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Appellate Division Opinion

Township of Jackson Plaintiff-Respondent vs.
Getzel Bee, LLC Defendant-AppellantPRB000001

Correspondence from Anthony DellaPelle, Esq.
to Borough Clerk dated April 27, 2022PRB000022

PRELIMINARY STATEMENT

Pursuant to R.2:12-4, we call the Court's attention to the recent Appellate Division Opinion in the consolidated appeals of Township of Jackson v. Getzel Bee LLC and Township of Jackson v. Bellevue Jackson LLC Docket A-0590-23 and A0599-23 (PRB000001) While the Opinion can be distinguished on the facts, the opinion and holding is based upon the predicate that the Federal and State Constitutions and New Jersey's statutes require that there be a municipal ordinance that sets forth the actual proposed public purpose in order for the municipality to duly exercise its power of eminent domain under N.J.S.A.20:3-8).

The above referenced Opinion involved separate appeals from identical orders of the law division authorizing condemnation and the appointment of commissioners against the LLC owners of their respective properties. The court stated that, "the record shows the lots are being condemned and combined with land the Township already owns to exchange them for land to be used for open space." In the original ordinance the use was to be open space. The court found "the township had failed to demonstrate the statutorily required public use of the condemned land, and the trial court erred in determining the Township had validly exercised its eminent domain authority to condemn the properties." (PRB000003) (emphasis added)

The opinion is based upon the “public use requirement” and because the power to condemn private property is grounded in the Federal and New Jersey Constitutions, the property acquired must be taken for a stated public purpose. The opinion states that statutes granting the power of eminent domain are to be construed strictly as they involve property rights protected by the Federal and State Constitutions; thus, strict adherence to the eminent domain act, N.J.S.A.20:3-1 to 50 and the Local Lands and Buildings Law, N.J.S.A.40A:12-1 to 38, is required.

The decision makes clear that municipalities as local entities must adhere to the conditions placed on their eminent domain powers and their legislative decisions are still bound by constitutional and statutory limitations on their legislative power. Here, the opinion is clearly applicable to the lack of the Township’s ordinance establishing a clearly articulated public purpose in this case under review.

After disposing of a collateral estoppel issue not relevant here, the Getzel Bee,LLC, opinion reversed the orders holding that the Township had duly exercised its owner of eminent domain because the Township did not plan to use the property for its legislative designated purpose of open space and “has not articulated any valid public use of the condemned land.” Then, the opinion concludes adding that: “as there is no ordinance that sets forth the actual

proposed public purpose of lots 84 and 90, a requirement of the Federal and State Constitutions and New Jersey's Eminent Domain Act...we decline to remand this matter to the municipality.”

ARGUMENT
POINT I
THE GETZEL BEE,LLC OPINION IS
CLEARLY IN CONFLICT WITH THE OPINION UNDER REVIEW.
AREAS OF CONFLICT

A. To the extent that the opinion under review and the plaintiff try to shift blame onto the property owner for not attending the public hearing on the ordinance, not filing an action in lieu of prerogative writ, or otherwise blaming the victim, the Getzel Bee,LLC opinion clarifies that a challenge under the Eminent Domain Act offers the exclusive procedure for a property owner's right to challenge the government's authority to condemn its private property including “jurisdiction to determine the authority to exercise the power of eminent domain”. (PRB000004,19,20)

B. The opinion under review states that courts use a limited and deferential standard when reviewing a municipality's decision to use its eminent domain power, citing Twp of West Orange v. 769 Assoc. LLC, 172 N.J. 564, 571-572. “Ordinarily when a municipality adopts an ordinance in the exercise of the power of eminent domain, that determination is entitled to great

deference,” citing Boro of Essex Fells v. Kessler, 289 N.J. Super. 329, 337 (Law Div. 1995).

However, the court in Getzel Bee, LLC (PRB000009) is more discerning, and recognizes that the Federal and State Constitutional limits are mandatory provisions and that strict adherence to the eminent domain act and the local land and buildings law is required. After the strict statutory and constitutional requirements are met, discretion may be afforded as to what property may be taken for public use.

This opinion under review did not apply strict construction. N.J.S.A.40A:12-5(a) requires the adoption of an appropriate ordinance including a proposed public use. An ordinance is a distinctively legislative action, and it requires public hearings and public input. Statements by the mayor or borough attorney are simply empty and not authorized by statute.

C. The most important point of conflict is that the opinion under review unequivocally finds that the enabling statute N.J.S.A.40A:12-5(a) “does not require that the ordinance authorizing the condemnation of property specify the public use to which the municipality intends to put the property”. (DPC015). Similarly, the court finds there is no requirement under the Eminent Domain Act, nor case law citing Twp. of Hillsborough v. Robertson, 260 N.J. Super.37, 42 (Law Div. 1992).

In contrast, the Appellate Division opinion in Getzel Bee, LLC, points to the New Jersey and Federal Constitutional limitations that require that property can only be acquired by the government for a “public use.” Statutes granting the power of eminent domain are to be strictly construed to protect these private property rights including specifically the Local Lands and Buildings Law, N.J.S.A.40A:12-5. Thus, the opinion properly finds that the “Township has failed to demonstrate the statutorily required public use of the condemned land, and the trial court erred in determining that the Township has validly exercised its eminent domain authority to condemn properties.” (emphasis added).

The statute requires that only by ordinance can the municipality authorize and provide for the acquisition of any real property. Strict construction and constitutional limitations require that the provision for such acquisition include a clearly articulated proposed public use. The proposed use is intrinsic to the authorization to acquire the property.

The Court also found a second ordinance, adopted after defendants’ opposition was raised, to be also defective in that while it elaborated and stated the condemnation of the lots was necessary to effect a land swap agreement it did not identify the proposed use of the condemned lots.

D. An effort to distinguish Getzel Bee, LLC on the facts, does not direct itself to the underlying predicate of Getzel Bee, LLC, that strict

construction of the Local Lands and Buildings Law viewed from the perspective of the constitutional limitations on the power of eminent domain require the enabling ordinance to specify the proposed use of the property. The opinion is based on the fact that a proper proposed public use is constitutionally essential to the proposed authorization.

It would appear that both the trial court and the appellate division are reading Village of South Orange v. Alden, 71 N.J. 362,366 (1976) and Millburn v. Pitt, 68 N.J. 424 (1975) too broadly, as if the town can cavalierly change the use whenever they “revise their development ideas”.(DPC000009)

The court in South Orange v. Alden, meant nothing more than that a condemnee whose parking lot was taken for a public parking lot “cannot have any legal binding assurance that the public use of the parking lot will be indefinitely continued”. In Millburn v. Pitt, 68 N.J. 424 (1975). There was a legitimate change of use to the restrictive covenant, years after the subdivision had been built out and the limitation to residential use was changed to parking for a public library. The change in use was based upon a legitimate change of circumstances twenty years after development of the tract. Very different from granting such flexibility at the time of taking.

Following the approach adopted by the appellate division in the instant case, the legislative body does not ever have to designate a public use, and the

property can be used for anything at all, or even sold eventually to a third party under subsection (d) of N.J.S.A.40A:12-5. The requirement of ordinance, “that the real property, can no longer be used for the purposes for which it was originally acquired” could be satisfied by simply referring to some statement by any municipal representative such as the mayor, attorney, individual councilman, borough clerk, or some clerical staff member. In this case, the property could now be sold to a developer to develop the multi-million dollar ocean front homes that the residents have been talking about as the best use of the property. Since the motel can now finally be demolished this will eliminate the police calls and rowdy conduct caused by winter residents at the problem motel. Allowing the Borough a much more effective course of action in eliminating the concerns as outlined in the foot note (1) DPC0011-12). However, this procedure was previously condemned by the Appellate Division in Twp of Pemberton vs. Berardi 378 N.J. Super. 430,447-448 (App. Div. 2005).

Also, the freedom to condemn the property and then decide on a use later is precisely the behavior previously rejected in Borough of Glassboro v. Grossman, 457 N.J. Super. 416,433 (App. Div. 2019). Such rejection is necessitated by the public use, constitutionally required. Cf CRDA v. Birnbaum, 458 N.J. Super. 173 (App. Div. 2019)

The opinion here under review states:

Indeed, during the pendency of this appeal, the borough was informed of the need for a new public drinking water well and determined that the property was well suited for such a use. This is precisely the sort of eventuality that underlies the need for flexibility in the uses and purposes to which property obtained through eminent domain can be put.

That, we suggest is the kind of dangerous language and “slippery slope” that erodes the constitutional protection the public and property owners were intended to enjoy under both the New Jersey and US Constitutions.

The Borough has not turned square corners here. The Borough Council has never to this day taken any position on a use for “which the property was originally acquired,” despite being questioned at public meetings on this issue.

Further, counsel has been less than forthcoming and perhaps petitioner can be faulted for trying to avoid comments on the conduct of counsel, trying to keep the focus on the legal and constitutional issue. But, to clarify, the record does not reveal anything said at the public hearing on the ordinance that said anything about the intended use. The Borough’s appendix to the Appellate Division includes all the correspondence between Borough Counsel and Shree’s prior counsel, Anthony Della Pelle, Esq. except his letter of April 27, 2022 on behalf of Shree Jyoti, LLC objecting to the ordinance as proposed as not providing a proper authorization for the use of eminent domain and requesting to be provided with the legislative basis for any proposed acquisition and to also

identify the alleged public purpose of any such proposed acquisition.

(DRB000022)

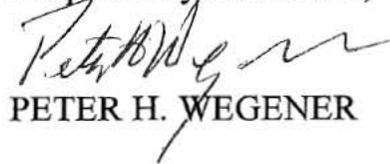
The Borough's letter brief complains about the two year delay and frustration, then says that if the petition is granted "all that the Borough would have to do is adopt the ordinance and reacquire the property." Obviously, that option was the most appropriate action for the Borough to take, when objection to the ordinance was made in the first place over two years ago.

The Borough Council has never gone on record supporting the idea of using the most valuable residential real estate in town, on the ocean front, for a parking lot.

CONCLUSION

The legislative intent of subsection (a) of the Local Land and Buildings Law specifically, N.J.S.A.40A12-5 requires an ordinance to authorize a taking which can only be allowed for a public use by the Constitution of the State and Federal governments. Subsections (c) and (d) clarify the intent of subsection (a) that the ordinance authorizing the taking satisfy the public use requirement by specifying the "use for which the property was originally intended." Otherwise, the language in (c) and (d) is meaningless.

Respectfully Submitted,



PETER H. WEGENER