



KeyCite Yellow Flag - Negative Treatment

Disagreed With by [Kelo v. City of New London](#), Conn., March 9, 2004

127 N.H. 234

Supreme Court of New Hampshire.

Clinton MERRILL et al.

v.

CITY OF MANCHESTER and
Manchester Housing Authority.
John H. GADD and Nancy J. Gadd

v.

CITY OF MANCHESTER and
Manchester Housing Authority.

Nos. 84-424, 84-426.

|
Aug. 16, 1985.**Synopsis**

Landowners petitioned to enjoin city from taking their land by eminent domain for development of industrial park. The Superior Court, Hillsborough County, Goode, J., denied petition, but the Supreme Court, 124 N.H. 8, 466 A.2d 923, remanded. On remand, the Superior Court again denied petition, and landowners appealed. The Supreme Court, **Batchelder, J.**, held that in light of legislative determination that preservation of open spaces was in public interest, landowners' open property was not subject to condemnation for construction of private industrial park.

Reversed and remanded.

West Headnotes (5)

[1] Eminent Domain [Jurisdiction of Courts in General](#)

Whether particular use for condemned property is permitted “public use” is question of law to be resolved by court. [Const. Pt. 1, Art. 12](#).

[1 Cases that cite this headnote](#)**[2] Eminent Domain** [Determination of Questions as to Validity of Exercise of Power](#)

In gauging constitutionality of proposed condemnation, court must determine whether expenditures will be primarily of benefit to private persons or private uses, which is forbidden, or whether they will serve public purposes for accomplishment of which public money may properly be used. [Const. Pt. 1, Art. 12](#).

[1 Cases that cite this headnote](#)**[3] Eminent Domain** [Public Use](#)

In determining whether purpose for which property is being condemned is permissible “public use,” court must consider extent to which proposed project will benefit public; net benefit to public will consist of benefits of proposed project and benefits of eradication of any harmful characteristics of property in its present form, reduced by social costs of loss of property in its present form, and if social costs exceed probable benefits, then project cannot be said to be built for “public use.” [Const. Pt. 1, Art. 12](#).

[4 Cases that cite this headnote](#)**[4] Eminent Domain** [Particular Uses or Purposes](#)

In light of legislatively declared public benefit of preservation of open land, such land, as long as it poses no threat of actual harm to community, may be condemned for redevelopment purposes only if it is to be put to use which directly benefits public, such as for school, playground, or utility line, and not to use which has only incidental public benefit, such as for private industrial park. [Const. Pt. 1, Art. 12](#); [Pt. 2, Art. 5-B](#); [RSA 75:1, 79-A:5](#), subd. 1.

[7 Cases that cite this headnote](#)**[5] Eminent Domain** [Particular Uses or Purposes](#)

In light of legislative determination that preservation of open spaces was in public interest, open land, which posed no threat of harm to community, was not subject

to condemnation for development of private industrial park. [Const. Pt. 1, Art. 12](#); Pt. 2, Art. 5–B; [RSA 75:1, 79–A:5](#), subd. 1.

2 Cases that cite this headnote

Attorneys and Law Firms

****216 *235** Eaton, Solms, Mills & McIninch, Manchester (Richard E. Mills, Manchester, on the brief and orally), for plaintiff Clinton Merrill.

John H. Gadd, by brief and orally, pro se.

***236** Craig, Weners & McDowell, Manchester (William H. Craig, Manchester, on the brief and orally), for the defendant Manchester Housing Authority.

Thomas R. Clark, Asst. City Sol., filing a joint brief with Manchester Housing Authority, ****217** by brief and orally, for defendant City of Manchester.

Barto & Gfroerer, Concord (Mark H. Puffer, Concord, on brief and orally), for Society for the Protection of New Hampshire Forests, as amicus curiae.

Opinion

BATCHELDER, Justice.

The plaintiffs appeal from a decree of the Superior Court (Goode, J.) approving the report of a Master (*Mayland H. Morse, Jr.*, Esq.) which denied their petitions to enjoin the defendants from taking their land by eminent domain for an industrial park pursuant to RSA chapter 205. We reverse and remand.

The circumstances which give rise to this dispute were set forth in detail in [Merrill v. City of Manchester](#), 124 N.H. 8, 466 A.2d 923 (1983), and briefly are as follows. The plaintiffs own twenty-six industrially zoned acres in Manchester. The Merrill tract comprises twenty-three acres of forest land under current use assessment. See RSA ch. 79–A (Supp.1983). The Gadd tract comprises the remaining three acres. Both properties lie within the boundaries of a 109-acre tract sought to be developed as an industrial park by the defendants, the City of Manchester and the Manchester Housing Authority.

We reverse the denial of the petition to enjoin and remand with instructions to grant the petition in both cases. A reversal of

the decision is required because we find that the constitutional requirement that the condemnation serve a public use is not here satisfied.

[1] [2] Under [part I, article 12 of the State Constitution](#), the power of eminent domain may be exercised only if the condemned property is “applied to public uses.” Whether a particular use is a public use is a question of law to be resolved by the courts. See [Velishka v. Nashua](#), 99 N.H. 161, 165, 106 A.2d 571, 574 (1954). In gauging the constitutionality of a proposed condemnation, we must determine “whether the expenditures will be primarily of benefit to private persons or private uses, which is forbidden, or whether they will serve public purposes for the accomplishment of which public money may properly be used.” [Opinion of the Justices](#), 99 N.H. 528, 530, 114 A.2d 514, 516 (1955) (construing [part II, article 5 of the State Constitution](#)).

[3] ***237** In determining whether the purpose for which property is being condemned is a public use, we must accordingly consider the extent to which the proposed project will benefit the public. See [Anderson v. McCann](#), 124 N.H. 249, 251, 469 A.2d 1311, 1313 (1983). The net benefit to the public will consist of the benefits of the proposed project and the benefits of the eradication of any harmful characteristics of the property in its present form, reduced by the social costs of the loss of the property in its present form. If the social costs exceed the probable benefits, then the project cannot be said to be built for a public use. In such a case, the true benefits of the project will accrue only to its private sponsors and participants, and the use of the power of eminent domain will violate the public use requirement of [part I, article 12 of the State Constitution](#).

[4] In the instant case, the master made only general findings regarding the public benefits that would result from the proposed industrial project. The record discloses that such benefits would include the enhancement of the local economy, an increased tax base, and new employment opportunities. The master concluded that the loss of the property in its current state did not have any social costs that could offset these indirect benefits of the proposed industrial project:

“The indirect public benefit derived from the planned development more probably than otherwise will be a significant and material benefit of the project. This contrasts sharply with *the*

absence of any proven public benefit that may be found to exist by allowing either of these properties to remain in their current state.”

****218** (Emphasis added.) This statement neglects the legislatively declared public benefit of the preservation of open land, such as the Merrill tract, which qualifies for current use assessment. *See* RSA ch. 79–A (Supp.1983). We hold that such land, as long as it poses no threat of actual harm to the community, may be condemned for redevelopment purposes only if it is to be put to a use which directly benefits the public, such as for a school, a playground, or a utility line, and not to a use which has only an incidental public benefit, such as for the private industrial park contemplated in the instant case.

Recognizing the recreational, scenic, and ecological importance of this State's open lands, the legislature in enacting RSA ch. 79–A (Supp.1983) sought to prevent the development of such lands due to the pressure of high tax assessments. *See* N.H. Const., pt. II, art. 5–B. The statute requires that the value of qualifying land be assessed by the local assessors on the basis of its current use, RSA ***238** 79–A:5, I (Supp.1983), and not its highest economic use as is required of nonqualifying land, RSA 75:1 (Supp.1983). RSA 79–A:1 (Supp.1983) provides:

“It is hereby declared to be in the public interest to encourage the preservation of open space in the state by providing a healthful and attractive outdoor environment for work and recreation of the state's citizens, by maintaining the character of the state's landscape, and by conserving the land, water, forest, and wildlife resources.”

The legislature has thus determined that the preservation of New Hampshire's open spaces is in the public interest.

In the instant case, no evidence suggested that the Merrill and Gadd tracts posed a threat of harm to the community. The master concluded that the property was an appropriate subject for development through the use of the eminent domain power solely because he found it to be “blighted” within the meaning of RSA 205:2–b. Under this statute, “vacant or predominantly

vacant land” “in which a redevelopment project is determined to be necessary” is blighted if it is not suitable for private development because either it would be “unduly costly to develop” due to the natural characteristics of the land, or “the ordinary operation of private enterprise” cannot remedy certain specified man-made characteristics of the property that result in its being used in “an unplanned, haphazard, or piecemeal manner.” RSA 205:2–b.

Although property having these conditions may properly be classified as blighted because its continued nondevelopment is “detrimental ... to the sound growth of the community,” RSA 205:2–b, such property cannot be regarded as being blighted in the common sense meaning of the word that the property poses a present threat to the community. *Cf.* RSA 205:1 (legislative finding that certain blighted areas “cause an increase in and spread of disease and crime”). The presence of an insect-breeding swamp or an unsightly, unsanitary slum, for example, may be blighting conditions whose eradication would directly benefit the public. In contrast, the blight on the Merrill and Gadd tracts consists solely in the unsuitability of the property for private development, and not from the existence of any harmful conditions. In this case, the benefit to the public will derive not from the eradication of blight, but only, if at all, from the eventual construction of the proposed industrial project.

[5] The legislature has determined that the preservation of open spaces, such as the Merrill tract, is in the public interest. *See* RSA ch. 79–A:1 (Supp.1983). Absent the presence of a blighting condition which poses an actual harm to the community, such land may be ***239** condemned only for uses that will directly benefit the public. Therefore, because there are no conditions on the Merrill and Gadd tracts that threaten the community with actual harm and because the proposed industrial park will not directly benefit the public, we hold that the public use requirement is not here satisfied.

****219** We have held that where several tracts of land are condemned as one unit, we will uphold the taking of each parcel as long as the taking of the whole is proper and the taking of the parcels is “reasonably necessary” to the accomplishment of the purpose of the condemnation. *Velishka v. Nashua*, 99 N.H. 161, 167, 106 A.2d 571, 575 (1954). This case, however, is easily distinguishable from *Velishka* wherein the property was found not to have been blighted, but rather to have been an isolated parcel in a project area, the conditions of which were causing an increase in and spread of disease and crime, thereby constituting a menace to the

health, safety, morals and welfare of the residents of Nashua. In the present case, however, the plaintiffs' properties, apart from considerations of current use assessment, are not greatly dissimilar to the remainder of the properties in the project area. See "Eligibility Report" prepared by Costello, Lomasney & deNapoli, Inc., for the Manchester Housing Authority (April 1981).

The determination of blight in this particular study is arrived at by virtue of a three-step analysis: first, a structural rating; second, blighting influence; and third, land development limitations. Certain structural ratings also are analyzed as blighting influences. The structural rating analysis has no applicability to the Merrill tract because there are no buildings upon it. The report indicates as well that there are no blighting influences with respect to Merrill, and ultimately faults the property only on one count, namely severe soil conditions and severe slopes. The Gadd property's structural evaluation in the Costello report describes three buildings: a residence structure which is described as "good," a detached wood frame garage which is described as "fair," and a livestock shelter described as "poor." It was suggested by Mr. Gadd at oral argument that the condition of the latter structure was not offensive to its occupants, some chickens and two beef cattle. The presence of the livestock structure and the incompatibility of the use of the premises as a residential and

agricultural use in an industrial zone were determined in the report to be blighting influences. The report further notes that the location of a stream on the property inhibited its "proper" land development.

The "blighting conditions" of the Gadd/Merrill tracts as determined in the Costello report are common to most of the other *240 twenty-four parcels involved in the project, and therein lies the distinction from *Velishka*. The power of eminent domain under RSA chapter 205 is not without limit.

We accordingly hold that the condemnation authority may not be exercised with respect to either the Merrill or Gadd tracts. Whether the remaining land may properly be condemned is not a question ripe for our consideration. We therefore reverse with respect to these tracts of land and remand with instructions to grant the petition.

Reversed and remanded.

All concurred.

All Citations

127 N.H. 234, 499 A.2d 216, 62 A.L.R.4th 1175