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## Eminent Domain-Urban Renewal-Broader Powers to Take Private Property for Public Use

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EMINENT DOMAIN—URBAN RENEWAL—BROADER POWERS TO TAKE PRIVATE PROPERTY FOR PUBLIC USE—Defendant city instituted a comprehensive urban redevelopment plan under which condemnation and purchase of blighted property<sup>1</sup> would be followed by extensive demolition and clearance. This land was then to be sold subject to certain use restrictions to private developers, chiefly for light industry. Plaintiff, an owner of real estate described as “improved and enhanced with . . . a good, sound, sanitary, modern and well-kept building,”<sup>2</sup> brought an action in a lower state court

<sup>1</sup> A “blighted area” is statutorily defined as an area marked by such conditions as “excessive land coverage,” “tax or special assessment delinquency exceeding the fair value of the land,” and “improper subdivision or obsolete platting,” as well as the lack of sanitary facilities and presence of fire hazards commonly associated with slum districts. WASH. REV. CODE ANN. § 35.81.010(2) (Supp. 1961).

<sup>2</sup> Principal case at 374, 378 P.2d 466.

seeking a declaratory judgment against the constitutionality of the Washington Urban Renewal Law,<sup>3</sup> and an injunction to prevent defendant city from condemning his property under the statute. The owner contended that resale to private persons would constitute use of the eminent domain power for a private purpose. The trial court gave summary judgment for the defendant city. On appeal, *held*, affirmed, by a five-to-four decision. Condemnation, acquisition, and demolition by public authority of substandard or blighted areas of urban land is a public use justifying the exercise of the eminent domain power, and subsequent resale of cleared land to private persons is only incidental to the main, constitutionally valid purpose. *Miller v. City of Tacoma*, 61 Wash. 2d 374, 378 P.2d 464 (1963).

Overwhelming pressure generated in this century by the slow physical and social decay of the nation's great cities has forced courts to re-evaluate traditional constitutional limitations upon the taking of private property for public use. Local governments have long been aware of residential and industrial slum problems, but not until passage of the Federal Housing Act of 1949<sup>4</sup> were states financially able to initiate extensive slum clearance and public housing programs. By 1958 all but eight states had passed legislation permitting local governments to undertake federally assisted urban renewal plans;<sup>5</sup> the principal case adds Washington to the list of thirty-one states whose highest courts have upheld condemnation under such urban renewal laws.<sup>6</sup> The Washington statute upheld in the principal case is typical of the statutes found in many states.<sup>7</sup> After declaring the necessity of removing blighted areas constituting a menace to public health, safety, and morals,<sup>8</sup> the law gives municipalities authority to determine the existence of blighted areas,<sup>9</sup> to draw up plans for redevelopment<sup>10</sup>

<sup>3</sup> WASH. REV. CODE ANN. §§ 35.81.010-.910 (Supp. 1961).

<sup>4</sup> 63 Stat. 413 (1949), 42 U.S.C. §§ 1441, 1451-60 (1958), providing for federal loans and capital grants to cover up to two-thirds of the cost of housing and renewal projects. For a history of federal statutory programs in public housing and urban renewal, see Comment, 72 HARV. L. REV. 504 (1959).

<sup>5</sup> 72 HARV. L. REV. 504, 507 n.29 (1959).

<sup>6</sup> See cases cited in principal case at 393-95, 378 P.2d at 476-77. Three courts have ruled to the contrary. The decision in *Housing Authority v. Johnson*, 209 Ga. 560, 74 S.E.2d 891 (1953), ruling against an urban renewal plan, was overruled by constitutional amendment, GA. CONST. art. XVI. The Florida court severely limited an earlier decision against renewal of a blighted area, *Adams v. Housing Authority*, 60 So. 2d 663 (Fla. 1952), by its ruling upholding a slum clearance plan, *Grubstein v. Urban Renewal Agency*, 115 So. 2d 745 (Fla. 1959). Only South Carolina, in *Edens v. City of Columbia*, 228 S.C. 563, 91 S.E.2d 280 (1956), is still firmly on record in opposition to urban renewal programs involving resale to private owners.

<sup>7</sup> E.g., CAL. HEALTH & SAFETY CODE §§ 33000-985; ILL. ANN. STAT. ch. 67½, §§ 63-91 (Smith-Hurd 1959); MICH. COMP. LAWS §§ 125.901-922 (1948); N.Y. PRIV. HOUS. FIN. LAW §§ 200-21.

<sup>8</sup> WASH. REV. CODE ANN. § 35.81.020 (Supp. 1961).

<sup>9</sup> WASH. REV. CODE ANN. § 35.81.050 (Supp. 1961).

<sup>10</sup> No federal loans or capital grants are approved by the Federal Housing and Home Finance Administrator until the authority requesting assistance presents "a workable program for community improvement." 75 Stat. 153, 172 (1961), 42 U.S.C. § 1451(c) (Supp. IV, 1963).

and to submit them to public hearings.<sup>11</sup> The city may then proceed to condemn land in the blighted area, and, once the land is cleared, dispose of it to private developers.<sup>12</sup>

The landowner in the principal case attacked the condemnation on two major grounds. First, petitioner challenged the taking of *his* property, which admittedly constituted no danger to public health or safety; second, he charged that the "public use" requirement imposed on the exercise of the eminent domain power prohibited resale of condemned land to private interests. Although plans for redeveloping predominately slum or blighted areas often include property not at all substandard, courts have uniformly held that no relief can be given on that basis. This determination frequently results from the considerable weight courts give to legislative decisions as to the necessity for taking particular property;<sup>13</sup> in other cases, courts have stated that the character of specific condemned property is defined by the area as a whole, and that exemption of some properties from a scheme of total area redevelopment would be impractical.<sup>14</sup> Although the court in the principal case adopted the latter point of view, it nevertheless seems exceedingly harsh to force an owner of well-kept land to relocate in the name of slum clearance. The Federal Housing Act originally required that urban renewal plans, in order to qualify for loans or grants, include provision for relocation of displaced residents.<sup>15</sup> Unfairness to owners of well-kept land persisted, however, and was among the factors leading to the 1954 amendment to the act,<sup>16</sup> which provided for federal loans, grants, and

<sup>11</sup> WASH. REV. CODE ANN. § 35.81.060(3) (Supp. 1961).

<sup>12</sup> WASH. REV. CODE ANN. § 35.81.081 (Supp. 1961): "Condemnation for urban renewal of blighted areas is declared to be a public use. . . ." Sale of condemned land to private developers is conditioned by restrictions on the possible uses of the land. WASH. REV. CODE ANN. § 35.81.090(1) (Supp. 1961).

<sup>13</sup> Housing & Redevelopment Authority v. Minneapolis Metropolitan Co., 259 Minn. 1, 104 N.W.2d 864 (1960); Kaskel v. Impellitteri, 306 N.Y. 73, 115 N.E.2d 659 (1953); Schenck v. City of Pittsburgh, 364 Pa. 31, 70 A.2d 612 (1950). In Kasken v. Impellitteri, *supra*, the court upheld a planning agency's determination of slum conditions despite evidence that in the area condemned only 10% of the buildings were substandard, and only 2% could properly be considered "slum." In Boro Hall Corp. v. Impellitteri, 128 N.Y.S.2d 804 (Sup. Ct. 1954), the objecting landowner argued that since some properties within the renewal area were not being condemned, it was discriminatory to take his. The court yielded to the administrative decision in that case as well. A similar argument was posed by the property owner in the principal case, but the majority did not deal with the contention directly.

<sup>14</sup> Berman v. Parker, 348 U.S. 26, 35 (1954); Graham v. Houlihan, 147 Conn. 321, 160 A.2d 745, 749 (1960); Randolph v. Wilmington Housing Authority, 37 Del. Ch. 202, 139 A.2d 476 (Sup. Ct. 1958); Herzinger v. Mayor & City Council, 203 Md. 49, 98 A.2d 87 (1953); Hunter v. Norfolk Redevelopment & Housing Authority, 195 Va. 326, 78 S.E.2d 893 (1953).

<sup>15</sup> 63 Stat. 416 (1949), 42 U.S.C. § 1455(c) (1958), see Leach, *The Federal Urban Renewal Program: A Ten-Year Critique*, 25 LAW & CONTEMP. PROB. 777, 788 (1960); Millsbaugh, *Problems and Opportunities of Relocation*, 26 LAW & CONTEMP. PROB. 6, 28-31 (1961).

<sup>16</sup> 68 Stat. 622 (1954), 42 U.S.C. §§ 1450-62 (1958). See also S. REP. NO. 1472, 83d Cong., 2d Sess. (1954).

mortgage insurance to assist community-wide programs of neighborhood conservation and rehabilitation.<sup>17</sup> This amendment has caused a trend toward plans designed to redevelop only specific slum or blighted properties,<sup>18</sup> and it may help remedy the anomaly of dismantling sound structures and housing as part of a sweeping program of renewal. Despite this trend, owners of well-kept land, like the plaintiff in the principal case, will continue to have their land condemned and taken from them. This result is probably justifiable, however, for if some owners could exempt their land by proving that it was not blighted, the door would be open to numerous spurious claims which could frustrate slum clearance projects by tying them up in the courts for years. The proper remedy for owners whose land does not merit condemnation lies in an effective program of public hearings prior to drawing up the final plan.<sup>19</sup> By giving all interested parties an opportunity to question the planning body on the necessity of taking particular property, individual rights can be given proper protection without sacrificing the community's need for expeditious urban renewal.

The plaintiff's second objection contested the power of the state to sell condemned land to private developers; this contention bears directly upon the usual constitutional provision that private property must not be taken for public use without fair compensation.<sup>20</sup> Courts for many years felt bound by the view that "public use" meant "use by the public,"<sup>21</sup> and consequently viewed any resale of condemned property to private persons with disfavor. The advent of the need for sweeping urban renewal made many courts realize that it was impractical to require cities to retain title to all the land which had to be condemned in order effectively to clear slums, and the courts have consequently discarded this limited definition of public use. One line of authority simply redefines "public use" in terms of "public benefit,"<sup>22</sup> thereby avoiding any requirement that the public continue to own condemned property. Under this view, resale is held to be only incidental to the main purpose of slum clearance.<sup>23</sup> The translation of "public use" into "public benefit" releases cities from the burden of land ownership and the resulting diminution of the tax base. Another

<sup>17</sup> Conservation and urban rehabilitation refer to plans designed to cure substandard housing conditions without condemning and totally demolishing existing structures. The cost of such programs is usually borne by both public and private sources. Rehabilitation should be distinguished from urban renewal, which contemplates using only public capital in plans of condemnation and destruction of slums and blighted areas.

<sup>18</sup> Comment, 72 HARV. L. REV. 504, 505, 539 (1959).

<sup>19</sup> *Id.* at 514, 551.

<sup>20</sup> *E.g.*, U.S. CONST. amend. V; WASH. CONST. art. I, § 16, amend. 9.

<sup>21</sup> *E.g.*, *Reed v. Seattle*, 124 Wash. 185, 213 Pac. 923 (1923); *Neitzel v. Spokane Int'l R.R.*, 65 Wash. 100, 117 Pac. 864 (1911); COOLEY, CONSTITUTIONAL LIMITATIONS 766 (7th ed. 1903). *But see* NICHOLS, EMINENT DOMAIN § 40 (2d ed. 1917).

<sup>22</sup> *Berman v. Parker*, 348 U.S. 26 (1954).

<sup>23</sup> *Id.* at 33-34; *Randolph v. Wilmington Housing Authority*, 37 Del. Ch. 202, 139 A.2d 476 (Sup. Ct. 1958); *Foeller v. Housing Authority*, 198 Ore. 205, 256 P.2d 752 (1953); *Hunter v. Norfolk Redevelopment & Housing Authority*, 195 Va. 326, 78 S.E.2d 893 (1953).

accepted theory, which upholds urban renewal resale plans while remaining faithful to the old definition of public use, is that resale subject to restrictions which limit future utilization of land to publicly authorized purposes is a public use because it constitutes continuing proprietorship by the city.<sup>24</sup> Both of these theories were embraced by the court in the principal case.<sup>25</sup> These interpretations of public use have been almost unanimously adopted by courts to overcome the constitutional objection to resale of condemned land;<sup>26</sup> furthermore, the increased use of rehabilitation programs may eventually eliminate whatever remains of the resale issue, as well as the problem of condemning unblighted property. This trend toward rehabilitation is fostered in part by the difficulty of disposing of cleared land subject to use restrictions. One study made in 1960 showed that cities had resold less than one-third of the total acreage condemned.<sup>27</sup>

Most courts which have upheld the resale provisions of urban renewal laws, however, have found a direct relationship between taking coupled with resale and the traditional police power of the state to promote health, safety, morals, and the general welfare. The principal case, when contrasted with the Washington court's earlier decision of *Hogue v. Port of Seattle*,<sup>28</sup> clearly delineates a probable area of future conflict in the law of eminent domain. While the principal case upheld an urban renewal plan designed to eradicate slum conditions, the court distinguished this situation from that in the *Hogue* case, where the same statute was held unconstitutional when used to condemn fully-developed agricultural and residential land for construction of port facilities and industrial sites. The court in the *Hogue* case ruled that conditions such as "inappropriate or mixed uses of land or buildings, . . . faulty lot layout . . . , defective or unusual conditions of title . . ." <sup>29</sup> bore no relation to the maintenance of public health or safety. Moreover, the plan for disposing of the land did not bear directly upon public health or safety, but was designed merely to promote new industry. Since neither the taking nor the disposition came within the scope of the police power, the plan was consequently held an unjustified use of the power of eminent domain. Other courts presented with similar requests to extend the eminent domain power beyond the state police power have given the same answers.<sup>30</sup>

<sup>24</sup> *Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777, 266 P.2d 105 (1954), cert. denied, 348 U.S. 897 (1954); *Velishka v. Nashua*, 99 N.H. 161, 106 A.2d 571 (1954).

<sup>25</sup> The principal case in effect overruled previous cases cited note 21 *supra*, as well as *Matthews v. Belfast Mfg. Co.*, 35 Wash. 662, 77 Pac. 1046 (1904), and *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681 (1903).

<sup>26</sup> See cases cited in principal case at 476-77.

<sup>27</sup> *Brownfield, The Disposition Problem in Urban Renewal*, 25 LAW & CONTEMP. PROB. 732, 740 (1960) (7,743 acres condemned, 2,368 acres resold).

<sup>28</sup> 54 Wash. 2d 799, 341 P.2d 171 (1959).

<sup>29</sup> *Id.* at 812, 341 P.2d at 178-79.

<sup>30</sup> *Randolph v. Wilmington Housing Authority*, 37 Del. Ch. 202, 139 A.2d 476 (Sup. Ct. 1958); *Opinion of the Justices*, 152 Me. 440, 131 A.2d 904 (1957); *Opinion of the Justices*, 332 Mass. 769, 126 N.E.2d 795 (1955).

The pattern of permissible use of eminent domain power outlined by these courts involves a distinction between the taking of property and the disposal of the same land by the condemning authority. Where the process of taking is designed to serve a specific purpose traditionally within the scope of the police power, such as eradication of slums, courts deem the public use requirement satisfied and allow cities to dispose of the land as they see fit.<sup>31</sup> On the other hand, where the taking serves no purpose within the usual scope of the police power, courts will not permit disposal of the acquired land to go beyond purposes traditionally related to the police power.<sup>32</sup> The practical consequence of these rules is that cities must either retain title to the property and use it for a strictly governmental operation, or sell it to housing developers to alleviate a community-wide housing problem, a kind of resale which the courts have considered a valid exercise of the police power.<sup>33</sup> It seems anomalous that courts have been willing to apply the broad public benefit definition of public use to either takings or dispositions but not to both; no court has yet given a satisfactory explanation of this phenomenon. While use of the eminent domain power has historically been closely tied to police power purposes, there presently exist many pressing community needs which are only indirectly related to public health and safety. A broad definition of public use in terms of public benefit for both takings and dispositions has apparently been accepted by some courts, notably the Supreme Court,<sup>34</sup> and this development may foretell increasing judicial acceptance of a wider scope of purposes for which governments will be allowed to wield the power to condemn. This trend is evident in recent cases involving attempts to condemn land to improve the aesthetic appearance of communities.<sup>35</sup> Furthermore, one important state court has held that the presence of some "compelling economic need" is enough to warrant use of the power of eminent domain.<sup>36</sup> Just such a need was present in the *Hogue* case.

Although the burden of slum conditions and the need for new housing stand out as among the most pressing problems faced by local governments, many communities are also searching for ways to attract new and diversified

<sup>31</sup> See note 26 *supra*.

<sup>32</sup> Cases cited note 30 *supra*.

<sup>33</sup> Provisions for federal assistance seem to recognize this pattern, since the Federal Housing Act stipulates that an urban renewal program, in order to qualify for federal grants, must involve either a removal of slum conditions or the construction of residential housing upon condemned open land. Cities may, however, receive up to 10% of the total amount of capital grants authorized by the act for renewal programs which meet neither of these qualifications. 70 Stat. 1097 (1956), 42 U.S.C. § 1460(c) (1958).

<sup>34</sup> *Berman v. Parker*, 348 U.S. 26, 32 (1954); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161, 166 (1896). See also *Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777, 266 P.2d 105 (1954); *Gutknecht v. City of Chicago*, 414 Ill. 600, 111 N.E.2d 626 (1953); *Atwood v. Willacy County Nav. Dist.*, 271 S.W.2d 137 (Tex. Civ. App. 1954).

<sup>35</sup> *Housing & Redevelopment Authority v. Minneapolis Metropolitan Co.*, 259 Minn. 1, 104 N.W.2d 864 (1960); *Schenck v. City of Pittsburgh*, 364 Pa. 31, 70 A.2d 612 (1950); *Berman v. Parker*, 348 U.S. 26 (1954) (dictum).

<sup>36</sup> *Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777, 266 P.2d 105 (1958).

industry, or for means of improving the appearance of urban areas.<sup>37</sup> Allowing governments to justify disposal of condemned land solely on grounds of public benefit, while limiting takings to those justifiable under the narrower terms of the police power, seems an illogical and inconsistent interpretation of most state constitutions. Moreover, limiting either taking or disposal to police power purposes denies to local governments a proper means of meeting vital economic, social, and aesthetic needs. Critics of a broad use of the condemnation power, including the dissenters in the principal case, often charge that the government is telling landowners that it knows better than they what is the best utilization of their property.<sup>38</sup> Nevertheless, "no society has ever admitted that it could not sacrifice individual welfare to its own existence,"<sup>39</sup> and governments have for years told landowners in the path of a proposed highway that it knows better than they what is the more proper use of their land. In the mid-twentieth century the means of satisfying community-wide economic and social needs are as vital to a city as was the construction of a highway connecting that city with neighboring towns thirty years ago. Courts should broaden the permissible use of the power of eminent domain and allow governments to use the tools necessary for satisfying modern community needs.

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<sup>37</sup> See Comment, 23 GEO. WASH. L. REV. 730 (1955).

<sup>38</sup> Comment, 23 ALBANY L. REV. 386 (1959); Note, 34 TUL. L. REV. 616 (1960); 38 NOTRE DAME LAW. 210 (1963).

<sup>39</sup> HOLMES, THE COMMON LAW 37 (Howe ed. 1963). "Public policy sacrifices the individual to the public good." *Id.* at 41.