Florida Law Review

Volume 13 | Issue 3 Article 4

September 1960

Constitutional Urban Redevelopment

Alphones G. Condon Jr.

NOTES

CONSTITUTIONAL URBAN REDEVELOPMENT

Unregulated urbran growth nurtures decay. This is particularly true in those blighted and slum areas in which the lower income element lives. Present Florida law recognizes a distinction between blighted and slum areas.[1] Both, however, are characterized by a preponderance of dilapidated, unhealthy, and frequently unsafe dwellings. Further, it has been found that such deleterious conditions are conducive to crime and juvenile delinquency. Those who live within these areas usually fail to pay taxes or are consistently delinquent in payment. Thus the expenditure of public funds is grossly out of proportion to the amount received from these areas.[2]

The city, as a victim of blight or slums, possesses no inherent power to rid itself of this malady. A city exists by the grace of the state legislature, and it can exercise only those powers delegated by special or general acts of that body.[3] Legislation to alleviate the plight of the cities has taken the form of urban renewal or redevelopment acts. This note is devoted to judicial attitudes toward redevelopment acts. Emphasis is given to an analysis of the currently uncertain Florida position in this area.

EMINENT DOMAIN AND THE POLICE POWER

A workable solution of the slum problem would be passage of a development act that provides for land assembly and clearance as well as rehabilitation.[5] New York passed the first urban redevelopment corporation law in 1941.[6] The New York act and subsequent developmental legislation provide an effective means for land assembly and clearance as well as for rehabilitation.[7] Under most development acts, a city is authorized to acquire the fee to a blighted or

[1]Grubstein v. Urban Renewal Agency, 115 So. 2d 745 (Fla. 1959).

[2]Fla. Laws 1945, ch. 23077, §1.

[3]FLA. CONST. art. III, §24. For a history of the development of municipal corporations see Tooke, *Status of the Municipal Corporation in American Law*, 16 MINN. L. REV. 343 (1932).

[4]*E.g.*, Fla. Laws 1945, ch. 23077; ILL. ANN. STAT. ch. 67½ (Smith-Hurd Supp. 1959); N.Y. UNCONSOL. LAWS §§3401-26 (McKinney Supp. 1960).

[5]See FORDHAM, LOCAL GOVERNMENT LAW 922 (1949).

[6]N.Y. UNCONSOL. LAWS §§3401-26 (McKinney Supp. 1960).

[7]See note 4 *supra*.

slum area by outright purchase or by use of the power of eminent domain.

Eminent domain is the process of condemning private property for public use.[8] It is an inherent attribute of sovereignty, permitting the state to take private property for public use; it is not necessarily created by either constitution or statute.[9] The power is a dormant right in the sovereign until legislative action points out the occasions, modes, and agencies for its exercise.[10] The determination of what constitutes a public use is ultimately for the judiciary.[11] Although the exercise of the power of eminent domain by a city or a public redevelopment authority has generally been upheld,[12] exercise of this power by a private developer is subject to challenge.

The typical redevelopment act provides for sale or lease of purchased or condemned land to private developers who take the land subject to restrictions in the lease or the covenants running with the land. A general requirement for condemnation and sale is that it be for a public purpose. The majority of courts that have passed on the "public purpose" and "public use" issues with respect to redevelopment acts have upheld the corresponding enabling statutes.[13] At present only the states of South Carolina and Florida have cases, arising under general legislation, that declare redevelopment acts invalid.[14] It should be noted that these decisions invalidated the legislation because it was to be implemented by private developers and the concurrent condemnation and sale would not have been for a public *use*. These cases, then, not only require a public purpose in order for these acts to be valid but also require that the use be public.

---

[8]See Grover Irrig. & Land Co. v. Lovella Ditch Reservoir & Irrig. Co., 21 Wyo. 204, 131 Pac. 43 (1913). "Public purpose" and "public use" are often used interchangeably by the courts. "Public purpose," originally a term associated exclusively with taxation, has subsequently been applied when eminent domain or taxation is referred to. See Note, 52 YALE L.J. 634, 639, n.24 (1943).

[9]Schrader v. Third Jud. Dist. Ct., 58 Nev. 188, 73 P.2d 493 (1937); Philadelphia Clay Co. v. York Clay Co., 241 Pa. 305, 88 Atl. 487 (1913).

[10]Thomison v. Hillcrest Athletic Ass'n, 9 W. W. Harr. 590, 5 A.2d 236 (Del. 1939).

[11]Adams v. Housing Auth., 60 So. 2d 663 (Fla. 1952); Zurn v. City of Chicago, 389 Ill. 114, 59 N.E.2d 18 (1945).

[12]See Annot., 44 A.L.R.2d 1447 (1955).

[13]See Fordham, *The Challenge of Contemporary Urban Problems*, 6 U. FLA. L. REV. 275, 281 (1953); Annot., 44 A.L.R.2d 1420 (1955).

[14]Adams v. Housing Auth., *supra* note 11; Edens v. City of Columbia, 228 S.C. 563, 91 S.E.2d 280 (1956).

In this context, public use requires a public redevelopment authority as an implementing mechanism as opposed to private developers. Georgia joined the majority by a constitutional amendment providing for urban redevelopment, overruling a prior holding adverse to a redevelopment act.[15]

Eminent domain is to be distinguished from the police power from which zoning ordinances are derived. The police power exists in the sovereign and, as with other municipal powers, must be delegated to a city by the legislature. The police power may be employed to regulate the use and enjoyment of property by the owner. He is deprived of his property outright to promote the public welfare, even though it is not acquired by the sovereign for a public use. This deprivation usually takes the form of restrictions on the uses to which land can be put. An example would be the required removal under a zoning ordinance of buildings from within a certain distance of a right of way. The owner is not entitled to compensation for any injury that he may sustain in consequence. The law considers that the injury is *damnum absque injuria,* or that the owner is sufficiently compensated by sharing in the general benefits resulting from this exercise of the police power.[16] When private property is taken for public use under eminent domain proceedings, however, the owner is entitled to compensation.[17]

Only land clearance can be accomplished by zoning legislation. The fee to zoned land remains in the private owner. Negative coercion, requiring the private owner to utilize his property in conformity with the zoning ordinance or not at all, falls far short of what is sought to be accomplished by an urban renewal program. Furthermore, zoning is a process that consumes considerable time. Unless a city is acting to abate a public nuisance, it must permit an amortization period for established non-conforming uses, so that those affected by its ordinance will have sufficient time to conform to the prescribed land use.[18]

Urban redevelopment acts authorizing eminent domain have been

---

[15]See Bailey v. Housing Auth., 214 Ga. 790, 107 S.E.2d 812 (1959).

[16]Chicago B. & Q. Ry. v. People *ex rel.* Grimwood, 212 Ill. 103, 72 N.E. 219 (1904), citing Frazer v. City of Chicago, 186 Ill. 480, 57 N.E. 1055 (1900).

[17]Adams v. Housing Auth., 60 So. 2d 663 (Fla. 1952); Chicago B. & Q. Ry. v. People *ex rel.* Grimwood, *supra* note 16.

[18]See Note, 12 U. FLA. L. REV. 322 (1959). For a comparison of city ordinances to common law principles of nuisance abatement see Noel, *Retroactive Zoning and Nuisance,* 41 COLUM. L. REV. 457 (1941).

used in conjunction with a comprehensive zoning plan.[19] It is wise for a municipality to undertake urban renewal with an over-all city plan in mind. City planning is the broader concept of which urban renewal is a necessary element, when blight or slums exist.

FLORIDA'S POSITION

In 1945 the Florida legislature purported to provide municipalities with a means of undertaking urban renewal programs where they were needed.[20] This act provided for the establishment in each city of a municipal housing authority charged with the task of initiating redevelopment projects and for utilization by these authorities of available federal funds.[21] The act further prescribed the use of eminent domain and the lease or sale of condemned land to private development corporations. This law, a general act, is similar to urban redevelopment statutes in other jurisdictions. These enabling laws have been held constitutional in at least twenty jurisdictions, notwithstanding provisions for sale or lease of condemned property to private developers.[22]

In 1950 the Housing Authority of Daytona Beach sought to acquire by purchase and eminent domain six and one-half acres of real estate in an area zoned commercial and for light industry and inhabited by low income families. After condemnation, the land was to be turned over to private commercial and industrial enterprises. In *Adams v. Housing Authority*[23] the Florida Supreme Court held that the acquisition of real estate for such disposition was not for public use or purpose and that the statute authorizing the procedure was unconstitutional. Four provisions of the Florida Constitution were found to have been violated.[24] Vitiating the Daytona Beach plan

---

[19]City planning is generally conceded to embrace the entire group of complex urban problems—physical, social, economic, and governmental. See Bartley, *Legal Problems in Florida Municipal Zoning*, 6 U. FLA. L. REV. 355, 356 (1953).

[20]Fla. Laws 1945, ch. 23077.

[21]See 42 U.S.C. §§1441-62 (1958).

[22]See Annot., 44 A.L.R.2d 1420 (1926).

[23]60 So. 2d 663 (Fla. 1952).

[24]*Id.* at 670. The Court held the following provisions of the Florida Constitution to have been violated and gave the indicated reasons therefor:

"(1) Section 1 of the Declaration of Rights in that the inalienable right of the citizens to acquire, possess and protect property would be denied; public authorities would be permitted to take one man's property against his will and make it available to another group for their private purpose rather than a public use,

as a real estate promotion scheme disguised as a redevelopment plan,[25] the majority noted the adequacy of the city's police power to abate a blighted area. The Court also cited *Standard Oil Co. v. City of Tallahassee*,[26] a federal case applying Florida law, which involved a suit to enjoin enforcement of a city zoning ordinance requiring removal of a gasoline station from state-owned property. The Fifth Circuit Court of Appeals held the ordinance to be a reasonable exercise of the city's police power. Unfortunately, although the police power can accomplish removal of a blighted or slum area, it is impotent as far as redevelopment is concerned.

The Florida Court has held constitutional a city's condemnation of privately owned land for use as a municipal parking lot when part of the lot had been leased to private interests for the operation of a gasoline station.[27] Lease of a county owned fishing pier to private interests to gain revenue for the county, when the portion leased was not required for a public park, has also been held constitutional.[28] However, the City of Clearwater's attempt to lease a tract to private individuals who intended to construct a private hotel was held unconstitutional by the Florida Court.[29]

In a case arising in Panama City the Supreme Court of Florida held that the housing authority could acquire realty but could not turn it over to private interests for development of a proposed naval low rent housing project under their control.[30] In *State v. Town of North Miami*[31] the Court held that a proposed issue of municipal

"(2) Section 12 of the Declaration of Rights and Section 29 of Article XVI in that the taking of private property for a purpose or use not public, to wit, for the purpose of selling or leasing the same for private use, profit and gain to other individuals, corporations or associations is attempted to be authorized and consummated,

"(3) Section 5 of Article IX in that the expenditure of public funds and the assessment and imposition of taxes for a purpose not public nor municipal would be authorized,

"(4) Section 10 of Article IX in that an attempt is made to authorize and consummate the appropriation of public or municipal funds or money, or the loaning of credit of a municipality to corporations, associations, institutions, or individuals for a purpose not public nor municipal and for private gain and profit."

[25]60 So. 2d at 666.

[26]183 F.2d 410 (5th Cir. 1950).

[27]Gate City Garage v. City of Jacksonville, 66 So. 2d 653 (Fla. 1953).

[28]Sunny Isles Fishing Pier, Inc. v. Dade County, 79 So. 2d 667 (Fla. 1955).

[29]City of Clearwater v. Caldwell, 75 So. 2d 765 (Fla. 1954).

[30]Lewis v. Peters, 66 So. 2d 489 (Fla. 1953).

[31]59 So. 2d 779 (Fla. 1952).

bonds was invalid because the proceeds were to be used to purchase land and erect an industrial plant thereon with subsequent lease of the property to a private corporation.

All of these cases, though not involving redevelopment acts, illustrate the Florida position on the public use question. By analogy, they relate to *Adams* and other cases that do involve these acts. The Florida Court has approved the following definition of "public use":[32]

> "A use to be public must be fixed and definite. It must be one in which the public, as such, has an interest, and the terms and manner of its enjoyment must be within the control of the State, independent of the rights of the private owner of the property appropriated to the use. The use of property cannot be said to be public if it can be gainsaid, denied, or withdrawn by the owner. The public interest must dominate the private gain."

The Court has said that the use may be "local or limited, and yet be a public use," and that "if the main object for which land is taken is a public use, it obviously matters not that incidental benefit will inure to private individuals."[33]

From the foregoing cases it may be concluded that the Florida Court does not approve of municipal action that results in lease or sale in toto of municipally owned realty to private interests. There must be more than an incidental benefit to the public. On the other hand, if the end result is such that the public enjoys the benefit or use of municipally owned land, lease of a *de minimis* part of that land to private interests is not unconstitutional. In those cases approving lease of a part of the publicly owned land to private interests, the private activity had a definite relationship to the particular public use to which the entire tract was devoted. This is illustrated by the municipal parking lot case and the fishing pier case discussed above.

In *Adams* the Court regrettably "threw out the baby with the bath water."[34] The Court did not simply declare the particular redevelopment plan involved unconstitutional, but invalidated the statute under which Daytona Beach purported to act. As a result, there is

[32]Demetar Land Co. v. Florida Public Serv. Co., 99 Fla. 954, 964, 128 So. 402, 406 (1930).

[33]Wilton v. St. Johns County, 98 Fla. 26, 44, 123 So. 527, 533 (1929).

[34]THE FLORIDA PLANNING & ZONING ASS'N, *Urban Renewal in Florida*, in 10 Florida Planning and Development, No. 12, p. 1 (Dec. 1959).

now no constitutional *general* law upon which a Florida municipality may rely in attempting urban redevelopment.

The City of Tampa, acting pursuant to the Urban Renewal Law of 1957,[35] a special act applicable only to that city, undertook a redevelopment project that involved forty acres of slum area within the city. In *Grubstein v. Urban Renewal Agency*,[36] involving a suit to enjoin the City of Tampa and its urban agency from further pursuance of the redevelopment program, the Florida Supreme Court upheld the act. The Court recognized that *slum* as distinguished from *blight* clearance was per se a public purpose.[37] The Court further held that the public purpose of the plan was not defeated because of lease or sale of the property to private interests, a possible non-public use. Here perhaps can be seen a conceptual merger of public use with public purpose. The main object for which the land was taken was slum clearance, a public purpose. The public interest dominates, and thus the only private use, development by private enterprise, is incidental to the over-all purpose. The area involved was to be returned primarily to residential use in conjunction with neighborhood commercial establishments to serve the residents. The

---

[35]Fla. Spec. Acts 1957, ch. 57-1904.

[36]115 So. 2d 745 (Fla. 1959).

[37]Fla. Spec. Acts 1957, ch. 57-1904, §§18 (f), (g), defines slum and blighted areas as follows: " 'Slum area' shall mean an area in which there is a predominance of building or improvements, whether residential or non-residential, which by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, or crime, and is detrimental to the public health, safety, morals or welfare.

" 'Blighted area' shall mean an area which by reason of the presence of a substantial number of slum, deteriorated or deteriorating structures, predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility or usefulness, insanitary or unsafe conditions, deterioration of site or other improvements, diversity of ownership, tax or special assessment delinquency exceeding the fair value of the land, defective or unusual conditions of title, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs or arrests the sound growth of a municipality, retards the provision of housing accommodations or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare in its present condition and use: Provided, that if such blighted area consists of open land the conditions contained in the proviso in Section 6 (d) shall apply: And provided further, that any disaster area referred to in subsection (g) of Section 6 shall constitute a 'blighted area.' "

Court emphasized that the decision was confined to that part of the act relating to *slum* clearance and that it expressed no opinion on that part of the act relating to blighted areas.

In *Berman v. Parker*[38] the United States Supreme Court upheld a redevelopment act of the District of Columbia for the removal of slum areas, stating that it was not a violation of the fifth amendment. The Court held that it was within the power of the legislature to take into account aesthetic considerations as well as those of health when enacting redevelopment legislation. In effect the power of eminent domain was looked upon as a means of protecting the health, welfare, and morals of the inhabitants of the District of Columbia. The *Grubstein* case did not go this far.[39]

Confronted with the *Adams* case, the Court in *Grubstein* relied heavily on the definitions of "slum" and "blighted area" to distinguish the two. Only a blighted area was sought to be redeveloped in the *Adams* case, and no relation to the public health, safety, or welfare that would justify use of eminent domain was found.

Justice Thornal, concurring in *Grubstein,* went further and asserted that the *Adams* decision had been "whittled away" to the point where its judgment was nothing more than a disposition of the particular project proposed in that case.[40] In other words, the *Adams* decision need not have gone so far as to declare the Housing Authorities Law[41] unconstitutional but should have been confined to declaring unconstitutional the particular plan involved. Justice Thornal's opinion reflects the conclusion of many critics.[42]

The foregoing survey of Florida cases indicates that a Florida city faced with a slum or blight problem may legally remove this mischief by acting pursuant to its police power — zoning ordinance or abatement of a public nuisance — or by utilizing a special act patterned after the Urban Renewal Act of 1957. However, any project undertaken pursuant to the Housing Authorities Law, a general act, risks frustration by the rule of the *Adams* case in spite of its modification by the *Grubstein* decision. Furthermore, in *Grubstein,* the Court as-

---

38348 U.S. 26 (1954).

39See Note, 34 TUL. L. REV. 616 (1959).

40115 So. 2d at 755.

41Fla. Laws 1945, ch. 23077; FLA. STAT. ANN. §421.08, note (1960).

42See *e.g.,* Dauer & Miller, *Municipal Charters in Florida,* 6 U. FLA. L. REV. 427 (1953); Fordham, *supra* note 13 at 429; Foss, *Interested Third Parties in Zoning,* 12 U. FLA. L. REV. 16, 45 (1959); Patterson, *Legal Aspects of Florida Municipal Bond Financing,* 6 U. FLA. L. REV. 312 (1953).

serted that the decision was confined to that part of the act pertaining to *slum* clearance.

When the question of blight removal, pursuant to an urban renewal program, comes before the Florida Court it is a matter of conjecture as to how the Court will hold. Apparent emphasis previously given by the Court to the distinction between blight and slum precludes a prediction that the Court will rule favorably on a redevelopment plan to remedy blight except perhaps in a case in which it can be shown that the blighted area has reached the point where only urban redevelopment can ward off a threatened debilitation of the public's health, welfare and morals. Other jurisdictions, while not distinguishing slum from blight as those terms are used by the Florida Court, have held blight elimination to be a public purpose.[43]

Apparently the *Grubstein* decision, concerning slum clearance, modified the *Adams* holding, which involved a blighted area, to the extent that the use of private interests in a redevelopment program does not per se render the plan unconstitutional. This decision represents belated judicial recognition in Florida of the solution of an urban problem of growing intensity. The Florida Court has seemingly accepted as a public purpose a renewal program providing for removal of a slum. The vehicle of private enterprise to achieve slum clearance no longer seems to face judicial condemnation in Florida when used to implement a renewal act. It may still be condemned, however, when the only community objective is blight removal. Unless the blight is shown to be a serious threat to the public, its removal may not be held to constitute a public purpose.

Proposed Solutions

Though the *Grubstein* opinion seems to be a green light for urban renewal in Florida, it may be construed in the future as having approved only *slum* clearance under the Urban Renewal Act of 1957. To avoid this result without attempting to breathe life anew into the Housing Authorities Law, the Florida legislature convening in 1961 should pass a general act patterned after the Urban Renewal Act of 1957. This proposed act should provide separately for slum and blight removal. There should be a severability clause to preclude

[43]*E.g.*, Zurn v. City of Chicago, 389 Ill. 114, 59 N.E.2d 18 (1945); Bellowsky v. Redevelopment Authority, 357 Pa. 329, 54 A.2d 277 (1947); see Fordham, *supra* note 13, at 275, 281.