

## New Jersey Appellate Ruling Imposes “Necessity” Test for Use of Eminent Domain to Acquire Property For Redevelopment

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In a January 7, 2019 decision approved for publication, the New Jersey Appellate Division held that a municipality exercising its power of eminent domain to acquire private property, pursuant to the Local Redevelopment and Housing Law (LRHL) must establish that the property is “necessary for a redevelopment project.” The Court’s ruling in *Borough of Glassboro v. Jack Grossman, Matthew Roche, and Dan Desilvio* states that that such necessity must be supported by evidence that “articulate[s] a definitive need to acquire the parcel for an identified redevelopment project ... [which] must be more specific than the mere ‘stockpiling’ of real estate that might, hypothetically, be useful for a redevelopment project in the future.”

In this case, the Borough of Glassboro instituted condemnation proceedings to acquire a mostly vacant, nearly one-acre lot located within a duly-designated redevelopment area and subject to an adopted redevelopment plan. The property was approximately a block from an ongoing substantial mixed-use redevelopment consisting of “190,600 square feet of retail space, 81,000 square feet of classroom space, 1,870 student-housing beds, 109 apartments, and a 1.75-acre park” with an estimated value of \$450 million.

After determining to acquire the property, obtaining an appraisal of \$125,000 for the property and unsuccessfully pursuing negotiations with the owners to acquire the property, the Borough filed a condemnation action pursuant to New Jersey’s Eminent Domain Act. The proffered public use for the property was “the public purpose of [r]edevlopment ... and for the specific purpose of increasing the availability of public parking ...”. During a cause trial court hearing, the Borough's attorney stated that “public parking is only a possible use, and that the property

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might be used for some other purpose related to redevelopment.” The attorney further stated that “it is often necessary during redevelopment activities to ‘assemble’ parcels in order to complete the overall plan.”

While the trial court rejected the Borough’s position that it was authorized to acquire any property within a designated redevelopment area without providing a specific reason, it found that the asserted need of public parking was sufficient to show that the taking of the property was “reasonable and necessary to effectuate the redevelopment plan.”

The Appellate Division granted the defendants’ application for a stay of the condemnation proceeding and emergent appeal, and also granted a motion by the Institute for Justice to appear as *amicus curiae*. The Institute for Justice identifies itself as a law firm that “litigates to limit the size and scope of government power and to ensure that all Americans have the right to control their own destinies as free and responsible members of society.” The Institute for Justice and defendants argued that courts “should strictly construe the LRHL” and should reject a redevelopment taking “that is not supported by actual evidence of necessity.”

The Appellate Division noted that under the LRHL, a “local government can only acquire, through its condemnation powers, a land or building ‘which is necessary for the redevelopment project’.” Citing to its decision in *Vineland Constr. Co., Inc. v. Twp. of Pennsauken*, the Court said the acquisition of a property for redevelopment must be “reasonably necessary,” meaning that “absoluteness or indispensability is not to be required [but] reasonable necessity . . . in the light of all the facts and circumstances and balancing all interests.”

The Court then proceeded to discuss what evidence was required to establish such reasonable necessity, which must strike a balance between the need for flexibility in the redevelopment process and public accountability. The Court adopted a two-component analysis, requiring the condemner to (1) articulate the purpose tied to a specific redevelopment project and (2) present evidence to substantiate that purpose. There “must be a particular redevelopment project identified and tied to the proposed acquisition.” The Court did not seek to specify what evidence would be required to substantiate the proposed purpose but made suggestions in that regard which included an expert planner, engineer, or traffic consultant report, architectural plans or a market study or economic forecast. The Court emphasized that the establishment of reasonable necessity would only be required in the event of a challenge to the right to acquire a property through eminent domain and that, upon producing such evidence supporting the purpose for the acquisition, it would remain the property owner’s burden to disprove the condemner’s evidence of necessity by a preponderance of the evidence.

While this decision does not have any direct and immediate impact upon already designated redevelopment areas or adopted redevelopment plans, municipalities contemplating property acquisitions in furtherance of a redevelopment plan should be prepared to demonstrate a necessity for the acquisition of any property before instituting condemnation proceedings. Developers pursuing redevelopment should also consider what evidence would likely be presented to support an acquisition of any property that it is

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negotiating to purchase in connection with a redevelopment project. An evaluation of the strength of such evidence should be a factor instructing negotiations and the likelihood of success in condemnation should the municipality determine to exercise its power of condemnation to acquire the property.

Please contact **Robert Beckelman**, the author of this Alert, with any questions concerning the Appellate Division ruling in this case or issues related to eminent domain and redevelopment in New Jersey.