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

CAPPY, C.J., CASTILLE, SAYLOR, EAKIN, BAER, BALDWIN, FITZGERALD, JJ.

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 RE: 1839 NORTH EIGHTH STREET	: No. 36 EAP 2006 : : Appeal from the Opinion and Order of the Commonwealth Court dated February 6, 2006 at No. 150 CD 2005 : : : ARGUED: April 16, 2007

OPINION

MADAME JUSTICE BALDWIN **DECIDED: December 27, 2007**

The primary question raised in this appeal is whether taking private property, certified as blighted 36 years previously, by eminent domain, in order to convey the property to a religious entity as part of a redevelopment plan, violates the Establishment Clause of the United States Constitution. The Commonwealth Court, in a four-three *en banc* decision, reversed the Court of Common Pleas of Philadelphia's determination that the taking was lawful, and found that, among other things, the taking violated the Establishment Clause. Because we believe that under the limited facts of this case the taking was Constitutional, we reverse.

In 1968, the neighborhood surrounding 1839 North Eighth Street in Philadelphia (the "Property") was certified as blighted by the City of Philadelphia's Planning Commission (the "Planning Commission"). Veronica Smith Howard and her mother, property owner Mary Smith ("Condemnee") resided in the house on the Property at that time.

On September 4, 2002, the Hope Partnership for Education (the "Hope Partnership"), a coalition of several Catholic groups, sent a letter to Philadelphia's Redevelopment Authority (the "RDA") requesting that the RDA acquire 39 specific parcels that the Hope Partnership had targeted in eastern North Philadelphia (including the Property) for the purpose of building a non-denominational, faith-based, not tuition based school for children of the blighted neighborhood and its surroundings. The RDA prepared a redevelopment proposal for the Planning Commission, including the request from Hope Partnership. The Planning Commission approved the proposal, which was then submitted to Philadelphia's City Council ("City Council"). Following a public hearing, the City Council passed an ordinance approving the acquisition of, among other things, the 39 properties designated by the Hope Partnership and the Partnership was identified as the developer. There is no question that these properties were blighted—only two were actually still occupied—and the estimated just compensation for the Property was $12,000. All 39 properties were to be transferred to the Hope Partnership. R.69a.

The Thirtieth Amended Redevelopment Proposal ("Redevelopment Proposal") covered significantly more than just the acquisition for the Hope Partnership. One thousand three hundred seventy six parcels were acquired for eighteen separate projects, with purposes including: (1) building affordable housing units for first-time homebuyers; (2) renovating historic structures for affordable housing for the elderly; (3) building low-income senior rental housing; (4) creating community gardens and related programs; (5) building a religiously operated middle school (the Hope Partnership program); (6) building low-income rental housing; (7) expanding existing business use; (8) building rental units for persons or

families living with HIV or AIDS; and (9) future development. R.88b-91b. Of the eighteen projects, only four had their acquisition costs paid for outside of the Redevelopment Authority's funding for renovation of the area: (1) the Women's Christian Revitalization Program low-income rental housing development (acquisition costs paid for by the Office of Housing and Community Development ("OHCD")); (2) an expansion of an existing business, Komplete Welding (acquisition costs paid for by the Philadelphia Authority for Industrial Development); (3) Advocate Community Development Corporation's development of rental units for persons or families living with HIV or AIDS (acquisition costs paid for by OHCD); and (4) Project H.O.M.E.'s development of housing for low-to-moderate income first-time homebuyers (acquisition costs paid for by Project H.O.M.E.). Of the entities designated as developers, some were religiously affiliated and others were not.

Condemnee filed preliminary objections to the taking on December 23, 2003. Condemnee alleged, among other things: that the taking of the Property was not for a public purpose; that the taking was arbitrary, capricious and discriminatory; that the taking is the result of a predetermined illegal commitment to a religiously-affiliated private entity; and that Condemnee's due process rights were violated.

The trial court overruled the preliminary objections, finding that "[o]nce the land was certified as blighted, it is proper then to transfer the land to private development, regardless of 'who' that future developer may be." In Re: 1839 N. Eighth St., November Term, 2003, No. 2988, slip op. at 3 (Pa. Ct. of Com. Pleas of Philadelphia Cty. February 24, 2004). The trial court relied upon this Court's decision in Belovsky v. Redevelopment Auth., 357 Pa. 329, 54 A.2d 277 (1947), in which we stated that the taking of private land deemed blighted was proper because the statute's purpose was "the clearance, reconstruction and rehabilitation of the blighted area" and the separate, subsequent transfer to a private developer was "purely incidental to the accomplishment of the real or fundamental purpose." Id. at 340, 54 A.2d 283. Because the trial court found the taking of the property

due to its blighted condition was legitimate, it refused to entertain any argument regarding whether the subsequent transfer of the property to a developer that is a religious entity violated the Establishment Clause of the First Amendment of the United States Constitution[1] or Article I, Section 3 of the Pennsylvania Constitution.[2] The trial court noted that there was no contention that the property was not blighted, the taking of the Property for the purpose of eliminating blight was a legitimate purpose, and that Condemnee had failed to challenge the certification of blight when it was made.

The Commonwealth Court reversed, finding four errors in the trial court's decision. According to the Commonwealth Court, the trial court erred: (1) in holding that land certified as blighted may be acquired and transferred to a private developer without regard to the identity of the developer; (2) in presuming that a condemnee's failure to challenge the certification of blight constituted waiver of any challenge to the taking; (3) in rejecting a condemnee's claim that the taking implicated an impermissible entanglement of church and state; and (4) in finding that a determination of blight was sufficient reason to justify the exercise of eminent domain.

Judge Pellegrini authored a dissent, joined by Judges Leadbetter and Leavitt, in which he found that in order for the taking to be invalid, Condemnee was required to prove that her property was not located in a blighted area, which she failed to do. According to Judge Pellegrini, the fact that the potential developer was a religious entity was not pertinent to the decision. Relying on Belovsky, the dissent would have found that the public purpose necessary to effectuate the taking is completely realized when the taking occurs

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[1] "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I. The Establishment Clause was incorporated to the states in Everson v. Bd. of Ed., 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

[2] "[N]o man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry without his consent . . . ." Pa. Const. art. I, § 3.

for the purpose of clearance, reconstruction and rehabilitation of the blighted area. In re 1839 N. Eighth St., 891 A.2d 820, 834 (Pa. Commw. Ct. 2006) (Pellegrini, J. dissenting) (citing Belovsky at 340, 54 A.2d at 282-83). Because elimination of blight is a valid purpose, any challenge to the taking based on the Establishment Clause will not prevail. The dissent additionally stated that even if they were to address the Establishment Clause issues, Condemnee would not prevail. Indeed, according to the dissent, to permit them to prevail would constitute "viewpoint discrimination" against religious groups, which is an impingement on the religious group's First Amendment Rights." In re 1839 N. Eighth St., 891 A.2d at 834 (Pellegrini, J. dissenting) (citing Good News Club v. Milford Cent. Sch., 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001)).

The RDA petitioned this Court for a grant of allocatur, which was granted.

An appellate court's scope of review where a trial court has sustained or overruled preliminary objections to a declaration of taking is limited to a determination of whether the trial court abused its discretion or committed an error of law. Condemnation of 110 Washington St., 767 A.2d 1154, 1157 (Pa. Commw. Ct. 2001). Review of the RDA's certification of blight and subsequent taking is limited to a determination that the RDA has not acted in bad faith, has followed the statutory procedures, and has not violated any constitutional safeguards. Crawford v. Redevelopment Auth. of County, 418 Pa. 549, 553, 211 A.2d 866, 867 (1965).

The record does not support a bad faith claim against the RDA. "Public officials are presumed to have acted lawfully and in good faith until facts showing the contrary are averred, or in a proper case are averred and proved." Robinson v. Philadelphia, 400 Pa. 80, 86-87, 161 A.2d 1, 5 (1960) (citing Parker v. Philadelphia, 391 Pa. 242, 249-50, 137 A.2d 343 (1958); Hughes v. Chaplin, 389 Pa. 93, 132 A.2d 200 (1957)). Justice Kennedy, in Kelo v. City of New London, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005), instructed that "[a] court confronted with a plausible accusation of impermissible favoritism

to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose." Kelo at 491, 125 S.Ct. at 2669, 162 L.Ed.2d at 459 (Kennedy, J. concurring). Additionally, in the instant case, the statutory procedures were followed, i.e., there was a plan, a public hearing, and approval by City Council. 35 P.S. §§ 1709 & 1712. Therefore, what remains is a review of whether the taking of the Property effectuated a constitutional violation, i.e., it violated the Establishment Clause.[3]

The constitutional violation allegation centers on whether the Commonwealth Court's review of the Establishment Clause issue was too narrow, leading to a misapplication of the three-part test announced in Lemon v. Kurtzman, 403 U.S. 602, 29 L.Ed.2d 745, 91 S.Ct. 2105 (1971). This Court has noted that Agostini v. Felton, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997), has not limited or abrogated the Lemon test. Haller v. Dep't of Revenue, 556 Pa. 289, 292, 728 A.2d 351, 352 (1999). The Lemon test requires, for a government action to survive an Establishment Clause challenge, that the state demonstrate: (1) that the 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 entanglement with religion. Lemon at 612-13, 29 L.Ed.2d at 756, 91 S.Ct. at 2111. The majority opinion in the Commonwealth Court found that the taking in this instance violated all three prongs of this test. First of all, the Hope Partnership requested specific land, which was acquired by eminent domain. This did not serve a secular purpose, but rather a purely religious one. Second, the principal or primary effect advanced religion by creating a religious school where there had not been one. Last, the

[3] Although it was addressed below, Appellee does not raise the Pennsylvania Constitution in this appeal. This Court will not address such issues sua sponte. Commonwealth v. Karash, 513 Pa. 6, 8, 518 A.2d 537 (1986) (citing Wiegand v. Wiegand, 461 Pa. 482, 337 A.2d 256 (1975)).

relationship between the Hope Partnership and the RDA demonstrates excessive entanglement. In re 1839 N. Eighth St., 891 A.2d at 830.

As to the first prong of the Lemon test, the Commonwealth Court is clearly in error. The secular purpose in the RDA's taking of the Property was but another in a series of steps taken to eliminate blight, as established in the Urban Redevelopment Act. 35 P.S. § 1702 ("Redevelopment Authorities . . . shall exist and operate for the public purposes of the elimination of blighted areas through economically and socially sound redevelopment of such areas . . . in conformity with the comprehensive general plan of their respective municipalities"). The Property was one of many properties in the area, all certified as blighted for over a third of a century, which were acquired after a developer was found who expressed an interest in the redevelopment project. The Property was acquired pursuant to the Redevelopment Plan. R. 42b-63b. The elimination of blight is a valid public purpose that, in the absence of bad faith, is completely separate from any religious use of the property subsequent to the taking. See In re Condemnation by the Urban Redevelopment Auth. of Pittsburgh, 590 Pa. 431, 913 A.2d 178 (2006); Belovsky v. Redevelopment Auth., supra. Indeed, in Belovsky, this Court found that "far from it being legally objectionable that property acquired by eminent domain be resold or retransferred to private individuals after the purpose of the taking is accomplished, the law actually requires" that it be so transferred. Belovsky at 341, 54 A.2d at 283. In Kelo, the United States Supreme Court approved a taking which was purely for economic development, and not of property previously determined to be blighted, finding that the necessary public purpose had been established. Kelo at 484-85, 125 S.Ct. at 2665-66, 162 L.Ed.2d at 454-55.

The second prong of the Lemon test has to do with whether the principal or primary effect of the government action, in this case, the taking of the Property, is to advance or inhibit religion. The Commonwealth Court found that the acquisition "had a primary religious effect because it directly aided the religious organization's mission to provide faith-

based educational services, among other things, to residents in the blighted area." In Re: 1849 N. Eighth Street at 830. We reject the Commonwealth Court's analysis, and find, for the following reasons, that current Establishment Clause jurisprudence would permit the taking of the Property for the purpose of conveying it to Hope Partnership in order for them to develop it into a school.

In 1973, the United States Supreme Court decided Comm. for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973). In Nyquist, a New York law established financial aid programs for nonpublic elementary and secondary schools, including direct monetary grants to "qualifying" nonpublic schools that were to be used for the "maintenance and repair of . . . school facilities and equipment to ensure the health, welfare and safety of enrolled pupils." Id. at 761-62, 93 S.Ct. at 2960, 37 L.Ed. at 956 (citing N.Y. Laws 1972, c. 414, § 1, amending N.Y. Educ. Law, Art. 12, §§ 549-53 (Supp. 1972-73)). The law was challenged on Establishment Clause grounds. Id. The Nyquist Court, noting that "[p]rimary among those evils [protected against by the establishment clause] have been 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" Id. at 770, 93 S.Ct. at 2965, 37 L.Ed.2d at 962 (citing Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970), Lemon). Thus, in 1973, the Supreme Court found that Establishment Clause jurisprudence recognized that "sectarian schools perform secular, educational functions as well as religious functions, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian. But the channel is a narrow one . . . ." Id. at 775, 93 S.Ct. at 2967, 37 L.Ed.2d at 964. Accordingly, the Court found that New York's "maintenance and repair provisions violate the Establishment Clause because their effect, inevitably, is to subsidize and advance the religious mission of sectarian schools." Id. at 779-80, 93 S.Ct. at 2969, 37 L.Ed.2d at 967.

In Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993), the Court rejected an Establishment Clause challenge to a program providing sign-

language interpreters to students, even those attending private sectarian schools. In Zobrest, the Court stated that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge." Id. at 8, 113 S.Ct. at 2466, 125 L.Ed.2d at 10. Thus, the primary beneficiaries were the children, not sectarian schools. Id. at 12.

In 2002, in Zelman v. Simmons-Harris, 536 U.S. 639, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002), the United States Supreme Court distinguished Nyquist, and found that a program that provided an incidental benefit to religious schools while providing a broad benefit to all students without regard to whether they attended a sectarian or non-sectarian school did not violate the Establishment Clause. In Zelman, there was a challenge to an Ohio law which provided educational choices to lower income students in Cleveland's schools, which, at the time, were some of the worst schools in the nation. Id. The high Court found that the Ohio program was "neutral in all respects toward religion." Id. at 653, 122 S.Ct. at 2467, 153 L.Ed.2d 604.

While the Commonwealth Court is correct that *an* effect of this taking is to advance a religious organization's mission to provide faith-based educational services, this is clearly not the *principal or primary* effect. The principal or primary effect of the redevelopment plan in general, and this taking in particular, is to eliminate blight in this long-suffering neighborhood. See, In re Condemnation by the Urban Redevelopment Auth. of Pittsburgh at 446-47, 913 A.2d at 186-87. One secondary effect is the provision of quality non-denominational educational opportunities to low-income urban families in their own neighborhood. R. 125b. Another secondary effect could potentially be the advancement of religion; however, as far as we can tell from the record, all potential developers were treated in the same manner: They were permitted to indicate property contained within the large blighted area in North Philadelphia that they would be willing to develop. The development plans were reviewed for their potential to eliminate blight in the neighborhood

and their conformance with the broad pre-existing North Philadelphia Redevelopment Area Plan (adopted in 1968). Assuming the development plans conformed to the Redevelopment Plan, they were included in the 30th Amended Redevelopment Plan at issue in the instant case, and attempts were made to acquire the property. After acquisition, all property was transferred to the developer for nominal consideration. While the religious nature of the school is reason for this Court's careful review of the record, the facts before us indicate no goal aside from the elimination of blight and do not provide any indication that the principal or primary effect would be to advance religion. See, Kelo, Nyquist, supra, Zobrest, supra, Zelman, supra.

The third prong of the Lemon test requires there to be no excessive entanglement between the state and a religious entity created by the government action. The Commonwealth Court found the instant facts to constitute excessive entanglement. We disagree. The Commonwealth Court has conflated the second and third prongs of the test. Basically, the Commonwealth Court found that because they believed the principal or primary effect of the transfer of the Property to Hope Partnership was the advancement of religion, then any relationship between the RDA and Hope Partnership constituted a joint effort that reflected excessive entanglement. See In Re 1839 N. Eighth St., 891 A.2d at 830. The Commonwealth Court ignores that entanglement is more than just mere interaction between government and religious entities. The United States Supreme Court has said that "[i]nteraction between church and state is inevitable and we have always tolerated some level of involvement between the two. Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." Agostini v. Felton, 521 U.S. 203, 233, 117 S.Ct. 1997, 2015, 138 L.Ed.2d 391, 420 (1997) (citing Bowen v. Kendrick, 487 U.S. at 615-17, 108 S.Ct. 2562, 2577-78, 101 L.Ed.2d 520, 544-46 (1988) (periodic monitoring of counseling program set up by religious institution not excessive entanglement)); Roemer v.

Board of Public Works of Md., 426 U.S. 736, 764-65, 49 L.Ed.2d 179, 96 S.Ct. 2337 (1976) (annual audits of religious colleges' use of grants not excessive entanglement)).

The exercise of eminent domain to eliminate blight has been approved repeatedly by both this Court and the United States Supreme Court. Berman v. Parker, 348 U.S. 26, 99 L.Ed. 27, 75 S.Ct. 98 (1954); Kelo v. City of New London, supra; In re Condemnation by the Urban Redevelopment Auth. of Pittsburgh, supra; Crawford, supra. Therefore, we find that the subsequent sale of the Property to a private developer, even a developer who is a religious entity, does not constitute "entanglement" that would somehow make the taking unconstitutional.

For the reasons stated above, to the extent that the Commonwealth Court was correct when that court found it necessary to overrule what it believed to be the trial court's finding of waiver for Condemnee's failure to challenge the certification of blight, we affirm. In all other respects, we reverse and remand to the Commonwealth Court for a determination of any outstanding issues consistent with this opinion.

Mr. Chief Justice Cappy and Messrs. Justice Castille, Saylor, Eakin and Fitzgerald join the opinion.

Mr. Justice Baer files a dissenting opinion.