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Personal And Real Property—Eminent Domain— —Functions And Revenue Production Incidental To Primary Public Purpose Considered By Court

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for a more definite statement of the objections to the title if he was not aware of what defects the vendee's letter referred? In other words, how much particularity of notice is required? Finally, could it not be argued that at best the vendor could disregard the demand as an inadequate notice and lay a foundation for a claim of damages by making tender of title on the closing day in its condition at that time? In the instant case the vendor is required to do absolutely nothing because of the vendee's breach. Yet one of the cases cited by the court in support of this position states:

[I]f an excuse were relied upon, then he was bound to allege facts constituting such excuse, and, in addition thereto, that he was at the time ready and had the ability to perform, and would have done so except for the acts of the other parties to the contract.²⁶

Perhaps the court should have taken a closer practical look at the inaction of the vendor as well as the breach of the vendee before having granted the vendor his counterclaim for damages for breach of contract.

Peter H. Bickford

EMINENT DOMAIN—FUNCTIONS AND REVENUE PRODUCTION INCIDENTAL TO
PRIMARY PUBLIC PURPOSE CONSIDERED BY COURT

The actions constituting the bases of this appeal are a suit for a declaratory judgment to determine the constitutionality of chapter 209, New York Laws 1962 and a condemnation proceeding to take certain Hudson & Manhattan Terminal property for port authority purposes. The litigants in both controversies were the Port of New York Authority and its subsidiary, the Port Authority Trans-Hudson Corporation, and property owners affected by the proposed condemnation. The challenged statute authorized the creation of a World Trade Center and modernization and extension of the rail facility with the purpose, as stated in section 6601(7)¹ of establishing a centralized location to accommodate all appropriate functions related to world commerce. Section 6602 designated a thirteen block area on the west side of lower Manhattan, including the present Hudson & Manhattan Terminal, as the site of the project. Section 6614 authorized the port authority to determine and acquire "necessary and convenient" property for public use in implementing the project. Courtesy Sandwich Shop contested the proposed condemnation of its property on the grounds that the authorization of the World Trade Center involved an unconstitutional delegation of powers to the port authority, and that since the terminal and trade center projects were inseparably joined in the legislative scheme, the unconstitutionality of the former would invalidate any power to take private property at the Hudson Tubes location. The Supreme Court, Special Term, granted an order of condemnation and vested title to Courtesy Sandwich Shop in the Port

26. *Stern v. McKee*, 70 App. Div. 142, 146, 175 N.Y. Supp. 157, 160 (1st Dep't 1902).

1. N.Y. Unconsol. Laws (McKinney 1961).

Authority Trans-Hudson Corporation. The issue of the constitutionality of chapter 209, and particularly the World Trade Center, was not decided. The Appellate Division reversed, and determined that the World Trade Center in its implementation would entail the exercise of unconstitutional powers by the Port Authority. On appeal, *held*, judgment reversed, one judge dissenting. Chapter 209 is constitutional in its authorization of the taking of private property by eminent domain both for the erection of structures wholly devoted to public use and also for structures, portions of which will be devoted to the production of incidental revenue. *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*, 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1 (1963).

Eminent domain is the right of the government to acquire private property irrespective of the consent of the owner.² It is an inherent right of the body political rather than a power constitutionally bestowed.³ Its exercise is a manifestation of the *élan vital* of the state in summoning to the sector of common dominion and utilization areas of private control and interest. The decision to exercise the power rests in the legislature.⁴ Its result is a forced sale or statutory conveyance.⁵ Basic to the doctrine of eminent domain is the requirement that the taking of private property can be justified only if there is a public purpose to be implemented.⁶ Obviously the exercise of so drastic a power will be vigorously contested by the affected private interests. The delineation of the challenge to condemnation proceedings takes the form of due process arguments grounded on federal and state constitutional guarantees that private property shall not be taken for public use without just compensation.⁷ No notice before the taking of property is legally necessary, but due process does require a notice and hearing on the issue of compensation.⁸ The function of the courts in a condemnation proceeding is, first, to determine if the legislature has authorized the use of eminent domain powers for a clearly public purpose,⁹ and second, if such purpose is found, to vest title in the state or its agency, and finally, to decide the elements cognizable in computing the value of the property.¹⁰ The first of these functions is paramount, and in interpreting "public

2. 19 N.Y. Jur. *Eminent Domain* §§ 1-40 *passim* (1961).

3. *People v. Adirondack Ry.*, 160 N.Y. 225, 236-37, 54 N.E. 689, 692 (1899), *aff'd*, 176 U.S. 335 (1900).

4. *Matter of City of New York*, 190 N.Y. 350, 357, 83 N.E. 299, 302 (1907); *Matter of Rennselaer & Saratoga R.R. v. Davis*, 43 N.Y. 137 (1870).

5. *Jackson v. State*, 213 N.Y. 34, 106 N.E. 758 (1914).

6. *Pocantico Water-Works Co. v. Bird*, 130 N.Y. 249, 258, 29 N.E. 246, 248 (1891); *Matter of Rennselaer & Saratoga R.R. v. Davis*, 43 N.Y. 137 (1870).

7. U.S. Const. amend. XIV, § 1; N.Y. Const. art. I, §§ 6, 7(a). *Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403, 417 (1896).

8. *United States v. Twin City Power Co.*, 350 U.S. 222 (1956); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276 (1925); *People v. Adirondack Ry.*, 160 N.Y. 225, 238-39, 54 N.E. 689, 693 (1899).

9. Comment, 23 Albany L. Rev. 386 (1959).

10. 19 N.Y. Jur. *Eminent Domain* §§ 138-60 *passim* (1961); *Matter of James Madison Houses*, 17 A.D.2d 317, 234 N.Y.S.2d 799 (1st Dep't 1962); Searles & Raphael, *Current Trends in the Law of Condemnation*, 27 Fordham L. Rev. 529 (1958-59).

purpose," the courts have evolved a broadening concept rather than a static limitation.¹¹

The past course of the elaboration of the public purpose concept may be charted by decisions upholding legislative authorization of condemnation powers affecting the welfare of the geographic area involved in the instant case. The high concentrations of population and economic activity in the New York City area place a premium on maximal social utilization of available land. The Court has upheld the Redevelopment Companies Law which provided for condemnation of areas to be developed by private enterprise for low income housing, declaring that the public purpose of the taking was not vitiated by the possibility that the developers might ultimately earn profits.¹² Similarly, the power to condemn substandard areas under the Public Housing Law was affirmed,¹³ even though the proposed housing project might benefit a specific group¹⁴ or the land might not be used for low-rent housing,¹⁵ on the basis of a well established principle that "to take for the maintenance and promotion of public health is a public purpose."¹⁶ Also, pursuant to the General Municipal Law, the Court found that a taking of blighted or potential slum areas was constitutional for a proposed private development of an industrial park.¹⁷ Specifically relevant to the economic viability of New York City, the Court had upheld the acquisition of land for public markets¹⁸ and for piers, even though leased to carriers,¹⁹ prior to the creation of the Port of New York Authority. With the approval of Congress in 1921, the states of New York and New Jersey established the authority²⁰ "with full power . . . to purchase, construct, lease and/or operate any terminal or transportation facility within said district . . .,"²¹ and "such other additional powers"²² as might be conferred by the legislatures of the two states. In a leading case,²³ the Court of Appeals held that the legislature intended to confer upon the Authority power to construct, on condemned land, buildings primarily for a public purpose (in this case a railroad terminal) which would include additional space for rental. Thus, revenue could be inci-

11. Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. Pa. L. Rev. 265, 324 (1963).

12. N.Y. Unconsol. Laws §§ 3401-26, particularly §§ 3402, 3420 (McKinney 1949); *Murray v. La Guardia*, 291 N.Y. 320, 52 N.E.2d 884, 43 N.Y.S.2d 408 (1943), *cert. denied*, 321 U.S. 771 (1943); *Beebe Imp. Corp. v. City of New York*, 129 N.Y.S.2d 263 (Sup. Ct. 1954).

13. *Weaver v. City of Utica*, 196 Misc. 634, 92 N.Y.S.2d 372 (Sup. Ct. 1949).

14. *Amalgamated Housing Corp. v. Kelly*, 193 Misc. 961, 82 N.Y.S.2d 577 (Sup. Ct. 1948).

15. *Klibanoff v. City of New York*, 24 Misc. 2d 649, 206 N.Y.S.2d 301 (Sup. Ct. 1960).

16. *Matter of Ryers*, 72 N.Y. 1, 7 (1878).

17. *Cannata v. City of New York*, 11 N.Y.2d 210, 182 N.E.2d 375, 227 N.Y.S.2d 903 (1962), *appeal dismissed*, 371 U.S. 4 (1962); 12 Buffalo L. Rev. 190 (1962).

18. *Matter of Cooper*, 28 Hun 515 (1st Dep't 1883), *appeal dismissed*, 93 N.Y. 507 (1883).

19. *Matter of Mayor of City of New York*, 135 N.Y. 253, 31 N.E. 1043 (1892).

20. N.Y. Sess. Law 1921, ch. 154; N.J. Acts, 1921, ch. 151; Pub. Res. No. 17, 42 U.S. Stat. 174.

21. N.Y. Sess. Law 1921, art. 6.

22. N.Y. Sess. Law 1921, art. 7.

23. *Bush Terminal Co. v. City of New York*, 282 N.Y. 306, 26 N.E.2d 269 (1940).

dentally derived from structures erected on property acquired by eminent domain.

The Court's reasoning in this case followed the respondents' oblique approach to their ultimate goal of defeating condemnation, but accepted only one of the two premises necessary to reach respondents' conclusion. Since the property involved was at the Hudson Terminal location, respondents could not have lodged a successful attack upon a Port Authority taking at that site, for the power to acquire and develop terminal or transportation facilities was directly and clearly conferred by article 6 of the compact of 1921. Consequently, it was necessary to invalidate the Hudson Tubes development not on its own merits, but as an adjunct of the World Trade Center, a project still in the planning stage at the time of this litigation. The appellate courts, having agreed with respondents upon the legislative intent to authorize a unified project,²⁴ concurred also that, theoretically, a trade center constituted a public undertaking which the legislature could mandate.²⁵ But divergence arose on the issue of whether or not the statute embodied an invalid implementation of the trade center concept. The Court of Appeals held, as a matter of statutory construction, that the term "incidental" as used in section 2 of chapter 209 authorized inclusion in the World Trade Center of functions incidental to the public purpose of transport and exchange in world commerce, and of revenue production incidental to the operation of structures and areas devoted primarily to the public purpose.²⁶ Exercise of the power of eminent domain under chapter 209 was not therefore, in violation of respondents' federal or state constitutional rights. Further challenges were disposed of by the Court in its determinations that the congressional consent given to the creation of the Port Authority in 1921 and 1922²⁷ extended to the additional powers granted by chapter 209 and involved no violation of the compact clause;²⁸ that express provisions of the statute, sections 6614 and 6616,²⁹ conferred power on the Port Authority's subsidiary to condemn; that respondents had no right to a hearing, before identification of the property to be taken, since the legislatures of the two states had designated the site in their statutes; and that objections directed to the items to be included in valuation were premature at this time.³⁰ The dissent, in the main, followed the reasoning of the majority below, that the statute in question was unconstitutional on the grounds of inadequate standards and, limitations of powers and that it was the duty of the court to protect private property from

24. Instant case at 388, 190 N.E.2d 402, 404, 240 N.Y.S.2d 1, 4; the case below, 17 A.D.2d 590, 594, 237 N.Y.S.2d 820, 823 (1st Dep't 1963).

25. Instant case at 389, 190 N.E.2d 402, 404, 240 N.Y.S.2d 1, 5; the case below 17 A.D.2d 590, 595-96, 237 N.Y.S.2d 820, 825.

26. Instant case at 390, 190 N.E.2d 402, 405-06, 240 N.Y.S.2d 1, 6-7.

27. Comprehensive plan adopted by New York and New Jersey, N.Y. Sess. Law 1922, ch. 43; N.J. Acts 1922, ch. 9.

28. U.S. Const. art. I, § 10.

29. N.Y. Unconsol. Laws (McKinney 1961).

30. Instant case at 391-93, 190 N.E.2d 402, 406-07, 240 N.Y.S.2d 1, 7-9.

condemnation where the justification was merely "some nexus with the public good."³¹

By placing in juxtaposition the holding of the Appellate Division, that chapter 209 "was on its face unconstitutional, in that the act granted a power to condemn property to be used for no other purpose than the raising of revenue for the expenses of the project, and for a class of tenants with a remote relationship with world trade," and the conclusion of this Court that the "benefit" is not too remote or speculative as to render the means chosen to achieve it patently unreasonable; nor is the benefit sought an improper concern of government,³² the major issues are brought into sharp relief. In holding that the statute was constitutional on its face, the Court has found a public purpose which will legally support the exercise of the right of eminent domain. This purpose is the economic well-being of the Port of New York, to be effectuated by facilitating and centralizing all business pertaining to world trade.³³ It is true that the facilities authorized by the World Trade Center provisions, section 6602, are broader in scope than the terminal and transportation facilities set forth in the compact of 1921. But the compact and the comprehensive plan of 1922 specify that additional powers could be granted and supplementary plans could be adopted by the two legislatures. The concept of public purpose was labile, therefore, by legislative intentment. The issue of revenue production from facilities operated by the authority should be examined in the context of two factors: (1) that the Court had implied a tax immunity for the Authority from the terms of the compact of 1921,³⁴ and (2) that the Authority is required to finance its projects through issuance of bonds supported by a general reserve fund into which surplus revenues are channelled. It is an ineluctable responsibility of the authority, therefore, to derive operating revenues at least from some parts of the projects undertaken. It is mandatory, however, that the income purpose be subordinate to a primary public objective which alone can justify a taking of private property. The Court has read the statute to limit the authority to deriving income which is incidental to a public function. Neither did the Court find that the statute would permit every private enterprise bearing some remote relation to foreign commerce—such as a retailer who imports merchandise—to make its business home in the area to be condemned for the World Trade Center. The functions which could be validly accommodated in this part of the Authority's project would be measured by the same standard applicable to revenue activities: are they incidental to the fundamental design, the facilitating of world commerce for the ultimate benefit of the peoples of New York and New Jersey? In summary, this decision may be viewed as advancing a step further along the well-marked path of affirming the use of eminent domain powers for the economic welfare. It is within the established

31. Instant case at 393-400, 190 N.E.2d 402, 408-11, 240 N.Y.S.2d 1, 9-15, *passim*.

32. Instant case at 387-89, 190 N.E.2d 402, 404, 240 N.Y.S.2d 1, 4-5.

33. Instant case at 389, 190 N.E.2d 402, 404-05, 240 N.Y.S.2d 1, 5.

34. Now expressly provided in § 6611.

tradition of interpreting "public purpose" on an *ad hoc* basis³⁵ to meet the dynamic needs of the community.

(Mrs.) Josephine Y. King

THE FORMULA FOR COMPENSATION IN CONDEMNATION PROCEEDINGS—REPRODUCTION COST LESS DEPRECIATION

The instant appeal is a consolidation of four cases concerning the claims for the value of trade fixtures by the tenants of a building being taken in condemnation. Each tenant owns a separate and different business. In each claim, the tenants seek to have the value of their trade fixtures determined by their reproduction cost less depreciation. In the first two cases, one concerning a pharmacy¹ and the other concerning a dress cutting shop,² the Court of Claims dismissed the claims of the tenants. The Appellate Division reversed this decision and allowed the claims. In the second two cases, concerning a supermarket³ and a dry cleaning shop,⁴ and which were decided subsequent to the Appellate Division's disposition of the first two cases, the Court of Claims allowed the claims for compensation for the trade fixtures based on their reproduction cost less depreciation. This decision of the Court of Claims was affirmed by the Appellate Division. From the adverse rulings of the Appellate Division, the State of New York appealed to the Court of Appeals. *Held*, affirmed unanimously, the means of evaluating the fixtures depends upon the facts of the case under consideration and in the present case, the fixtures being attached to the realty and either custom built or expressly adapted thereto, it was proper to evaluate the fixtures according to their reproduction cost less depreciation; it is also proper to consider the fixtures apart from the realty as a whole for the purposes of evaluation. *Marraro v. State of New York*, 12 N.Y.2d 285, 189 N.E.2d 606, 239 N.Y.S.2d 105 (1963).

The law of fixtures gradually became established in order to lessen the harsh effect of the old common law rule⁵ that everything attached to the fee became part of it and that a person having an interest amounting to less than a fee in the land would lose the value of any improvements he had made thereon.⁶ It is now established that, even when the buildings or fixtures are so attached to the land that title would pass with a conveyance of the land, as between the landlord and the tenant, they remain the personal property of the tenant, and, in the absence of an agreement to the contrary, the fixtures may

35. *Matter of New York City Housing Authority v. Muller* 270 N.Y. 333, 1 N.E.2d 153 (1936).

1. *Marraro v. State*, 15 A.D.2d 707, 223 N.Y.S.2d 556 (3d Dep't 1962).

2. *Caruso v. State*, 15 A.D.2d 687 (3d Dep't 1962).

3. *Aber-Dulberg, Inc. v. State*, 15 A.D.2d 712, 223 N.Y.S.2d 853 (3d Dep't 1962).

4. *East Hills Cleaners & Dyers, Inc. v. State*, 15 A.D.2d 713, 223 N.Y.S.2d 853 (3d Dep't 1962).

5. *Matter of the Mayor*, 39 App. Div. 589, 57 N.Y. Supp. 657 (1st Dep't 1899).

6. 2 Kent, Commentaries 343 (12th ed. 1873).