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EMINENT DOMAIN--Blight Declaration--Extensive Delay in Initiating Condemnation After Declaration of Blight May Constitute a Taking Under State Constitution

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EMINENT DOMAIN—Blight Declaration—Extensive Delay in Initiating Condemnation After Declaration of Blight May Constitute a Taking Under State Constitution. *Washington Market Enterprises, Inc. v. City of Trenton*, 68 N.J. 107, 343 A.2d 408 (1975).

In 1958, the City of Trenton examined the possibility of redeveloping a large portion of its downtown area. In 1967, after a tortuous planning process, the land designated for redevelopment was declared blighted. Plaintiff, the owner of a large commercial building in this redevelopment area, alleged that in 1963 it began losing tenants because of the widespread publicity given to the threatened condemnation. After the 1967 declaration of blight, the area deteriorated markedly. By 1973, plaintiff's building was almost entirely vacant, yielding $6,300 in rent compared to costs of $9,500 in insurance charges and $30,000 in annual property taxes. Plaintiff sought an order requiring the defendant to condemn its property, or alternatively to pay damages for the diminished value of property.[1] The Supreme Court of New Jersey held that plaintiff alleged a cause of action despite the absence of a direct taking by the defendant.[2]

There are generally two types of state condemnation statutes.[3] The traditional statute is patterned after the unjust taking provision of the fifth amendment of the U.S. Constitution which requires just compensation for the taking of private property for public use.[4] What constitutes a taking has been the subject of much decisional law[5] and legal commentary.[6] It has been the traditional rule that a

1. Washington Market Enterprises, Inc. v. City of Trenton, 68 N.J. 107, 110-12, 343 A.2d 408, 409-10 (1975).

2. *Id.* at 123-24, 343 A.2d at 416-17.

3. The two types of statutes have about equal representation among the states. For a listing, see Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439, n.3 (1974).

4. "No person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

5. *See, e.g.*, Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

6. *See generally* Sax, *Takings, Private Property & Public Rights*, 81 YALE L.J. 149 (1971). The takings issue has been most frequently litigated recently in respect to wetland legislation, *see* Note, *State & Local Wetlands Regulation: the Problem of Taking Without Just Compensation*, 58 VA. L. REV. 876 (1972), and landmark preservation, *see* Note, *Landmark Preservation Laws: Compensation for Temporary Taking*, 35 U. CHI. L. REV. 362 (1968).

taking of property in the constitutional sense required an actual physical invasion or direct legal restraint on its use.[7]

The second type of condemnation statute allows recovery not only for a governmental taking but also for property damage caused by a governmental body without a taking.[8]

Since the New Jersey constitution[9] contains the first type of condemnation provision, the court in *Washington Market* had to find a taking by the government. In so finding, the court arguably has gone further than any previous court in like circumstances.[10]

In reviewing eminent domain suits, state courts have looked to the extensive federal body of law in the area to understand the constitutional requirements that must be met.[11] Traditionally, it has been the character of the invasion and not the amount of

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7. *See* NICHOLS, EMINENT DOMAIN § 6.38(1) (rev. 3d ed. 1974) states:

> [T]he Supreme Court of the United States and the great majority of the state courts have adhered to the old doctrine and hold that when the owner of property continues in use and possession as before, it is not taken in the constitutional sense, however much it may be depreciated in value. In other words, when a municipal or public service corporation . . . inflicts injury upon private land under authority of and in compliance with an act of the legislature, and there has been no want of reasonable care or skill in the execution of the power, such party is not liable in an action at law for such injury, even though the same act if done without legislative sanction would be actionable, unless the injury is of such a character as to deprive the owner of the use and possession of his land, or compensation is required by special statutory or constitutional provision whenever property is damaged by the construction of a public improvement.

8. *See, e.g.*, CAL. CONST. art. 1, § 14 which provides in part: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for the owner . . . ."

9. N.J. CONST. art. 1, ¶ 20.

10. Although there have been a number of decisions that have either allowed recovery or found a valid cause of action for damages arising from a declaration of blight, in all of these cases condemnation proceedings were eventually begun. *See, e.g.*, Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966); Elmwood Park Project Section 1, Group B v. Cassese, 376 Mich. 311, 136 N.W.2d 896 (1965). Moreover, in each instance, the delaying tactics on the part of the government more directly interfered with the property owner's interest than was the case in *Washington Market*. *See, e.g.*, Sayre v. United States, 282 F. Supp. 175 (N.D. Ohio 1967) (notices sent to residents informing them of the impending condemnation, and denial of request by plaintiff's bankrupt to repair its property). *See also* Comment, *Delay, Abandonment of Condemnation, and Just Compensation*, 41 So. CALIF. L. REV. 862 (1968). For a more complete discussion of the significance of *Washington Market*, see text accompanying notes 45-59 *infra*.

11. For an overview of these guidelines, see Dunham, *Griggs v. Allegheny County In Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63 (1962). For a new insight into eminent domain law, see Sax, *supra* note 6.

resulting damage that determines whether there has been a taking.[12] Typically, a taking requires a physical invasion or a conversion.[13] Thus, an invasion of land by water, sand, earth, and other material constitutes a taking,[14] while a zoning ordinance which only restricts the use of the land does not.[15] It is difficult to reconcile the different treatment of these two situations since both involve a similar quantum of damage. Yet the Supreme Court has always separated the zoning power from that of eminent domain and has allowed recovery only in situations involving the latter.[16] The rationale is that eminent domain involves the taking of property for public use, while zoning involves regulating property in order to prevent its use to the detriment of the public.[17]

The treatment given the zoning power has been extended to other legislative enactments similar to the declaration of blight in *Washington Market*. For example, in *Danforth v. United States*,[18] the Supreme Court held that a condemnor is free to discontinue a project at any time and may not be liable for dimunition in property values which resulted from legislation enacted in respect to the project.[19] The rationale of the Court was that such changes in value were "incidents of ownership. . . . [and could not] be considered as a 'taking' in the constitutional sense."[20]

Those state courts which have ruled on the precise issue in *Washington Market*, have reasoned along *Danforth* lines, and thus have found in favor of the condemnor.[21]

In *Cayon v. City of Chicopee*,[22] plaintiff owned land which the defendant publicly announced would be taken for urban renewal

12. United States v. Cress, 243 U.S. 316, 385 (1916).

13. *See* note 7 *supra*.

14. Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).

15. Hadachek v. Sebastian, 239 U.S. 394 (1915).

16. *Compare* Euclid v. Ambler Co., 272 U.S. 365 (1926) *with* Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).

17. Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962, 978 (N.D. Cal. 1975); *see* Sax, *Takings & the Police Power*, 74 YALE L.J. 36 (1964).

18. 308 U.S. 271 (1939).

19. *Id.* at 286-87.

20. *Id.* at 285.

21. *See, e.g.*, Hilltop Properties, Inc. v. State, 233 Cal. App. 2d 349, 43 Cal. Rptr. 605 (1965); Chicago v. Loitz, 11 Ill. App. 3d 42, 295 N.E.2d 478 (1973); Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971).

22. ___ Mass. ___, 277 N.E.2d 116 (1971).

purposes. The city failed to take the property officially, but demolished other buildings preparatory to urban renewal. Plaintiff alleged that as a result of these activities he was deprived of the productive use of his property, and the ability to sell it or pay the taxes levied. He requested a finding that the conduct of the government constituted a "taking" of his property.[23] The court, basing part of its disagreement on public policy,[24] discussed the great deal of planning involved in urban renewal projects, much of which must be done prior to the construction phase of the project.[25] An important aspect of the project involves notice to the community of the proposed action so that residents have an opportunity to represent their interests. The court observed that if such a public announcement warranted compensation for the diminished property value, the purpose of the announcement would be frustrated and subsequent proceedings hampered.[26]

Plaintiffs often demand consequential damages resulting from the condemnation of adjacent properties. In *Orfield v. Housing & Redevelopment Authority*,[27] the Minnesota Supreme Court affirmed a trial court's denial of such relief noting[28] that the

> Urban Renewal Area Project arose out of the decline of the area, and the decline was not the result of the urban renewal project. Therefore, much of the deterioration of the neighborhood complained of by petitioners was under way prior to the housing authority activity and, indeed, might well have progressed even faster had there been no renewal project.

The New Jersey Supreme Court, prior to *Washington Market*, had also consistently found in favor of the condemnor absent direct invasion of absolute conversion. In *Morristown Board of Education v. Palmer*,[29] the New Jersey Highway Department planned to construct a six lane interstate highway which would pass within 40 feet of a wing of one elementary school. Plaintiffs contended that the proposed highway would render the school "useless" as an elementary school facility because of the danger to pupils, the problem of

23. *Id.* at ___, 277 N.E.2d at 117.
24. *Id.* at ___, 277 N.E.2d at 117, 119.
25. *Id.* at ___, 277 N.E.2d at 119-20.
26. *Id.* at ___, 277 N.E.2d at 119-20.
27. ___ Minn. ___, 232 N.W.2d 923 (1975).
28. *Id.* at ___, 232 N.W.2d at 927.
29. 88 N.J. Super. 378, 212 A.2d 564 (App. Div. 1965), *rev'd*, 46 N.J. 522, 218 A.2d 153 (1966).

air pollution and noxious fumes, and the noise of traffic which would substantially handicap the teaching process. Plaintiffs demanded that the Highway Department be compelled to institute condemnation proceedings and that pending such proceedings the Highway Department be stayed from taking any further action on the project which substantially affected the use of the school.[30]

The superior court held that it was error for the trial court to have dismissed the action summarily and remanded the case for a full hearing on whether the use of the school was being totally or substantially destroyed so as to constitute a taking as was alleged.[31] On appeal, the supreme court reversed, finding that the "project as presently planned . . . reveals . . . no physical invasion of the school premises . . . ."[32] Prior to that appeal, the Highway Department had changed its plans so that the highway would not encircle the school with its access roads or ramps.[33] Thus, *Palmer* clearly demonstrates that property suffering only consequential damage as a result of non-confiscatory government action is excluded from the compensatory scope of the New Jersey constitutional taking provision. *Palmer*, however, expressly left open "[t]he question of whether a total or substantial destruction of the beneficial use of property amounts to a taking in the constitutional sense . . . ."[34] It was this issue that confronted the court in *Washington Market*.

Cases involving claims for relief from blight declarations had been brought before the New Jersey Supreme Court prior to *Washington Market*. In discussing these cases, the court distinguished them, and attempted to limit *Washington Market* to its facts. In one such case, *Wilson v. City of Long Branch*,[35] plaintiffs urged that the " 'very determination of blight in itself constitutes a taking of property' " because the property's market value is thereby diminished or destroyed and with the Damocles sword of condemnation hanging over it, sale would be difficult.[36] The court rejected the argument by equating such a result with that which often occurs as a result of

30. *Id.* at 382-85, 212 A.2d at 565-67.
31. *Id.* at 391, 212 A.2d at 571.
32. 46 N.J. 522, 525, 218 A.2d 153, 155 (1966).
33. *Id.* at 525, 218 A.2d at 155.
34. 68 N.J. at 116, 343 A.2d at 412.
35. 27 N.J. 360, 142 A.2d 837, *cert. denied*, 358 U.S. 873 (1958).
36. *Id.* at 374, 142 A.2d at 844.

municipal zoning and is non-compensable.[37] The court in *Washington Market* distinguished *Wilson* by noting that it did not refer to the situation where, in addition to a declaration of blight, the passage of time and other related factors "are said to have shorn property of literally all or most of its value."[38]

The degree of directional change that *Washington Market* represents is best demonstrated by comparing it with *Freeman v. Paterson Redevelopment Agency.*[39] In *Freeman*, a government agency issued a declaration of blight for an area which included the plaintiff's commercial property. It took no action for over ten years and then informed the plaintiff that it would not be taking his property after all. During the ten year period, plaintiff lost one of his two commercial tenants and was unable to rent the property to another tenant. The defendant's employees told prospective tenants that plaintiff's property would soon be taken but condemnation proceedings were never initiated. Plaintiff sought the appointment of a commission to assess damages or, alternatively, an order that the agency initiate condemnation proceedings.[40] The court held that "under the New Jersey approach the facts that plaintiff relies upon to establish a constructive taking would be appropriate to establish the quantum of damages after initiation of condemnation, but do not justify the compelling of that condemnation itself."[41]

The single factor which differentiates *Washington Market* from *Freeman* is the greater percentage of rental income loss suffered by the plaintiff in the instant case.[42] The court in *Washington Market*, however, does not base its decision on a threshold amount but rather generally discusses the recent extensions of the "taking" concept[43]

37. *Id.*, 42 A.2d at 845.

38. 68 N.J. at 115, 343 A.2d at 412.

39. 128 N.J. Super. 448, 456-57, 320 A.2d 228 (Law Div. 1974).

40. *Id.* at 450-53, 320 A.2d at 229-30.

41. *Id.* at 456, 320 A.2d at 232.

42. The plaintiff's property in *Washington Market* generated $160,000 in rent revenues in 1963 as compared with $6,300 in 1973. 68 N.J. at 113, 343 A.2d at 410. Although no figures are stated in *Freeman*, the plaintiff lost only his commercial tenant for the first floor of his building but retained the commercial tenant on the second floor and the two residential tenants on the third floor. 128 N.J. Super. at 452, 320 A.2d at 230.

43. The court initially considers those "taking" cases concerning low-flying airplanes. In United States v. Causby, 328 U.S. 256 (1946), the Supreme Court granted recovery for damages resulting from overflights that interfered with plaintiff's chicken farm. In Griggs v. Alleghany County, 369 U.S. 84 (1962), the Court granted recovery to a homeowner whose

and the hardships that may flow from blight declarations.[44] But close analysis of these recent extensions of the "taking" concept, demonstrates that *Washington Market* goes further than other "blight" cases that have found in favor of the property owner.

Illustrative of these cases is *City of Cleveland v. Carcione*.[45] In *Carcione*, plaintiff owned property consisting of two stores and fourteen dwelling units in an area which the city of Cleveland sought to condemn for an urban renewal project. After declaring the area blighted, the city sent eviction notices to the residents and occupants of the property owned by plaintiff and began demolishing buildings in the surrounding area. These two actions combined to cause an exodus of the inhabitants from the area which, in conjunction with an alleged reduction in police protection, led to extensive vandalism.[46] The major issue in the case was whether the property was to be assessed in the condemnation proceeding at the time of trial or at the time the property was declared blighted.[47] The court held that the blight declaration date applied since the time of trial date "may result in an award of compensation to the owner of the property appropriated which is unreasonable and unjust under unusual facts and circumstances, as are present in the case at bar."[48]

Probably the most significant extension of the "taking" doctrine prior to *Washington Market* was *Foster v. City of Detroit*.[49] In

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living conditions were rendered intolerable by low-flying planes. *See also* Leavell v. United States, 234 F. Supp. 734 (E.D.S.C. 1964); Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964). *See generally* Comment, *The Airport Noise Cases: Condemnation by Nuisance & Beyond*, 7 WAKE F. L. REV. 271 (1971). The court also discussed recent cases concerning blight declarations. *See* text accompanying notes 45-59 *infra*.

44. The court stated:

> A declaration of blight is one of the early steps in an urban renewal project. Experience had shown that there is generally a considerable interval of time between such an announcement and the eventual acquisition—whether by purchase or condemnation—of property located in the blighted area. Occasionally, as was the case here, the project will be entirely abandoned before completion. From the time it becomes generally known that an area has been selected as the site of an urban renewal project, as we have pointed out in earlier cases cited above, there ceases to be a ready market for premises within the area. It becomes difficult to find tenants and impossible to enter into long-term leases. Upkeep, maintenance and renovation cease; the value of the property tends constantly to diminish.

68 N.J. at 119-20, 343 A.2d at 414-15.

45. 118 Ohio App. 525, 190 N.E.2d 52 (1963).

46. *Id.* at 526, 190 N.E.2d at 54.

47. *Id.* at 528, 190 N.E.2d at 56.

48. *Id.* at 529, 190 N.E.2d at 57.

49. 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968).

Foster, a condemnation proceeding against plaintiffs' property lasted almost ten years before it was abandoned. It was only when a second proceeding was commenced two years later that actual appropriation took place.[50] However, in determining damages, the court took into account the depreciation in value caused by the city's actions in the first proceeding.[51] These included the razing of several blocks in the neighboring vicinity, telling plaintiffs that they would receive no compensation for improvements to their property, and publicizing the proposed condemnation.[52]

Both *Carcione* and *Foster* are distinguishable from *Washington Market* in two respects. First, the conduct on the part of the government in both cases was of a more egregious and interfering nature. In *Washington Market* mere delay was the extent of the city's activities that allegedly caused the decline in plaintiff's competitive position in real estate.[53] In *Carcione* and *Foster*, the respective governments went considerably further by notifying individual tenants of the impending condemnation and by razing adjacent properties.[54] Second, both *Carcione* and *Foster* culminated in actual condemnation.[55] Although the *Foster* court did hold that the aborted condemnation proceeding constituted a taking,[56] the court was not required to reach the issue since an actual condemnation took place just prior to the suit.[57]

Several courts have considered the decline in market value brought by the city's pre-taking activities in determing awards in eminent domain proceedings, but only after condemnation actually occurred.[58] Nevertheless, *Foster* foreshadowed the situation where

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50. *Id.* at 660.
51. *Id.* at 662.
52. *Id.*
53. *See* text accompanying note 1 *supra*.
54. *See* text accompanying notes 45-52 *supra*.
55. *See* text accompanying notes 45-52 *supra*.
56. The court stated:

> Thus, this court now holds that the actions of the defendant which substantially contributed to and accelerated the decline in value of plaintiffs' property constituted a "taking" of plaintiffs' property within the meaning of the Fifth Amendment, for which just compensation must be paid.

254 F. Supp. at 665-66.
57. *Id.* at 660.
58. *See, e.g.*, Elmwood Park Project Section 1, Group B v. Cassese, 376 Mich. 311, 136 N.W.2d 896 (1965); Cleveland v. Hurwitz, 19 Ohio Misc. 184, 249 N.E.2d 562 (Ohio Prob. 1969).

recovery for dimunition in property value caused by a declaration of blight would be warranted despite the absence of an actual condemnation.

Washington Market is a logical extension of those decisions that realized the damage that may occur as a result of a government's procrastination in initiating urban renewal. The New Jersey Supreme Court realized the inconsistency in recognizing dimunition in market value after condemnation and denying it absent acquisition of the properties by the government. The court fails, however, to hold unequivocally that blight declarations regardless of duration will support a cause of action under the taking provision of the state constitution. The erosion of the traditional notions of the "taking" doctrine that such a holding might create may be easily obviated by the adoption of a provision in the New Jersey Constitution allowing recovery not only for a governmental taking but also for property damage caused by a governmental body without a taking.[59]

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59. *See* text accompanying note 8 *supra*. *See also* Fisher v. City of Syracuse, 46 App. Div. 2d 216, 361 N.Y.S.2d 773 (4th Dep't 1974). In his concurrence Judge Goldman expressed the hope that the state legislature would note the plight of literally hundreds of property owners and amend the state constitution to provide for just compensation when property is taken or damaged. *Id.* at 219, 361 N.Y.S.2d at 774.