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## REAL ESTATE & TITLE INSURANCE

### *Mt. Laurel's* New Legacy?

*Mipro* could widen the gulf between homeowners and renters — a situation the *Mt. Laurel* decisions were intended to remedy

By Andrew R. Davis

In *Mount Laurel Township v. Mipro Homes, LLC*, 379 N.J. Super. 358 (App. Div. 2005), decided Aug. 2, the Appellate Division approved the condemnation of property that had obtained approval for residential development in accordance with the Municipal Land Use Law (MLUL). This decision reversed the trial court's determination that the township arbitrarily, capriciously and unreasonably abused the power of eminent domain in this case. The property at issue had received final subdivision approval, was to be developed for a use entirely consistent with zoning, was not included in any open space or conservation plan and was targeted for acquisition only after the township became aware that the intended use changed from an assisted living facility to a single-family residential

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development.

*Mipro* comes only six weeks after the U.S. Supreme Court's much ballyhooed condemnation case, *Kelo v. New London*, 125 S.Ct. 2655 (June 23, 2005). In that 5-4 decision, the Supreme Court approved the taking of nonblighted private property for transfer to another private owner for purely economic reasons. *Mipro* is not particularly significant as an interpretation of *Kelo* (although it cites that case for support), but it raises at least six issues relevant to the development of housing in New Jersey.

1) Will discrimination against persons of financial means be *Mt. Laurel's* new legacy? Perhaps the most bizarre aspect of the *Mipro* decision is that it emanates from the same municipality that was a defendant in the exclusionary zoning cases that spawned the most extensive affordable housing programs and policies in the nation. Thirty-odd years ago, the then-mayor of Mt. Laurel told lower-income residents of rental housing that if they could not afford to purchase homes in town, they should "move out." The current local government has now apparently succeeded in keeping out folks who have the ability to plunk down \$450,000 for a new house. Also of interest, but not really relevant to the ultimate decision, is the *Mipro* Court's inclusion of an excerpt of a letter Mt. Laurel's mayor issued to her constituents extolling the benefits of industrial/commercial development, because it "send[s] no children to our schools." One wonders if a new campaign

slogan might be: "Kids Stink, Warehouses Rule!"

2) Has the American dream of home ownership gone from Euclidean veneration to contemporary stigmatization? The U.S. Supreme Court decision that established the constitutionality of zoning placed single-family homes at the apex of all uses, labeling apartment houses "parasitic," and "destructive" of residential zones. *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 394 (1926). How odd that some 80 years later, new, single-family residential development has become a pejorative term (e.g. with new homes come nasty, bratty, rich kids and the expense of educating them). More disturbing than the fact that the Appellate Division's *Mipro* decision could be read to lend credence to this hackneyed stereotype, is the connotation that development of market-rate housing is a nuisance-like activity that government has the right — almost an obligation — to eradicate.

3) The ubiquitous use of euphemisms. *Kelo* cemented the notion that the "public use" clause of the Fifth Amendment is satisfied when the government condemns property for any conceivable "public purpose." *Mipro* characterizes Mt. Laurel's action in this case as an effort to "slow down" residential development. In reality, however, development was "prevented." When did "growth moderation" become a euphemism for "obliteration?" It also seems as if "no plan for recreational use" is synonymous with "a broad based program." The opinion notes that Mt. Laurel had "no plan" to devote the property to recreational use, and that the taking was part of a "broad based municipal program for the acquisition of

open space.”

4) Have we entered an era of “no planning” or “spot planning”? *Mipro* permits taking property for open space even when a parcel is not specifically included in an open space element of a master plan. In this case, the planning board amended the master plan *after* it granted final subdivision approval and *during* the pendency of the litigation. This amendment was rather crude in that it simply targeted all remaining undeveloped land in Mt. Laurel as open space. Such an amendment is so overbroad that it could not possibly qualify as a “plan” under the most liberal interpretation of the word. Further, to the extent this amendment was applied to the *Mipro* property, it certainly seems suspect in terms of timing. These facts apparently did not concern the Court, as it declined to address them by way of a footnote. By contrast, in *Kelo*, a formal planning effort preceded the litigation, and whether one agrees with the plan or not, there was at least some substance to it. Consider whether the *Mipro* decision has at once given birth and tacit approval to an oxymoronic land-use concept: “spot planning.”

5) Measuring municipal motivations: How far is “too far?” Just about all of Mt. Laurel’s actions in this case appear to reflect intentions that are less than pure. (How else could one explain the decision

to institute condemnation proceedings just two weeks after the planning board granted final subdivision approval?) The Appellate Division seems to have given short shrift to the trial court’s findings in this regard, and it curiously cited *Borough of Essex Fells v. Kessler Institute*, 289 N.J. Super. 329 (Law Div.1995), for the proposition that courts will not generally inquire into the motives of public bodies in their exercise of eminent domain authority. In *Essex Fells*, the court actually determined that the borough’s stated purpose for the acquisition was a ruse, and it dismissed the condemnation action. *Essex Fells*, 289 N.J. Super. 329, 342-43. At some point, local governmental determinations must cross the line of propriety, or else the “fairly debatable standard” for measuring such actions is meaningless. See, *Bow and Arrow Manor v. Town of West Orange*, 63 N.J. 335 (1973).

6) Will generalized environmental concerns always trump specific land development rights? In this day and age, it is fairly well settled that land use and environmental concerns are inextricably intertwined. This notwithstanding, *Mipro* brings to a head the issue of which body of law should govern the procedural elements of real estate development. The property owners in this case appear to have followed the MLUL, and the municipality seems to have ignored that law by

failing to take any steps to create an open space plan element that included the parcel, and by failing to amend its zoning ordinance accordingly. Notwithstanding these facts, the Court authorized the taking of this property, citing a string of environmental funding laws, and an executive branch decision to provide what will most certainly be only a fraction of the cost required to obtain the property. (The opinion makes no less than three separate references to the DEP Commissioner’s approval of a \$400,000 grant to help Mt. Laurel purchase the site.) Even if the New Jersey Supreme Court takes this case up, a reversal seems unlikely in light of its recent decisions granting significant deference to local governmental determinations in the land use arena. See, *Rumson Estates v. Fair Haven*, 177 N.J. 338 (2003); and *D.L. Real Estate Holdings v. Point Pleasant*, 176 N.J. 126 (2003).

Turbulence created by the social and legal issues affecting housing development in New Jersey does not come without a cost. Uncertainties that can result from decisions such as *Mipro* are likely to continue to drive land values ever higher. How ironic and unfortunate that an unintended consequence of this decision could be to widen the gulf between homeowners and renters — a situation the *Mt. Laurel* decisions of yore were intended to remedy. ■