

## REAL ESTATE & TITLE INSURANCE

# Court Greenlights Ambush Acquisitions

Recent eminent domain decision endorses assault on housing

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**M***ipro Homes*, together with other recent takings decisions, is likely to have a grave impact on the state's eminent domain laws. *Mt. Laurel Tp. v. Mipro Homes*, 379 N.J. Super 358 (App. Div. 2005). Perhaps just as important, *Mipro Homes* endorses what seems to be a regulatory, political and legislative assault on housing opportunities in New Jersey.

*Mipro* follows closely on the heels of the United States Supreme Court's *Kelo* decision. *Kelo v. New London*, Docket No. 04-108 (June 23, 2005). In *Kelo*, the Court held that a municipality can acquire private property within a redevelopment area by eminent domain for economic development without violating the public use requirement of the Fifth Amendment's Takings Clause. The Court suggested that "economic development" could include, but would not be limited to "new jobs and increased tax revenue." In so ruling, the Supreme Court affirmed prior decisions, such as *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), which interpreted the term "public use" to mean any legitimate public purpose and surrendered the responsibility for making this determination to state legisla-

tures.

The legal pronouncements in *Kelo*, although certainly dire to private property owners, are not inconsistent with New Jersey's takings jurisprudence and, therefore, will not likely bring about any major changes in this state. However, *Kelo's* message of unflinching deference to legislative determinations has already served to discourage critical and thorough judicial review of challenges to government land acquisition plans. At least this certainly appears to have been the case in *Mipro*.

In *Mipro*, a municipality added a 16.3-acre parcel to its recreation and open space plan after discovering that the landowner intended to develop the site with new housing and, soon thereafter, sought to acquire the site. Interestingly, when the municipality initiated condemnation proceedings, the zone in which the said lands were located had not been designated as open space in the municipal master plan. The Appellate Division first addressed this issue and concluded that the municipal governing body "[h]ad authority to condemn the *Mipro* site for open space even though the master plan did not then identify open space as a planned use in the area where it is located."

The Appellate Division then answered two additional questions. First, the court found that an action to condemn property for open space

may be maintained even if the municipality's primary motive in selecting particular properties for acquisition is to slow down residential development. The court said the municipality had "a reasonable basis for concern that additional residential development would aggravate traffic congestion and pollution problems in the municipality and impose added stress on its school system and other municipal services." Second, the court found that the conservation of land for open space is a public use. Therefore, a municipality may condemn private property for open space purposes even if, at the time of acquisition, it does not have a plan to devote such lands to an active recreational use.

Although purely dictum, the court hinted that if the subject property had been approved for an inherently beneficial use, such as a medical rehabilitation center, it might have reached a different result. Notwithstanding this potential limitation on the scope of its ruling, the court's distortion of the public use doctrine in *Mipro* is unnerving, and could open the floodgates to emotionally and politically driven land acquisitions, sometimes referred to as "ambush acquisitions," by municipal governing bodies.

Unless overturned by the New Jersey Supreme Court, *Mipro* could cause significant reverberations. Although an appeal is expected, as of press time, filing of the appeal could not be confirmed.

Many municipalities, which otherwise welcome commercial development, shun most residential development. One exception is senior housing. Commercial development and age-restricted housing produce few, if any, school children. Since public school education is funded principally on a local level through ad valorem (real estate) taxes, educational costs outstrip real estate taxes for the vast majority of nonage-restricted housing. Somewhere along the line, the sounds of children laughing and learning became too expensive to be endorsed by significant portions of our state.

The fact that *Mipro* endorses these sentiments, or at least does not prohibit ambush acquisitions targeting residential development (or other uses of property), should be nothing short of scary. The development community is up in arms at the prospects that planning and investment for the housing needs of citizens of New Jersey can be undone after the fact and most of New Jersey should be as well.

Ambush acquisition is the antithesis of planning — a detailed plan and methods for land use and development — which is required by various statutes in New Jersey, notably the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., and the State Planning Act, N.J.S.A. 52:18A-196 et seq. Good planning considers all of the various needs and impacts of development, providing for a balance of sufficient housing opportunities and types as well as commercial and industrial development and open space. For example, what would happen if there were insufficient housing to populate jobs? Or, for that matter, if there were not enough available jobs for residents? Residents having to drive long distances for retail needs, housing and jobs adds to traffic on our roads and is the converse of “smart growth.” Ambush acquisitions of land to prevent development not only increases the costs of the acquisitions — approved projects costs far more than raw land — but also takes away

money for planned open space that would most benefit the community. Would we want a state where development opportunities provide insufficient quality or quantity of affordable housing (which most argue already exists) or other housing types? These are only a few of the problems that could result from lack of balance and planning. Focusing on the tax impacts of development and permitting ambush acquisitions endorses poor planning.

There are numerous other examples of the assault on housing. For instance, the recently enacted Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq., which covers 1,250 square miles of property in 88 municipalities, permits, in some instances, one home on 88 acres of land. These limitations are mandatory. Although municipalities are permitted to allow necessary development and growth in the planning areas, they are under no obligation to do so. Another clear example of the assault on housing is when the New Jersey Department of Environmental Protection, by Administrative Order 2002-27, enacted a moratorium principally affecting 1,200 residential homes, including housing under construction, in the growth areas provided for under the Pinelands Protection Act, N.J.S.A. 13:18A-1 et seq., due to a so-called “water shortage.” However, by way of contrast, the Borgata Hotel Casino and Spa, which reportedly uses some 1 million gallons a day of water from the same water source, was permitted to open. The state reversed the moratorium in the face of litigation and political pressure. The most recent regulations promulgated under the Fair Housing Act, N.J.S.A. 52:27D-301 et seq., is yet another instance of this assault on housing.

Retired New Jersey Supreme Court Justice Gary Stein took the very unusual step of lambasting the intent and constitutionality of the affordable housing regulations then proposed under the Fair Housing Act, seemingly seeking to send a strong message to his former colleagues on

the Supreme Court that the regulations did not satisfy state and municipal constitutional obligations to provide adequate opportunities for affordable housing. Justice Stein’s comments are particularly compelling given that he was the last remaining New Jersey Supreme Court Justice having a strong background in land use.

By contrast, it should be noted, that the only real opportunities for development of dense housing projects, called for under the “smart growth” concepts being touted, are in our cities. While this is perhaps an opportunity to redevelop our cities, are families, particularly those with young children, willing to live in cities?

Many people will point out that in New Jersey, new housing developments continue to be constructed at rapid rates. Knowing that it takes two to four years to get a typical housing subdivision approved answers that question. Given the rapid appreciation and demand for new housing in New Jersey, developers are using existing inventory of approved development to meet that need for the time being. Given the slowing of approved projects and project densities, the inventory of approved housing projects is lessening considerably. Moreover, various developers anticipate focusing more on other states for housing development opportunities.

Limitations on housing development, particularly when the opportunity does not match the demand, will drastically increase housing costs, which we have seen in New Jersey. Other facts, which are beyond the scope of this article, may moderate housing prices, at least for a time. In the short term, increasing housing prices benefits homeowners in bolstering their net worth and borrowing power. However, the positive impacts cannot be maintained. For instance, last year, 29 percent of New Jersey homeowners spent more than 35 percent of their income on their mortgage payments. In 2000, that number was 23 percent. This increase occurred during a time when income

remained relatively flat. Robert Gebeloff, "Stretched Thin in the McMansion," *The Star Ledger*, Aug. 31, 2005, Page 15. People are thrilled when their homes appreciate so rapidly, as we have been seeing, but will that elation continue as first-time homebuyers enter the market with few housing choices or existing homeowners wish to trade up?

It has long been reported that housing development has a tremendous impact on our economy, historically leading us into, and out of,

recessions. Although recent recessions have not followed that trend as closely, a full 20 percent of the 3.725 million jobs added in the past two years ending in June, were directly related to housing. "Behind the Numbers, Another Real Estate Ripple," *The Star Ledger*, Aug. 21, 2005, Section 3, Page 1.

In fairness, it should be noted that some favor, in whole or in part, the assault on housing and the opportunities for *Mipro*-endorsed ambush acquisitions; whether for

perceived or real impact on taxes, politics, the environment, traffic or "not in my back yard" reasons. However, if these policies and tactics are going to continue into the future, then we need to do extensive planning to address the economic and sociological impact of our housing policies, which some would say are nearly bankrupt. It is almost as if we need to plan for our lack of planning. For this reason, many would be thrilled to have *Mipro* overturned. ■

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