

Final Showing: To Fight Blight, Pittsburgh Has Right To Condemn the Last Adult Theater

BY ALAN NOCHUMSON

Special to the Legal and PLW

Many cities in Pennsylvania are combating urban blight. A recent court decision has allowed the city of Pittsburgh to continue its own fight. In *In re Condemnation (appeal of New Garden Theatre)*, 2003 Pa. Commw., the Commonwealth Court rejected a free speech challenge to the condemnation of an adult movie theater made under Pennsylvania's Urban Redevelopment Law, 35 P.S. Section 1701, et seq.

URBAN REDEVELOPMENT LAW

Pennsylvania's Urban Redevelopment Law empowers governmental authorities to combat blight and to promote economic development. Where a determination of blight has been made, the governmental authority may use its power of eminent domain to implement its redevelopment plan.

If the governmental authority decides to exercise its power of eminent domain, it must strictly follow the procedural requirements of the Eminent Domain Code, 26 P.S. Section 1-101, et seq.

After the governmental authority files the requisite declaration of taking, it must serve the condemnee with written notice of the filing in order to give the condemnee the opportunity to challenge through the judicial system.

TAKING CONTROL OF AREA

Since the late 1960s, the area near the Garden Theatre, a movie theater, has been considered a neighborhood in decline. The area has suffered from rising crime, problem bars, declining population, loss of businesses and services, and deteriorating and underutilized buildings. Since the 1970s, the Garden Theatre has been used as an adult movie theater.

In 1989, Pittsburgh's Department of City



ALAN NOCHUMSON is an associate in the business services department of Spector Gadon & Rosen, where he handles real estate-related litigation on behalf of financial institutions, real estate developers, condominium associations and commercial and residential landlords and tenants.

He can be reached at anochumson@lawsgro.com or at 215-241-8877.

Planning issued a report recommending certification of the area as blighted and eligible for redevelopment through Pennsylvania's Urban Redevelopment Law. The report indicated that the presence of the adult movie theater added to the area's negative image.

After a hearing, Pittsburgh's Planning Commission certified the area as blighted, and a team of planning participants was convened to begin preparations for a proposed redevelopment plan. The proposed goals of the redevelopment project included removing existing blight that had resulted in disinvestments and abandonment, encouraging new commercial investment and development, reinvestment in the housing stock and improving the area's appearance.

In the mid-1990s, Pittsburgh's city council approved a redevelopment proposal, authorizing the Urban Redevelopment Authority of Pittsburgh (URA) to move forward with redevelopment activities for the 47 properties located in the blighted area. The proposed uses of the Garden Theatre included performing arts space for music, dance, film, special events and conferences. URA amicably acquired 46 of the properties in the area. When the New Garden Realty Corp. (NGRC), the owner of the Garden Theatre, refused to sell the theater building, the URA filed a declaration of taking in 1997 to acquire title to the building.

After the NGRC received written notice of

the declaration of the taking, it filed preliminary objections with the Court of Common Pleas of Allegheny County. The preliminary objections included, inter alia, a challenge to the taking as an impermissible time, place and manner restriction on free speech under the First Amendment to the U.S. Constitution and Article I, Section 7 of the Pennsylvania Constitution.

THEATER'S CHALLENGE REJECTED

While the trial court recognized the right to display non-obscene, sexually explicit motion pictures and the right to see such movies under the U.S. and Pennsylvania constitutions, the court nevertheless found that the taking was content-neutral, and it did not represent a content-based prior restraint on free speech. Since the taking had an incidental impact on protected speech, the court applied the following three-prong intermediate scrutiny standard of review:

- Whether the taking is within the constitutional power of the government and furthers an important or substantial governmental interest.
- Whether the governmental interest is unrelated to the suppression of free expression.
- Whether the incidental restriction on alleged First Amendment rights is no greater than is essential to the furtherance of the governmental interest.

The trial court concluded that the URA's power to condemn the Garden Theatre for urban renewal is within its constitutional powers and the renewal and redevelopment of blighted areas constitute important and substantial governmental interests that are unrelated to suppression of free expression. It then noted that the area suffered from extraordinary blight and that the redevelopment project was an attempt to radically deal with the blight.

Finally, the trial court found that the URA's objective of redeveloping the area in general

would be achieved less effectively without acquiring the Garden Theatre since the theater building was an integral part of the entire area.

LOWER COURT AFFIRMED

The court held that the First Amendment challenge was controlled by *Arcara v. Cloud Books Inc.*, 478 U.S. 697 (1986). In *Arcara*, an undercover investigator witnessed illegal sexual activity in an adult bookstore within view of the owner of the store. A civil complaint resulted in an order temporarily closing the store under provisions of a public health statute that authorized the closing of a building used for prostitution and lewdness. The Supreme Court noted that the crucial distinction from other First Amendment cases was that the statute proscribed conduct that involved no element of protected expression. It subsequently held that the bookseller could not claim special protection from governmental regulations of general applicability simply by virtue of its First Amendment protected activities.

Pennsylvania courts have rejected First Amendment challenges to governmental regulations of general applicability on similar grounds. (See *Commonwealth ex rel. Preate v. Danny's New Adam & Eve Bookstore*, 625 A.2d 119 (Pa. Commw. 1993), upholding an injunction against an adult store used for illicit sexual activity under a statute declaring any building used for lewdness and prostitution to be a common nuisance).

NGRC argued that, under *Arcara* and its progeny, the activity being restrained must have no expressive element and the official restraint must be generally applicable rather than selectively applied. In its view, URA's motive to change the Garden Theatre's use to a venue for performing arts, cultural and community activities to increase the possibility of marketing other buildings in the area showed

Pittsburgh continues on RE13

V A R A L L O
I N C O R P O R A T E D

Residential

Commercial



Pittsburgh

continued from RE3

that expressive conduct was being restrained. NGRC further contended that Arcara and its progeny have referred to laws that restrain all persons at all times as regulations of general applicability (i.e., fire codes), while the URA's power of eminent domain was based upon individualized assessments by officials to use eminent domain to combat blight.

The court found that the URA's exercise of a generally applicable power to use eminent domain to combat blight did not automatically transform the taking into a time, place and manner restriction on speech. Instead, the burden was on NGRC to prove that the URA intended to suppress speech. Although there was evidence that some of the participants in the planning process believed that the adult theater contributed to the negative image of the area, the court nevertheless found that the ultimate purpose of the redevelopment plan was to preserve and restore all of the buildings in the area. The court was convinced that it was necessary for the URA to acquire the theater, the area's largest and most centrally located building, in order to ensure the ultimate success of the redevelopment plan.

After finding that the taking was not content-based, the court next focused on whether the taking survived intermediate scrutiny. NGRC asserted that the trial court failed to

decide whether there were ample alternative avenues for communications of films with adult themes. The court found that, unlike a regulation prohibiting nude dancing generally or restricting the locations of adult theaters, the taking of a single property has no effect on other alternative avenues of communication.

Although the theater was the last adult movie theater in Pittsburgh, the court found that the taking for redevelopment purposes did not necessarily eliminate reasonable alternatives of communication. The court pointed out that alternative means of viewing adult movies such as rental or purchase at video stores was still available.

NGRC also argued that the trial court abused its discretion by failing to independently analyze its free speech claim under Article I, Section 7 of the Pennsylvania Constitution. Article I, Section 7 provides that "the free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely

speak, write and print on any subject, being responsible for the abuse of that liberty."

NGRC relied heavily on a recent decision by the Pennsylvania Supreme Court. In *Pap's A.M. v. City of Erie*, 812 A.2d 591 (Pa. 2002), the Supreme Court found that nude dancing is

expressive conduct that is subject to protection under Article, Section 7, which is broader than that under the First Amendment of the U.S. Constitution. The *Pap's A.M.* court found that the ordinance was an obvious attempt to burden expression itself. It held that an intermediate level of scrutiny is inappropriate when expressive conduct such as nude dancing is involved, and that the more restrictive strict scrutiny standard applied.

The Commonwealth Court concluded that *Pap's A.M.* does not apply to an *Arcara*-type situation. The court explained that the Supreme Court's decision did not contradict the sensible rule of *Arcara* that persons may not claim special protection from governmen-

tal regulations of general applicability simply by virtue of their free speech activities even if enforcement of the law has some effect on speech.

The court was also convinced that the taking was permissible under strict scrutiny. Under this standard of review, the burden is on the government to show there is no less instructive, practicable method available to effect the legitimate, important governmental interest. The court concluded that the URA used the least restrictive means to achieve urban renewal of an otherwise blighted area. It pointed out that the record indicated that the redevelopment plan was arrived after years of study and was implemented only after the URA determined, in its expertise, that correcting the certified blight would require acquisition of all of the properties in the area. Since the multiple uses for the theater were central to the overall plan of development, the court agreed that the only other alternative to acquiring the theater building was not acquiring it and permitting the blight to continue.

LESSONS LEARNED

Other cities can learn an important lesson from the latest chapter in Pittsburgh's push toward urban renewal. URA's redevelopment plan was upheld primarily because the process was thorough with studies, hearings and the like. In its attempts to improve blighted areas, other cities must likewise do their homework and focus on the process. •

The court found that, unlike a regulation prohibiting nude dancing generally or restricting the locations of adult theaters, the taking of a single property has no effect on other alternative avenues of communication.

Title Insurance

continued from RE7

qualifying refinances would cost Californians in excess of \$8 million per year.

PROTECTING THE PUBLIC RECORD

Going back hundreds of years — in parts of Pennsylvania, back to the time of William Penn — public land records are at the heart of the real estate transaction system. Accurate county records depend on the title insurance process and its constant input of good information and correction of erroneous information. On the other hand, the RLP process would do nothing to rectify any lien or recording problems that can subsequently cloud title.

Substitution of RLP for title insurance on refinances would increase the frequency of errors in the public record by nearly 50 percent, delaying closings and incurring interest charges for these delayed settlements. Inaccuracy of the public

market substitutes for land title insurance in various parts of the nation.

"Title insurance 'alternatives' were first introduced in a short-lived refinance boom of the mid-1980s," Maher said. "Since the mid-1990s, at least a half-dozen financial services companies have gotten into the act with products aimed at the second-mortgage/home equity arena."

Radian itself was an unsuccessful earlier entrant into the market. In 2000, it acquired ExpressClose.com, which had attempted to introduce its Lender Master Protection (LMP), an individual policy that covered lenders in the event of an undisclosed lien

Radian's core product and a common element of residential mortgage lender/borrower relationships where the homebuyer's down payment is less than 20 percent of the property value. As mortgage guaranty insurance, PMI reimburses residential mortgage lenders if borrowers default on their loans. However, a lender may suffer an insured loss on a mortgage guaranty policy that arises due to an unknown lien discovered upon the default of the borrower. Such a loss would not be covered by a mortgage guaranty policy, and thus a new class of coverage — mortgage impairment insurance — was developed to

companies into more than one line of insurance. California's monoline insurance requirement was cited as the basis of the administrative law judge's decision upholding a cease-and-desist order against Radian in that state. In his ruling, California Insurance Commissioner Garamendi specifically warned Radian that if it attempts to offer RLP anywhere in the United States, it risks losing its license to sell its bellwether PMI product in California.

Radian's strategy from here appears to be to continue thumping the "pro-consumer" tub and seeking legislative changes in California and perhaps other states. California State Sen. Jackie Speier is sponsoring a bill (now in committee) that would allow mortgage insurers to write lender's title insurance policies for refinances, and would theoretically allow the homeowner to choose among policies from various underwriters. In a competitive marketplace, perhaps Radian will be

Licensed title insurers point out that RLP offers negligible protection to consumers, and substantially fewer protections to lenders than legitimate title insurance.