to how the municipality shall proceed. (emphasis added)

The current version (1992) is now divided into four sections (a), (b) and (d) have to do with acquisitions and disposal and require an ordinance, while now it is (c) which provides that real estate “which shall have become unsuited or inconvenient for the use for which it was acquired” may be converted to another use without the means of an ordinance. The Legislative intent is obviously that (a) establish the use for which the property was acquired.

Accordingly, both the language of subsection (c) and the rationale of the Supreme Court’s opinion in Millburn, id, confirms that the legislative intent is that the proposed use of the property must be set forth in the ordinance providing for its acquisition.

The Milburn case involved the acquisition of land by Milburn in 1955 for the purpose of off-street parking. That property had been part of a subdivision with restricted covenants limiting the use of the lots to residential use.

Some years later, the township decided to set aside a part of the tract it had previously acquired for construction of a public library. It adopted an

ordinance authorizing a bond issue designating the site for construction of the library.

The township claimed that N.J.S.A.40A:12-5(b)² authorized it to convert real property, which shall have become unsuited or inconvenient for the use for which it was acquired. Defendants argued that an ordinance was required to effect such conversion of the use for which it was acquired.

The Supreme Court found that while (a) and (c) required ordinances, (b) set forth no formal requirement was required for (b).

Under the current statute (c) allows the change of use from the “use for which it was acquired” when that use for which it was acquired becomes unsuitable or inconvenient without the need of an ordinance.

The rules of statutory construction avoid any construction of legislative intent that makes a statute or section of a statute meaningless. Which is exactly what results if there is no legislative determination of the “use for which the property was acquired.”

The Constitution limits the taking of private property to a “public use”. (Subsection (c) of the enabling statute only makes sense if (a) providing for acquisition by ordinance sets forth a use for which the property is being

²Now (c) after 1992 amendment.

acquired. If the statute is to be interpreted as not requiring the designation of a use under (a) there is no reason to make any provision in the statute for a change of use.

III

ADDITIONAL COMMENTS REGARDING ERRORS OF THE APPELLATE DIVISION OPINION

While the Appellate Division opinion asserts that R. 4:73-1 setting forth the requirements for a complaint correctly points out that the rule makes no requirement that the complaint does not have to set forth any use for which the property is being acquired, the opinion of the trial court and the Appellate Division opinion appears to put forth an argument that the amendment to the complaint cured the defect which resulted in the dismissal of the first amended complaint.

Neither the amendment to the complaint, nor the mayor's (non-certified) certification can supply the required legislative determination of the specific use for which the property was acquired. However, tellingly, the language used seems to confirm that the governing body had not made any determination as to a proposed use for the property.

In its second amended complaint (Da16) plaintiff included a new paragraph 4 stating:

Plaintiff has determined to acquire a fee simple interest
in the lands hereinafter described for public use,

including, but not limited to, a parking lot together with electric vehicle charging infrastructure.

At pg. 16 of the slip opinion, the appellate opinion seems to agree that such language means that the Borough is not limited to the public use and purpose set forth in the ordinance. The complaint simply says the property is being acquired for public use. Public use being a class of uses including, but not limited to a parking lot.

As we saw previously, all issues including the authority to take must be decided before the court enters judgment appointing commissioners. whether a change of use in the future, “if the real estate shall become unsuited or inconvenient for the ‘use for which it was acquired’”, is not an appropriate issue when dealing with the authority to condemn and whether a public use for which the property is being acquired has been established.

Further, there is no evidence in the record to support the finding that the Borough determined sometime in 2023 that a well would be appropriate for this site. But in any event, the issue before the court was whether the trial court erred in denying the motion to dismiss in November 2022, an issue involving the acquisition of property under subsection (a) as opposed to a change of use under (c).

At pg 13, the opinion says, “nothing in the record suggests that Shree was unable to challenge the validity of use and purpose on which the Borough relies to exercise eminent domain: The opinion here is in conflict with its later comments referred to pages 15 and 16 which confirms that the language of the complaint doesn’t rely upon the parking lot issue at all, it simply provides that the taking is for public use. The parking lot idea is only one of any number of proposed uses most undisclosed and not adopted by ordinance.

There is nothing in the record to suggest that at the meeting of council adopting the ordinance anything was said about the proposed use. On the contrary, Exhibits A,B &C to the order expanding the record to include the minutes and newspaper account of the council work session of May 11 2023 more than a year after the adopting of the ordinances and months after the filing of the amended first complaint. The minutes reveal that when asked by a resident, the mayor noted there were several public uses including electric charging stations, but the Borough Attorney indicated they were not able to discuss the other uses because of litigation. However, the account of the same work session published in the Shorebeat the following day and certified to be accurate based on personal observations at the session reported that “the future of the property, once its demolished is still unclear”, though the Mayor, John Peterson said Thursday (May 11, 2023) that it could potentially become part of

a green energy parking initiative. “After we get the project specs back, decisions will be made,” said Peterson. The idea received some pushback from residents who said they “wanted to see both properties back on the tax rolls”. Why can’t we sell it to a builder who wants to put up a beautiful home” said resident Shirley Kreszl. “I don’t understand why we would use oceanfront property for a parking lot. It just doesn’t make sense,” asked Beth Anderson.

“While it is all but assured that the motel will be demolished, its future is still up for discussion right now, said Borough Attorney Steven Zaborsky.” “No decisions have been made regarding the future location or the ultimate participation of the borough for the parking initiative”

Also, Peterson said “the former park central apartment complex, which itself was recently demolished, was rejected by the state for the parking initiatives due to its elevation and concerns over flooding. [The Desert Palm is in a flood zone]. The Desert Palm, or another oceanfront lot owned by the Borough on N Street, are both now under consideration”. This occurred long after the borough attorney defined “public use” as “including, but not limited to a parking lot.”

The footnote 2 at the conclusion of the appellate division opinion seems to confirm that in its view, there never has to be a determination by the governing

body as to a use for which the property is being acquired. After all its talk about the parking initiative, it turns out that the application doesn't reference this site at all. Since the original site was later rejected because of flooding concerns, the Borough now is considering two different sites one of which is the subject almost a year after the taking. This is clearly a case of take it now and decide a use later. A practice specifically rejected by the Appellate Division in Borough of Glassboro v. Grossman, 457 N.J. Super. 416 (App. Div. 2019) and CRDA v. Birnbaum, 458 N.J. Super. 173, 191 (App. Div. 2019)

There is nothing in the record to support the opinion's findings "that had Shree attended the meeting it would have been apprised of the use and purpose to which the Borough intended to put the property. There was nothing in the notice and nothing the ordinance about a specific use. The first defendant learned anything about a parking use for this property was the second amended complaint and the Mayor's certification which was prepared for this litigation almost six months after the adoption of the ordinance.

There is nothing in the record to support the Mayor's "non-certified" statement in the document entitled "certification" but not certified per R.1:4-4 that the "Borough Council made a legislative determination to purchase the subject property for the purpose of public parking ...". The ordinance speaks for itself and says no such thing.

IV

REASONS WHY THIS PETITION SHOULD BE GRANTED

Property owner and public are entitled to know the use for which the property is being acquired from the ordinance authorizing the taking. The primary issue in cases questioning the authority for a condemnation is always in terms of the use and necessity to which the property will be put. Whether it's a rationale use; whether there is a necessity to take the amount of property for the proposed use, alternatives to the taking which may likely serve the proposed purpose etc. are all issues that are appropriate but cannot be addressed without a legislative determination of the proposed use.

All the cases cited in the Appellate Opinion that relate to challenges to the use involved cases that have the proposed uses contained within the legislation authorizing the taking as the taking.

This case is obviously wrongly decided and the taking here, without the governing body deciding upon a use for which the property was taken is unconstitutional since there is no way of challenging the taking as to whether some ultimate use is a public purpose. Alternatively, since the subject property was thought by some to be a public nuisance as described (unfairly) in the redevelopment report referenced by the Appellate Division, the motel could be

demolished and the Borough could sell off the property for ocean front lots and even perhaps make a profit.

But, more importantly, the practice of eminent domain law is a narrow specialty. Many condemnors such as in this case bring in special counsel for eminent domain cases. Even though this opinion may not be published, it is available to all and will be used by other condemnors. That a taking must be for a public purpose in black letter law. The basic question for practitioners and the court in cases challenging the taking is virtually always “is there a clear public purpose and necessity for the taking?” See: New Jersey Condemnation Practice, 4th Ed., Buonocore, Olson and DellaPelle. This opinion runs contrary to virtually all the jurisprudence on the subject.

CONCLUSION

For the reasons set forth above, this petition should be granted.

Respectfully submitted,
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Shree Jyoti, LLC

Dated: June 28, 2024

By: 

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