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'Didden v. Port Chester':
Placing Eminent Domain Debate in Proper Perspective

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Abstract: Controversy often arises when landowners in blighted areas resist government driven urban-renewal condemnation of their property. Often, these urban-renewal areas, the scope of which is determined after extensive study, are condemned and transferred to a private developer who has an overall plan for the entire designated area. This article discusses the issues that arise when private property interests are overridden by public interests and how urban renewal will help revitalize the economies of troubled inner-city regions.

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When the U.S. Supreme Court denied certiorari on January 16, 2007 in the case of *Didden v. Port Chester*, it extinguished the last hope of a property owner whose land development aspirations were frustrated by the urban renewal process. No. 06-652, 2007 U.S. LEXIS 1036 (U.S. Jan. 16, 2007). The case has attracted a fraction of the media attention of the *Kelo v. New London* case in which the Court upheld the taking of private property for the public purpose of pursuing an area-wide development project under Connecticut's municipal development statute. 545 U.S. 469 (2005); *see* CONN. GEN STAT. § 8-186. The *Didden* case, like *Kelo*, is consistent with decided precedent; however, both cases raise public policy concerns regarding the reach of the power of eminent domain.

Didden and his partners owned various adjoining parcels that were partly inside and partly outside the Village of Port Chester's formally-established urban renewal area. They made plans to develop their property as a CVS Pharmacy, sought and received various development approvals from local land use boards, and entered into a lease with CVS. In order to proceed with their development, they had to secure the release of the parcels that were inside the urban renewal area from village constraints. The village had designated G & S Port Chester LLC the redeveloper of the urban renewal area giving it control over the use of all land within the area. Negotiations between the Didden group and G & S failed

and the village then approved the condemnation of the inside properties allowing G & S to develop them in accordance with the village's adopted urban renewal plan. Didden sued seeking a stay of the condemnation proceedings as well as declaratory and monetary relief. *Didden v. Port Chester*, 304 F. Supp. 2d 548 (S.D.N.Y. 2004); *Didden v. Port Chester*, 322 F. Supp. 2d 385 (S.D.N.Y. 2004). The United States District Court for the Southern District of New York was asked to declare that the condemnation of the Didden property pursued a private interest, that of G & S, rather than a public purpose as required by the Fifth Amendment.

Both Port Chester and New London are small, distressed communities with a history of high poverty and unemployment in the midst of surrounding affluence. Port Chester had attempted various revitalization strategies in its 27-acre downtown and waterfront area without success for over 20 years before designating G & S as the qualified and eligible developer of the area in 1998. Consistent with General Municipal Law provisions, Port Chester adopted an urban renewal plan calling for the development of the land in phases and entered into a Land Acquisition and Disposition Agreement (LADA) with G & S enabling it to acquire and redevelop the property. The plan called for the provision of approximately 500,000 square feet of retail establishments including a Costco warehouse store, movie theater, department store, Bed, Bath & Beyond, and a number of additional stores and enterprises. The goal was to provide jobs, increase the limited tax base of the village, and stimulate economic revitalization in the surrounding areas. By the time the Court denied certiorari early this year, development pursuant to the urban renewal plan was well underway.

The policy behind urban renewal is to jump-start stalled local economies in order to restore economic and social health for the benefit of the citizenry, including low- and moderate-income families, which tend to congregate in urban settlements. The public harm caused by blighted urban conditions is extensive and well documented; it is the aim of urban renewal to restore health to communities through blight removal strategies such as Port Chester's. The intransigence of urban blight explains, in part, the extraordinary powers delegated to municipalities under urban renewal law. The power of government to delegate the implementation of redevelopment plans to publicly-selected private companies recognizes the complexity of land acquisition and redevelopment financing and execution: a job better undertaken by experienced development companies than by public bodies. Blight elimination and urban revitalization are the public purposes that justify the taking of private property under the Fifth Amendment and comparable provisions of state law.

Municipalities in New York receive their urban renewal powers under Articles 15 and 15-A of the General Municipal Law. Under these provisions, municipalities are authorized to conduct blight studies, define the boundaries of blighted neighborhoods, designate them as urban renewal areas, draft and approve an urban renewal plan, issue a request for proposals from private

developers interested in building pursuant to the plan, designate a qualified and eligible redeveloper, and then authorize that redeveloper to acquire parcels in the area and develop them in accordance with the plan. Should any of the private parcel owners in the area not be willing to sell their land voluntarily, the municipality, or its urban renewal agency, is authorized by Article 15 and 15-A to acquire those parcels by eminent domain.

All of these steps must be taken following public notice and public hearing and are subject to judicial review. All procedures and standards contained in New York's Eminent Domain Procedures Law (EDPL) must be followed in condemning title to properties in urban renewal areas. Pursuant to these provisions, the Village of Port Chester provided public notice of a public hearing on the adoption of the urban renewal plan. Following the public hearing, on July 14, 1999, the board of trustees adopted a resolution making a finding of public purpose under Article 2 of the EDPL, approving the LADA, and designating G & S as the qualified and eligible redeveloper for the urban renewal project. The project called for the acquisition of over 38 properties.

EDPL § 207 allows affected landowners to appeal the public purpose findings of a condemning authority within 30 days. The Didden group's judicial action, which was brought under 42 U.S.C. § 1983, was commenced in January, 2004. The statute of limitations applicable to § 1983 claims in New York is three years. When the statute of limitations accrues is a question of federal law.

The district court noted that the Didden group proceeded with its CVS project, including securing local land use approvals, knowing that G & S had the authority to buy or have the village condemn its parcels. *Didden*, 304 F. Supp. 2d at 553. The group met several times with G & S to try to negotiate an arrangement that would allow them to proceed with their agreement with CVS. Plaintiffs allege that during these negotiations G & S demanded that they pay $800,000 as the price for releasing the land from its control. Didden alleged that G & S used its authority under the LADA to seek condemnation of the property to extort funds. G & S argued that the parties negotiated reasonably about the value of the CVS venture and explored options for pursuing it. These negotiations failed to result in an agreement and on November 3rd Port Chester commenced a condemnation proceeding. Plaintiffs requested that the village withdraw the proceedings, but after holding special meetings, the request was denied.

In its January, 2004 petition to the district court, the plaintiffs argued that the village and G & S "conspired to deprive Plaintiffs of the use of their property in order to pursue their own private interests—specifically, their development plans with Walgreens—rather than the interests of the public." *Didden*, 304 F. Supp. 2d at 557. On January 23, 2004, the district court denied plaintiffs' request for a preliminary injunction. On May 24, 2004, the district court granted defendants' motion to dismiss for failure to state a claim. The court held that all

of plaintiffs' claims were time-barred. The three-year statute of limitations period applicable to § 1983 claims began to run when Port Chester made its public purpose finding on July 14, 1999. At that point, plaintiffs had reason to know of the basis for their injury because they were fully aware that the finding of public purpose exposed their property to the possibility of condemnation. Accordingly, the triggering of the statute of limitations was not delayed until November, 2003, when G & S allegedly attempted to exact a cash payment from plaintiffs.

Plaintiffs claimed they were not aware that EDPL § 207 required that appeals of public purpose findings be made within 30 days. The plaintiffs conceded that they received notice of the public hearing in July of 1999 and, under law, were charged with knowledge of the procedures established for judicial review. Since they received notice and failed to challenge the village's public purpose findings, they lost their right to contest the validity of those findings. The district court also found that plaintiffs' claim that G & S attempted to extort payments from the plaintiffs had no legal significance. It noted that "[a]s Plaintiffs themselves assert in their Complaint, G & S . . . ha[s] the authority under the LADA to obligate Port Chester to pursue condemnation of properties within the Project's boundaries. Threats to enforce a party's legal rights are not actionable." *Didden*, 322 F. Supp. 2d at 390.

On April 5, 2006, the Second Circuit affirmed the district court's decision on the statute of limitations noting that the plaintiffs would not have succeeded even if their action were not time-barred. *Didden v. Port Chester*, No. 04-3485-CV, 2006 U.S. App. LEXIS 8653 (2d Cir. April 5, 2006). Citing *Kelo v. New London,* the court declined to substitute its judgment for that of the village. *Id*., at *5. In *Kelo*, the court noted: "Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project." *Id*. (quoting *Kelo,* 545 U.S. at 488). Because G & S was fully authorized to proceed with the acquisition of the plaintiff's property under the plan, its position in voluntary negotiations undertaken with the plaintiffs was not "an unconstitutional exaction in the form of extortion." *Didden*, No. 04-3485-CV, 2006 U.S. App. LEXIS 8653, at *5. In other words, the district court was correct in finding that any attempt by G & S to exact a cash payment from the plaintiffs did not constitute a cognizable injury.

Conclusion:

Some critics of the *Didden* case raise concerns that designated redevelopers have too much power under the urban renewal process. G & S used that power, they assert, to advance its private interests to the prejudice of those of the plaintiffs. G & S had negotiated with CVS and failed, then turned to Walgreens. Meanwhile, the Didden group successfully concluded a deal with CVS, secured approvals from other local agencies, and was ready to proceed with the development of the pharmacy. Surely the law that permitted G & S to

prevail in this private sector struggle advances the private interests of one developer over another rather than advancing a public purpose as required by the Fifth Amendment.

The case, when removed from its statutory underpinnings and history, can be cast as the use of public authority to elevate one private party's interest over that of another. Viewed against the backdrop of decades of urban decline and a statutory structure that provides tools designed to aid the difficult task of urban regeneration, however, perceptions change. How can area-wide redevelopment be achieved if private redevelopers are not given the ability to work at a sufficient scale of operations to reverse decades of blight? How can this ability be limited to protect the private rights of owners within designated areas without compromising the market feasibility of redevelopment? Every statutory amendment that affords greater protections must consider the tension between private rights and the greater public interest in urban revitalization.

From a public policy perspective, what, if anything, is wrong with the procedures and authorities delegated to local governments under Articles 15 and 15-A and the procedures for condemnation set forth in the EDPL? Proposals for their reform include severe limitations on the use of eminent domain, more and better planning and public process, lengthier periods of public notice and statutes of limitation, and higher levels of compensation for the owners of condemned properties. Each of these reforms has been advanced in the New York legislature since *Kelo* was decided. Each proposal raises legitimate questions about the tension between expeditious and cost-effective action to achieve area-wide redevelopment and the rights of individual property owners.

The *Didden* case provides an excellent opportunity to place the debate over eminent domain reform in its proper perspective. G & S, and other redevelopers, are practical proxies for the public interest in urban redevelopment. Legal provisions that make it possible for redevelopers to build in accordance with publicly-approved plans, following a transparent public process, should not be seen as laws that promote private interests. The attempt to charge the debate in this way obscures the legitimate and critical public stake in our urban places.

The nation is slowly recovering from a long period of urban decay, which recovery is due in part to urban revitalization strategies like that adopted by the Village of Port Chester. The certain consequences of climate change require greater concentration of urban settlements to conserve energy and mitigate carbon emissions. If our society does experience serious sea level rise, the law must provide a means of adaptation. When legislatures hold extensive hearings to consider urban decay and redevelopment as they did in the 1950s and 1960s and prescribe a defined public process leading to urban renewal, the courts must defer to their findings and procedures. This reflects our historical understanding

of the role of the courts and will serve us well as we confront new challenges appearing on the horizon.