

NEW JERSEY EMINENT DOMAIN AFTER GRASSBORO V. GROSSMAN AND CRDA V. BIRNBAUM

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Two recent Appellate Division decisions have added significantly to the body of New Jersey eminent domain jurisprudence. Though both rest heavily on the statutory provisions underlying the respective property acquisitions at issue, the principles they collectively establish have broader reach and should be considered integral components of all New Jersey legislative constructs authorizing condemnation. Succinctly stated, the two decisions conflate to the following principle: A governmental entity initiating eminent domain proceedings in this State must be prepared to demonstrate a reasonable necessity for acquiring the subject property that is linked to an identifiable project advancing a legitimate public purpose, the realization of which is reasonably anticipated in the foreseeable future.

In the first case, *Borough of Glassboro v. Grossman* (App. Div., slip op., January 7, 2019), the court dismissed a condemnation complaint filed by a municipality under the Local Housing & Redevelopment Law, N.J.S.A. 40A:12A-1 et seq. ("LHRL") on the grounds that it was unable to credibly demonstrate (i) a specific redevelopment project, (ii) with a sufficient link to the targeted property, and (iii) a reasonable necessity for taking the latter in advancement of the former. The court's statutory analysis under the LHRL and the procedure it established for a plenary hearing to litigate the foregoing are the subject of a previous article by the author in this publication. See "[Court Establishes New Procedure For Redevelopment Condemnations: The 'Glassboro Hearing'.](#)"

The second case, *Casino Reinvestment Development Authority v. Birnbaum* (App. Div., slip op. February 15, 2019) involved Article 12 of the Casino Control Act, N.J.S.A. 5:12-1 et seq. ("CCA"), and was also the subject of an article in this publication so will thus not be discussed at length. See "[In Atlantic City Eminent Domain Case, Appellate Division Sizes Up 'Land Banking'.](#)" *New Jersey Law Journal*, February 25, 2019. The CCA not only established and empowered a specific state entity, the Casino Reinvestment Development Authority ("CRDA"), but also vested it with wider latitude to condemn property than is afforded to municipalities under the LHRL. The court nonetheless dismissed CRDA's complaint seeking condemnation of a particular property given the substantial uncertainties underlying the project for which the property was ostensibly sought.

The foundational principle on which both decisions rest is that even when governmental undertakings appear cloaked with adequate statutory authorization, they remain subject to judicial review against a standard of "fraud, bad faith, or manifest abuse of authority." Cf. *Township of West Orange v. 769 Associates, LLC*, 172 N.J. 564 (2002). Moreover, this principle cannot be legislatively overridden because it derives from rights vested in private

citizens by both the United States and New Jersey State Constitutions. Given the number of different statutes allowing for the taking of private property (listed in Fn. 6 of *Birnbaum*), this warrants further consideration.

Stepping back from the subject condemnation actions, what must be remembered is that neither the Federal nor State Constitution *creates* the government's right of eminent domain; quite contrarily, they limit it. Indeed, in *Abbott v. Beth Israel Cemetery Association of Woodbridge*, 13 N.J. 528 (1953) the Court observed that "[t]he power of eminent domain is a high sovereign power that has been allotted to the legislative branch of government since the Magna Carta." Further, "constitutions do not give, but merely place limitations upon, the power of eminent domain which would otherwise be without limitation." *Id.* While a more in-depth historical analysis is beyond the scope of this article, perhaps the foregoing can most readily be seen when one considers that our right as U.S. citizens not to be "deprived of property without due process of law" nor have our "private property ... taken for public use without just compensation" is set forth in the Fifth Amendment to the Constitution, adopted in 1791 as part of the Bill of Rights. Importantly, those are rights of *citizens*, not rights of *government*. The United States Constitution is otherwise silent as to eminent domain.

In 1866 the Fourteenth Amendment made the foregoing applicable to the states but did not significantly affect the private property rights of New Jerseyans, whose State Constitution had always guaranteed "certain natural and unalienable rights, among which are those of ... acquiring, possessing, and protecting property[.]" See Art 1, §1. Again, however, the pre-existence of government's inherent right to take private property for public use is unstated but clearly presumed. This was subsequently amplified in the 1946 State Constitution which specifically provided that "redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken." See Art. 8, §3, ¶1.

Thus, whether involving a condemnation for the elimination of blight under the LRHL as in *Glassboro*, for an Atlantic City casino development project under the CCA as in *Birnbaum*, or any other statute providing for the exercise of eminent domain, it must be acknowledged that, assuming a legitimate public purpose, government already possessed that right. Cf. *Wilson v. Long Branch*, 27 N.J. 360 (1958) ("Even if there were no express constitutional sanction for redevelopment of the type described in [the predecessor LRHL], ample authority to do so might be found in the well of police power.") However, the right of governmental entities to take private property is subject to three principal constraints: The taking must be (i) for a valid public purpose, (ii) upon payment of just compensation, (iii) pursuant to a procedure affording the landowner due process of law. Cf. *Township of West Orange, supra*.

Neither procedural due process nor just compensation were issues in *Glassboro* or *Birnbaum*. Instead, the critical issue in each case came down to the first requirement, i.e., whether a governmental taking of private property for a *future* use passes constitutional muster as a valid public purpose.

Once again stepping back from the specific to the general, the overarching principle should first be noted that the identification and scope of a particular public use is a legislative function. Hence, the role of the judiciary is not to substitute its judgment for a legislature's in that regard; rather, it is only to determine whether the asserted public use is palpably lacking in any reasonable foundation. Cf. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984). Returning then to the specific, a careful reading of *Glassboro* and *Birnbaum* affirms the right of government to take private property for a future use; provided, however, that if challenged, the condemnor is able to offer satisfactory proofs of an identifiable project anticipated to be undertaken in the foreseeable future, and a reasonable necessity linking the targeted property to that project.

Interestingly, *Birnbaum* reaches this conclusion notwithstanding a specific provision in the CCA authorizing condemnation of property by CRDA that it finds "necessary to complete a project ... whether for immediate use." See *N.J.S.A. 5:12-182(b)*. CRDA argued that by virtue of this specific statutory authorization, it was unconstrained by a temporality requirement. Citing to its preceding *Glassboro* decision, however, the court rejected this assertion and ruled that "our Legislature did not intend, and the Constitution does not permit, property to be acquired and to remain idle indefinitely, without a reasonable assurance that the proposed plan to justify the taking will be implemented."

To summarize, the two cases stand for that proposition that even when an attempted condemnation is instituted by a New Jersey governmental entity in good faith and in scrupulous accordance with all requisite statutory procedures, it will nonetheless be deemed constitutionally infirm if the practical effect is merely to "landbank" the property for a future use that lacks *either* present specificity *or* a realistic timeline for project commencement.

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