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IS EMINENT DOMAIN LOSING ITS EMINENCE?

The use of eminent domain -- the "forced sale" of property to the government -- has been the subject of increasing scrutiny since the U.S. Supreme Court decided *Kelo v. City of New London*. In that case, the nation's highest court ruled that the use of eminent domain in a redevelopment plan was a permissible taking of property if the likely impact was to increase property-tax revenues.

Critics noted that the redevelopment plan wrongfully forced middle-class property owners out of their homes to make way for luxury condos, office space, and the headquarters of a pharmaceutical company. After losing in the U.S. Supreme Court, property-rights activists convinced a number of states to limit the use of their eminent domain powers.

Recently, as a result of an appellate decision in *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, New Jersey has joined that trend.

The Gallenthins owned an undeveloped parcel of land in Paulsboro since 1952. Prior to 1963, its main use had been as a deposit site for materials dredged by the U.S. Army Corps of Engineers from neighboring Mantua Creek. While a wild-growing reed that neutralizes soil pollutants had been harvested from the site, the extent of Gallenthins's profits from that venture, if any, were unknown.

In 1998, Paulsboro adopted a plan seeking to redevelop different areas of the borough in order to aid the local economy, and the Gallenthins's parcel, along with neighboring tracts of land, were targeted for re-development.

In 2003, the borough's Planning Commission held public hearings to determine whether the Gallenthins's property was "in need of redevelopment" and thus would be susceptible to appropriation by way of eminent domain. The Commission, using an aggressive interpretation of New Jersey law, ruled that because the site was not "fully productive," it was eligible for a taking.

After the Commission ruled against the Gallenthins, the family brought suit in New Jersey state court to stop the forced sale, alleging that it was violative of the state's constitution.

While the New Jersey state constitution grants the government eminent domain power, the property must be blighted, the state must give fair compensation, and, the property owner must be given due process under law.

Since their property wasn't "blighted," the Gallenthins alleged that the exercise of the eminent domain power was unconstitutional. Paulsboro countered that the Planning

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Commission's ruling was legal under a statute enacted pursuant to the New Jersey eminent domain powers. That law provides that property may be deemed "in need of redevelopment" if a planning commission finds a "stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare."

Paulsboro interpreted that law to mean that a property was vulnerable to a taking whenever the site was not "fully productive."

New Jersey's highest court viewed that interpretation as overly broad and noted that, "If such an all-encompassing definition of 'blight' were adopted, most property in the State would be eligible for redevelopment." Following the lead of other state courts, New Jersey defined blight as "deterioration or stagnation that has a decadent effect on surrounding property."

As a result, the planned taking of the Gallenthins's property was found to be improper because it was premised upon a misguided interpretation of governing law. However, in an interesting twist, the New Jersey Supreme Court did not foreclose the possibility that the property could be deemed "in need of redevelopment" on other grounds.

While it is unclear how this ruling will ultimately impact New Jersey, the case should put an abrupt end to excessive or abusive use of the eminent domain power.

Will the Empire State follow suit? (We wouldn't bet on it!)

If you have any questions or comments about this article, please contact partner Jonathan H. Newman at 212-619-5400 x 205 or email him at JNewman@fnfllp.com. To join the debate, visit us at www.nyreblog.com.

WE'VE GOT A SUPER LAWYER!

In our business, accolades are seldom sought.

Knowing that we have done our best for our clients serves as its own reward.

That being said, it is with great pride we announce that our partner, Lucas A. Ferrara, has been selected as a "Super Lawyer."

Lucas is one of 4,000 lawyers -- out of approximately 130,000 lawyers in the New York Metropolitan area -- chosen to be included in the organization's prestigious publication. In addition to Lucas's photograph and biographical information being featured in the October 2007 edition of Super Lawyers Magazine, he also appeared in the Super Lawyers directory which was inserted in the Sunday, September 23rd edition of the *New York Times*.

Congratulations, Lucas!

LETTER TO THE EDITOR:

I always enjoy reading your newsletter. Keeps me in touch and up to date on important issues. Keep them coming!

Ms. Frances Kaplan, Brooklyn, NY

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WHERE WAS SHE HIDING FOR 9 YEARS?

If you're just a "roommate" -- that is, you are not named in a lease or pay rent directly to your landlord -- the law may consider you to be a "licensee," which means you can be evicted once the person who granted you permission to occupy the space is no longer in possession of the property (or no longer wants you there). An exception to that rule exists if you're a "family" member who is continuing to reside in a regulated apartment upon the death or departure of the tenant of record.

In *Matter of New York City Housing Authority Hammel Houses v. Newman,* Ellamae Newman claimed she was entitled to remain in her apartment because she had lived there since 1995 as the lawful wife of the deceased tenant of record.

Both the Housing Part of Queens County Civil Court and the Appellate Term, 2d and 11th Judicial Districts, ruled against the Housing Authority's efforts to evict Newman from her apartment. On appeal, the Appellate Division, Second Department, disagreed with the lower courts and reversed. Since the Housing Authority was never made aware of, nor consented to, Newman's occupancy, the AD2 concluded that she lacked a legal entitlement to remain.

Federal regulations mandate that residents of federally funded, low-income housing units be limited to family members who are identified in the lease, with tenants required to request Housing Authority approval before additional family members may be considered authorized occupants.

Courts have forgiven noncompliance with that procedure, particularly when the Housing Authority was aware of the disputed occupant but took no action against that individual. The AD2 found an exception inapplicable here because Newman had failed to obtain written permission to reside in the apartment and because she had never been listed as an occupant on any of the annual income affidavits submitted to the Housing Authority.

How is it possible that the Housing Authority was unaware of this tenant's spouse? And, why was she never listed on income affidavits? (We can't figure this one out.)

NO CLAIM FOR NEGLIGENT WAXING?

We found a couple of cases involving negligent waxing and they had absolutely nothing to do with hirsutism. (Go figure.)

Rose Davies sued the City of New York claiming that her slip and fall, and the injuries that resulted therefrom, were due to "excessive waxing" of the floors of a local youth center.

According to the Appellate Division, First Department, in *Davies v. City of New York*, just because a floor is "shiny" does not mean the surface is dangerous or that the work in question was negligently performed.

And, since Davies's case rested solely upon her observation of the floor's condition, the AD1 did not believe that evidence sufficiently established the City's breach of its duty to maintain the premises free of conditions that would present harm.

Similarly, in *Kudrov v. Laro Services Systems, Inc.*, Natasha Kudrov slipped on a "shiny, slippery" floor of Manhattan's Port Authority Bus Terminal. Since Kudrov could not remember there being any water or debris, and the accident report reflected that the surface was "clean and dry," the AD1 again concluded that no liability could attach. As the appellate court observed:

> Absent proof of the negligent application of wax or polish, the fact that a floor is slippery by reason of its smoothness or having been polished does not give rise to an inference of negligence ....

Unfortunately, we're unable to wax poetic about these cases.

If you have any questions or comments about the above articles, please contact partner Lucas A. Ferrara at 212-619-5400 x 211 or email him at LFerrara@fnfllp.com. To join the debate, visit us at www.nyreblog.com

TENANT EVICTED FOR DENYING ACCESS

Unreasonably refusing a landlord access to your apartment can result in your eviction.

In *3420 Newkirk LLC v. Sulker*, the Sulkers were unwilling to allow their landlord entry into their rent-stabilized unit for the purpose of addressing a "severe water condition" that not only impacted their apartment but that of a "disabled elderly person, on dialysis, whose rent subsidy was in danger of termination owing to the deteriorated conditions therein."

After a trial, the Kings County Civil Court found that the tenants had violated a substantial obligation of their tenancy by refusing to allow their landlord access to perform repairs.

On appeal, the tenants contended they were at a severe disadvantage since they had been unrepresented at the time of trial. Finding no irregularity in the way the proceeding was conducted, the Appellate Term, 2d and 11th Judicial Districts, offered the following quote:

> "[I]t is well settled that a litigant who appears pro se at trial does so at his [or her] own peril and acquires no greater rights than any other litigant" ... and, in any event, the record does not reveal that the court below failed to apply the law accurately and impartially, or that it improvidently exercised its discretion in its ruling with respect to the conduct of the proceedings and the admission of evidence.

The tenants' remaining arguments, including but not limited to, that the landlord's intention was to harass them and that the case was in retaliation for their attempts to form a tenants' association, were summarily discounted by the appellate court as contrary to the weight of the evidence and governing law, and, the judgment of possession was permitted to stand.

In other words, these tenants were deaccessed.

If you have any questions or comments about this article, please contact partner Robert Finkelstein at 212-619-5400 x 227 or email him at RFinkelstein@fnfllp.com. To join the debate, visit us at www.nyreblog.com.

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