[J-20-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

A CONDEMNATION PROCEEDING IN REM BY THE REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA FOR THE PURPOSE OF REDEVELOPMENT OF NORTH PHILADELPHIA REDEVELOPMENT AREA MODEL CITIES URBAN RENEWAL AREA CONDEMNATION NO. 30 B PHILADELPHIA, PA INCLUDING CERTAIN LAND IMPROVEMENTS AND PROPERTIES	:	No. 36 EAP 2006
	:	Appeal from the Opinion and Order of the Commonwealth Court dated February 6, 2006 at No. 150 CD 2005
	:	891 A.2d 820 (Pa. Cmwlth. 2006)
RE: 1839 NORTH EIGHTH STREET	:	ARGUED: April 16, 2007

DISSENTING OPINION

MR. JUSTICE BAER **DECIDED: December 27, 2007**

I respectfully dissent from the Majority's conclusion that taking private property through condemnation and transferring that property for nominal consideration to a religious partnership to develop a religious school does not have the principal effect of advancing religion. I believe that this government action provides direct aid to a religious school in violation of the Establishment Clause, and would therefore affirm the Commonwealth Court's holding that the taking was unconstitutional.

As part of a redevelopment plan in Philadelphia, the City of Philadelphia's Planning Commission certified as blighted the neighborhood that includes the property located at 1839 North Eighth Street (the Property), in which Veronica Smith Howard lived with her mother, Mary Smith, the property owner (Appellee). There is no dispute that the Property and the surrounding neighborhood are blighted. The Hope Partnership requested that

Philadelphia's Redevelopment Authority (RDA) acquire thirty-nine specific parcels in the neighborhood, including the Property, to transfer to the Hope Partnership to develop a nondenominational, faith-based school for children. The Hope Partnership described the venture as being between "[t]wo Communities of religious sisters, the Society of the Holy Child Jesus and the Sisters of Mercy. . . ." R.R. at 43, 47. It further explained that "[t]his collaborative venture is being built on the long established Holy Child and Mercy traditions of service, characterized by reverence, compassion, and belief in the life-changing power of education. As vowed religious, we are called to journey with those in need. . . ." Id. One of the purposes of the Sisters of Mercy, which is a Roman Catholic Order, is to operate schools devoted to education under the principles of commitment to God. The school that Hope Partnership seeks to run will be based on a model inspired by Judeo-Christian values that is nondenominational, but assumes the presence of God.

The RDA prepared a redevelopment proposal for the Planning Commission that included the acquisition for Hope Partnership, as well as numerous other nonreligious projects, such as building affordable housing, expanding existing businesses, and creating community gardens. The Planning Commission approved the proposal, and the Philadelphia City council approved the acquisition. Thirty-nine properties were identified for the Hope Partnership at a proposed acquisition cost to the RDA of $860,250.[1] After acquiring these properties, the RDA proposed to transfer them to the Hope Partnership below market value, for nominal consideration.

Appellee challenged the condemnation before the trial court, which held that the existence of blight justified the condemnation regardless of the specific developer's purpose for the intended project. On appeal, Appellee argued that the RDA's condemnation violates the Establishment Clause of the First Amendment of the United

[1] The RDA offered Appellee $12,000 as estimated just compensation for her property.

States Constitution and Article 1, Section 3, of the Pennsylvania Constitution because the intended beneficiary of the condemnation is a purely private religious organization that intends to develop a religious school on the site.[2] The Commonwealth Court agreed, and reversed the trial court's grant of preliminary objections in favor of the RDA.

On appeal, the issue before this Court is whether the RDA may exercise eminent domain to condemn a private homeowner's property that was certified as blighted and then transfer that property for nominal consideration to a purely private religious organization to construct and operate a private religious school. As noted, this issue implicates the Establishment Clause and Article 1, Section 3, of the Pennsylvania Constitution.[3] To survive an Establishment Clause challenge, the state must demonstrate (1) that the government action serves a secular purpose; (2) that its principal or primary effect neither advances nor inhibits religion; and (3) that it does not foster an excessive government

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[2] The Establishment Clause of the U.S. Constitution states: "Congress shall make no law respecting an establishment of religion. . . ." Similarly, Article I, Section 3, of the Pennsylvania Constitution provides that "no man may be compelled to attend, erect or support any place of worship, or to maintain any ministry without his consent. . . ." We have held that "[t]he protection of rights and freedoms" secured by Article 1, Section 3, of the Pennsylvania Constitution "does not transcend the protection of the First Amendment of the United States Constitution." Wiest v. Mt. Lebanon School Dist., 320 A.2d 362,366-67 (Pa. 1974).

[3] The Majority indicates that Appellee does not rely on the Pennsylvania Constitution in this appeal and uses Appellee's failure in this regard to decline to address the Pennsylvania Constitution *sua sponte*. Respectfully, whether Appellee relied on the Pennsylvania Constitution does not determine whether this Court can address it. This Court can affirm on any basis. Carrozza v. Greenbaum, 916 A.2d 553, 569 (Pa. 2007); Craley v. State Farm Fire & Cas. Co., 895 A.2d 530, 532-33 (2006). Besides, Appellee does, in fact, rely on the Pennsylvania Constitution. See Appellee's Brief at 14-15. To the extent Article 1, Section 3, of the Pennsylvania Constitution is consistent with the Establishment Clause of the U.S. Constitution, our discussion in regard to the U.S. Constitution is equally apposite to the Pennsylvania Constitution. See Wiest, 320 A.2d at 367.

entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602 (1971). All three of the Lemon test's requirements must be met before the act in question may stand. Springfield School District v. Dept. of Edu., 397 A.2d 1154, 1158 (Pa. 1979).

The Majority finds the taking constitutional premised upon its application of the three-prong Lemon test. Regarding the first prong, the Majority finds a secular purpose in the elimination of blight as established by the Urban Redevelopment Act. See 35 P.S. § 1702. Regarding the third prong, barring excessive entanglement between the state and a religious entity, the Majority concludes that the sale of property to a private developer, even a religious developer, does not constitute entanglement that would render the taking unconstitutional.

I agree with the Majority's conclusions regarding these two prongs of the Lemon test. However, I part ways with the Majority regarding the second prong because I disagree that the state has demonstrated that the government action's principal or primary effect neither advances nor inhibits religion. The Majority describes the government action as the taking of the Property, and concludes that one effect of the taking is to advance a religious organization's mission, but that this is not the principal or primary effect. Shifting gears and looking more broadly at the entire redevelopment plan, rather than the specific taking and transfer for the Hope Partnership, the Majority reasons that the principal or primary effect of the redevelopment plan is to eliminate blight in the neighborhood, while a secondary effect is the provision of quality religious educational opportunities and, potentially, the advancement of religion. The Majority reaches its conclusion in reliance on Zelman v. Simmions-Harris, 536 U.S. 639 (2002), and Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993).

I respectfully disagree. This case, like all other Establishment Clause cases, requires a careful examination of whether the government action violates any of the Establishment Clause's prohibitions, including the "sponsorship, financial support, and

active involvement of the sovereign in religious activity." Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (citing Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)). To answer whether the government action has the primary effect of advancing religion, the Supreme Court has drawn a consistent distinction between government programs that provide aid directly to religious schools, see, Mitchell v. Helms, 530 U.S. 793 (2000)(plurality), Agostini, supra, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995)(collecting cases), and programs involving truly private choice, in which government aid reaches religious schools only by virtue of the independent choices of private individuals. See Zelman, 536 U.S. at 649; Mueller v. Allen, 463 U.S. 388 (1983); Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481 (1986); Zobrest, 509 U.S. 1.

Each time the Supreme Court has been faced with Establishment Clause challenges to private choice programs involving indirect aid to religious schools, the Court has rejected the challenge. In Mueller, the Court rejected an Establishment Clause challenge to a program authorizing tax deductions for educational expenses because the class of direct beneficiaries included all parents rather than specific schools. Similarly, in Witters, the Court rejected a challenge to a vocational scholarship program that provided tuition aid to a blind student who wished to use the grant to attend a Christian college and become a pastor, because the aid that ultimately flowed to religious institutions did so only as a result of the choices of the aid recipients. In Zobrest, the Court examined whether a deaf student was permitted, under the Establishment Clause, to bring his state-employed sign-language interpreter with him to a Roman Catholic School. The Court concluded broadly that government programs that neutrally provide benefits to classes of citizens without regard to their religion are not readily subject to an Establishment Clause challenge. Finally, in Zelman, the challenged program provided tuition aid for certain students to attend participating public or private schools of their parent's choosing and tutorial aid for students

who remained in public school. The Court held that because the aid reached the religious organizations only by way of the choices of the individual recipients, the incidental advancement of a religious mission is attributable to the individual aid recipients, not the government. In all of these cases, the Court emphasized that the student, not the religious school, was the intended beneficiary of the state aid, and that any money that ultimately went to the religious institution did so as an incidental result of private choices. See also Agostini v. Felton, 521 U.S. 203 (1997) (rejecting a challenge based on the Establishment Clause to a program placing full-time public employees on parochial campuses to provide secular instruction, because the provision of the instructional services was available only to the students at whatever school they chose to attend, and do not relieve sectarian schools of costs they would otherwise bear).

In contrast to these indirect aid cases, special Establishment Clause dangers exist when aid is given directly to religious schools. Mitchell, 530 U.S. at 820. Unlike the Majority, I find no analogy between this case and cases detailed above involving indirect private choices. Rather, I believe this is a case of direct government aid, in the form of a land transfer below market value to a religious organization for the development of a religious school. The state action here is neither directed at, nor directly benefits, individual students without regard to where they choose to apply the aid. Instead, the aid here is essentially a land grant, directly to the religious school, as a consequence of state decision-making.

Appellee relies on two cases concerning direct aid to religious schools, which I agree are more germane to the facts *sub judice*. See Tilton v. Richardson, 403 U.S. 672 (1971) (plurality); Nyquist, 413 U.S. 756. In Tilton, the Court rejected a plan that provided federal grants directly to both religious and secular institutions for construction of academic facilities. The plan in question required assurances from religious beneficiaries of the plan that, for twenty years, the facilities would not be used for sectarian purposes, subject to a

right of recapture in the event that they were so used. At the end of twenty years, however, the restrictions and right of recapture would lapse. Although the opinion was not a majority, the Justices unanimously agreed that the lack of restriction and a recapture right after twenty years violated the Establishment Clause by leaving a religious institution with something of substantial value, given by the government, in which the beneficiaries were permitted to forward religious interests.[4]

In Nyquist, the challenged government action authorized direct payments to nonpublic religious schools for maintenance and repair without restricting payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes. Although the program was enacted for ostensibly secular purposes as part of a broader plan encompassing nonpublic schools serving low-income families, the Court found that the program's function was "unmistakably to provide desired financial support for nonpublic, sectarian institutions." Id. at 783. A majority of the Court struck down the law, concluding that because the grants were given without restriction on usage, it was possible for schools to finance their entire maintenance and repair budget from state tax-raised funds, and nothing prevented the schools from paying out of state funds the salaries of employees who, for example, maintained the school chapel. Absent appropriate restrictions on expenditures, the Court concluded that "it simply cannot be denied that [the maintenance and repair provision] has a primary effect that advances religion in that it subsidizes directly

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[4] Chief Justice Burger, joined by Justices Harlan, Stewart, and Blackmun concluded that the restrictive obligations of a recipient institution cannot constitutionally expire while the building has substantial value, and severed this portion of the Higher Education Facilities Act of 1963. See Tilton, 403 U.S. at 683-84. Justices Douglas, Black, and Marshall agreed that the reversion of the facility to the religious school at the end of twenty years was a grant from taxpayer funds that was plainly unconstitutional, but they saw constitutional infirmities in the statute as a whole. Id. at 692-93. Justice White concurred in the result.

the religious activities of sectarian elementary and secondary schools." Nyquist, 413 U.S. at 774.

In the instant case, the RDA paid, from the public treasury, an acquisition cost of $860,250 for the thirty-nine parcels of land it intends to transfer to the Hope Partnership for nominal consideration. The Hope Partnership, a religious partnership, intends to develop a religious school on the property to advance Judeo-Christian values. The RDA is, therefore, essentially gifting land to a religious organization. It is not clear what the value of this gift is, but it cannot be disputed that the difference between the $860,250 paid by the RDA and "nominal" cost paid by the Hope Partnership represents substantial aid, or direct financing of religious education, with the primary effect of advancing religion. Cf. Everson v. Board of Edu., 330 U.S. 1, 16 (1947) ("No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they adopt to teach or practice religion.").

Further, the transfer of land to the religious organization will be given without restriction on usage. If tax-raised-funds may not be granted to institutions of learning where the possibility exists that those funds will be used to construct a facility utilized for sectarian activities twenty years hence, see Tilton, and they may not be distributed to sectarian schools for the maintenance and repair of facilities without limitation on their use, see Nyquist, it follows that they cannot be used to purchase land to give outright to a religious institution to develop a sectarian school.[5]

Appellant and the Majority defend the vastly below-market-value transfer of land to the Hope Partnership by focusing on its inclusion in a broader redevelopment plan. I disagree that providing direct aid to a religious school as part of a redevelopment plan that

[5] Of course, Hope Partnership, may, consistent with the Establishment Clause, participate in the redevelopment of a blighted area so long as it pays fair market value for the land it acquires.

also benefits secular organizations shields it from constitutional scrutiny. In Tilton, the direct aid to private schools was provided pursuant to an aid program that required assurances, for twenty years, that no part of the project would be used for sectarian instruction or other religious activity. Congress intended the program to benefit all colleges and universities regardless of any affiliation with or sponsorship by a religious body. Id. at 676. This secular intent and inclusion of nonreligious schools was nevertheless insufficient to save the program from the Court's unanimous conclusion that the expiration of the government's restrictions and recapture right rendered the program unconstitutional because it left the religious school with unrestricted use of valuable property.

I also note my disagreement with the Majority's discussion of viewpoint discrimination. The Majority argues that to bar the Hope Partnership from participating in the redevelopment of a blighted area where all other entities are permitted to participate, solely on the basis of the Partnership's religious views, would likely constitute viewpoint discrimination. Majority Slip Opinion at 11, citing Good News Club v. Milford Central School, 533 U.S. 98 (2001) and Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1999). Although the Majority does not develop the basis for its position, it apparently believes that requiring fair market value from a religious organization, where such is not required from nonreligious parties, amounts to an unconstitutional discrimination on speech on the basis of viewpoint. See Good News Club, 533 U.S. at 106-107; Rosenberger, 515 U.S. at 829. I respectfully, but resolutely reject this as sophistry. Rosenberger and Good News Club involve, respectively, forums for public expression such as school facilities that are opened for after-school activities or for use by non-government organizations; or government-funded subsidies for student publications. In such cases, a sectarian/religious activity or publication cannot, consistent with the Free Speech clause of the First Amendment, be excluded from an otherwise open forum or subsidy program directed at a expressive medium solely on the basis of sectarian/religious content.

This reasoning is irrelevant, however, in a situation where there is no forum for speech. In Locke v. Davey, 540 U.S. 712 (2004), the Court refused to strike down a state constitutional prohibition barring the grant of state scholarship aid to students majoring in devotional theology, rejecting the argument that such a ban was viewpoint discrimination. The Court reasoned that the scholarship program is not a form for speech, and its purpose, to assist students from low and middle income families with the cost of postsecondary education, was not "to encourage a diversity of views from private speakers." In so concluding, the Court pointedly distinguished cases dealing with speech forums as inapposite. Similarly, the Urban Redevelopment Law is not a forum for speech; its purpose, to eliminate blight, is not to encourage a diversity of views from private speakers. Viewpoint discrimination is not implicated where the issue does not implicate access to a forum for speech. To find, as the majority suggests, that withholding public funds from a religious school amounts to viewpoint discrimination would create an inherent conflict between the First Amendment's establishment and expression aspects, causing the government to choose which aspect to vindicate, and which to violate, a result that finds no support in any legal authority. Accordingly, it is no answer to the foregoing Lemon analysis to suggest that it leads to unconstitutional viewpoint discrimination.

For all the stated reasons, I strongly dissent to what I view as an unfortunate decision by this Court.