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Personal And Real Property—Power Of Eminent Domain Exercised For The Taking Of Non-Slum Land For Private Redevelopment

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river only thirty-five miles in length. Mr. Justice Eager seemed to summarize the view of the New York courts when he replied in an unreported decision which denied a claimant's application that "It is true that the result is an inequitable one, but the enforcement of a statute of limitations ofttimes results in inequity."[17]

M. A. K.

POWER OF EMINENT DOMAIN EXERCISED FOR THE TAKING OF NON-SLUM LAND FOR PRIVATE REDEVELOPMENT

One of the increasingly important problems facing our generation is that of the physical deterioration of our cities and its expensive burden upon society. Various measures and programs have been instituted at different levels of government to alleviate this problem. One such attempt can be found in section 1 of article XVIII of the Constitution of the State of New York, wherein is provided legislative authority for slum clearance and the construction of decent housing facilities for citizens of low income, and "for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, or for both such purposes, and for recreational and other facilities incidental or appurtenant thereto." For some time the frontal attack on urban deterioration has proceeded along broad, general lines calling for the destruction of slums and their replacement with new housing. Today, however, it is becoming increasingly apparent that this is not enough; that there is need of a complementary program of commercial, industrial, institutional, recreational, and educational urban redevelopment, if existing patterns of deterioration are to be checked and reversed. New York State embarked upon such a course with the passage of a statute that gives cities the power of eminent domain for reclaiming and redeveloping urban areas that are predominantly vacant and economically dead, such that their continued existence impairs the sound economic growth of the community, with the resultant development of slums and blighted areas.

Cannata v. City of New York, 11 N.Y.2d 210, 182 N.E.2d 395, 227 N.Y.S.2d 903 (1962), was an action instituted in the Supreme Court, Special Term, Kings County, for a judgment declaring this statute, section 72-n of the General Municipal Law,[1] unconstitutional on its face. The action was brought by sixty-eight home owners in the Canarsie section of Brooklyn whose land is to be condemned and acquired by the city through a procedure authorized by the statute. The homes of the plaintiffs are, for the most part, located in one section of the total area to be condemned, but they were considered by the New York City Board of Estimate and the City Planning Commission to be

17. Brief for Respondent, Schroeder v. City of New York, 10 N.Y.2d 522, 180 N.E.2d 568, 225 N.Y.S.2d 210 (1962).

1. N.Y. Gen. Munic. Law, § 72-n, Laws 1958, repealed and re-enacted in modified form in Article 15.

an integral part of a 95-acre parcel to be resold to private parties for the development of an industrial park. It was determined by the Planning Commission that this particular section of Brooklyn has become stagnant and economically dead within the meaning of the statute, and that for purposes of redevelopment, the wisest course of action would be the establishment of industry in this area, which is at the present time seventy-five per cent vacant. The decision of the Planning Commission was based upon an accumulation of extensive data relating to sociological and historical findings bearing upon the past, present, and future development of the city in general, and the borough of Brooklyn in particular.

The plaintiffs asserted that the statute in question is unconstitutional on its face in that it exceeds the concept of slum clearance as authorized by article XVIII, section 1 of the Constitution, and that the taking of the land in question cannot be for a public use because there is no "tangible physical blight" in the area, *i.e.*, it is non-slum, and because the land is to be resold to private developers, although they will be guided by a municipal masterplan. The Supreme Court dismissed the complaint[2] and appeal was taken to the Appellate Division, which affirmed.[3]

The majority of the Court of Appeals, concurring in the opinion of Chief Judge Desmond, held that section 72-n was not unconstitutional on its face, nor was its application in the instant case. The taking of non-slum land for redevelopment by private corporations was held to be a species of public use, where the area in question is seventy-five per cent vacant and has been subdivided in such a way as to prevent its effective economic development. It was further held that such taking for redevelopment by needed industries was also within the ambit of a public use. The decision is in no sense a departure from previous rulings in similar situations. In *Murray v. La Guardia*,[4] the plaintiff resisted the condemnation of some eighteen city blocks, their clearance and subsequent erection of thirty-five apartment buildings to house more than 24,000 people. Although the city of New York provided the masterplan for development, the project was financed by the Metropolitan Life Insurance Co. The plaintiff sought to enjoin the plan and asserted the unconstitutionality of the statute authorizing such action on the ground that it did not confine itself to slum clearance and reconstruction for former slum dwellers. But the Court of Appeals held that article XVIII of the Constitution authorizes the legislature to provide low cost housing for persons of low income, *or* to reconstruct or rehabilitate substandard and insanitary areas. It was not believed that the mere fact that the project was to be carried out by a private corporation made the taking and redevelopment of substandard land any less a species of public use: "If upon completion of the project the public good is enhanced, it does

2. 24 Misc. 2d 694, 204 N.Y.S.2d 982 (1960).
3. 14 A.D.2d 813, 221 N.Y.S.2d 457 (2d Dep't 1961).
4. 291 N.Y. 320, 52 N.E.2d 884 (1943).

not matter that private interests may be benefited."[5] A like result was reached by the Court of Appeals in *Kaskel v. Impellitteri*.[6] Further support for this view was found by the majority in an opinion by the Supreme Court of the United States in *Berman v. Parker* wherein it was stated: "We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."[7]

A lengthy minority opinion by Judge Van Voorhis founded its dissatisfaction with the statute in question upon the assumption that land could be subject to eminent domain even if it were not substandard or insanitary. It was felt that in this particular case there had not been a finding "that any of this area is substandard or insanitary, *i.e.*, slum."[8] The statute in question has clearly confined itself to the taking of substandard and insanitary land for purposes of redevelopment. And the findings of the City Planning Commission[9] do in fact designate this area to be "blighted," and in every sense of the word substandard or insanitary. What must be remembered is that an area *can* be substandard, *or* insanitary, *or* blighted without being a slum. If we are to follow the rule laid down in *Murray* and *Kaskel*, it must inevitably follow that the taking of substandard real estate by a municipality for redevelopment projects, even where such redevelopment is to be in the hands of private capital, is a species of public use; and this has been found to be within the ambit of constitutional authority. There is no extension here and no departure from precedent as the minority fears. A close reading of *Murray* and *Kaskel* reveals that an opposite result from that achieved by the majority would mean a diluting of the full import of these cases and a backward step for urban renewal progress.

There is further apprehension in the minority opinion that the power of administrative bodies in determining what areas are to be condemned as substandard, insanitary or blighted can be exercised in an arbitrary and capricious manner. This is, of course, a possibility. The statutory machinery for slum clearance and redevelopment necessitates the making of value judgments by individuals who must decide what is substandard, insanitary, or blighted, and what manner or mode of redevelopment will be in the public interest and for a public use. This is one of the hazards of any democratic form of government —that mistakes can be made; that unconstitutional statutes can be passed by legislatures; that injustice can be perpetrated at the hands of administrative officials.[10] But it is also one of the cornerstones of our system of government

5. Id. at 329, 52 N.E.2d at 888.
6. 306 N.Y. 73, 115 N.E.2d 659 (1953).
7. 348 U.S. 26, 33-34 (1954).
8. 11 N.Y.2d 210, at 215, 182 N.E.2d 395, at 397, 227 N.Y.S.2d 903, at 906.
9. Exhibit II, Record.
10. The language of the Court in Kaskel is especially pertinent with regard to this apprehension of the minority: "It is not to be assumed that responsible public officers will, in some future instance, label as 'substandard or insanitary' an area in which there are no buildings at all, or fine, modern buildings only, or that they will attempt to condemn a number of such buildings by stretching the concept of 'area'. Such attempts can be dealt with if and when they are made." Kaskel v. Impellitteri, 306 N.Y. 73, 81, 115 N.E.2d 659, 663 (1953).

that no citizen's grievance need go unheard where it is felt that his constitutional rights have been negatived by a statute or its capricious administration by government officials. This is why *Cannata* was brought—to seek a declaratory judgment pertaining to an administrative action thought to be based upon an unconstitutional statute, capriciously applied by administrative officials. That review having been granted, it was decided that the statute in question is not unconstitutional on its face, nor is its proposed application to the facts of the case.[11]

The General Municipal Law, section 72-n is, in the last analysis, a realistic approach to a problem that must be solved. By its application it will eliminate not only existing slums, but potential slums as well and promote the sound growth of the community. It recognizes that even before a slum exists in a particular area the seeds of its birth may be present in such factors as the subdivision of land into lots of such size and shape as to negative their development into a healthy neighborhood; the existence of a poorly designed street scheme; outmoded utilities and topographical conditions unsuited for effective growth; buildings poorly designed and placed; old and dilapidated sanitary facilities. It further recognizes that such areas are not only tomorrow's slums, but today's tax delinquency and impediment to the providing of more vital services for more citizens, and that one of the major urban needs is the reversal of the industrial trend of abandoning the urban area because of a lack of reasonably priced land for needed expansion.[12] The inevitable result of eliminating such areas and reversing this trend is to provide more jobs for urban workers, more income for their families, more tax revenue for the city government—part of which will return to the task of urban redevelopment—and the elimination of our slums before they begin. Thus the attack upon urban deterioration advances from the stage of block-by-block destruction of slums and the hasty reconstruction of neighborhoods, to that of a positive and progressive program of slum *prevention.* And the desirability of the statute, aside from its established constitutionality, is to be found in its recognition of a carefully planned procedure by which substandard land is to be deemed necessary for redevelopment and subject to condemnation and in its express provision that any such area to be redeveloped must be "predominantly vacant." It is submitted that the instant case represents an encouraging judicial affirmation of a sound foundation for today's progress in urban redevelopment—the cooperation of governmental authority and administration with the increasingly important resources of the social and economic sciences.

J. P. M.

11. It has long been held that the question of whether or not a condemnation is for public purpose is a judicial question. See Denihan Enterprises v. O'Dwyer, 302 N.Y. 451, 99 N.E.2d 235 (1951).

12. Hoover and Vernon, Anatomy of a Metropolis 30 (1959). The authors point out that New York City has lagged in the area of growing industries while merely holding its own in the shrinking ones.