

HOUSING APPEALS COMMITTEE

Elio Di Biase and Ugo Di Biase as they are Trustees of the Riverside Realty Trust under written Declaration of Trust dated November 1, 1971

Decision # **72-01**

Appellant: **Elio Di Biase and Ugo Di Biase as they are Trustees of the Riverside Realty Trust under written Declaration of Trust dated November 1, 1971**

Appellee: **Charles J. Higgins, John B. Hickey, Carol Di Ciero, Velma Munroe, and Elizabeth Teeven as they are Members of the Board of Appeals of the Town of Chelmsford**

Date: **July 27, 1972**

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FACTS

Riverside Realty Trust (the Developer) filed an application with the Board of Appeals (the Board) of the Town of Chelmsford (the Town) for a comprehensive permit to build low and moderate income housing under the provision of Stat. 1969, Chapter 774, now Mass. GL., Ch. 40B, Secs. 21-23.

The application was filed December 6, 1971. A hearing was held January 5, 1972. The Board's decision denying the application was rendered February 9, 1972.

At a Special Town Meeting on December 27, 1971, it was voted to take the site by eminent domain for conservation purposes. The order of taking was recorded the following morning, December 28, 1971, at 8:55 a. m.

Though the vote to take by eminent domain took place after the application for a comprehensive permit was filed, in fact a number of previous moves to take the land had been made. (NOTE 1).

NOTE 1. An article to take the land had first appeared in the warrant of the June 28, 1971 Special Town Meeting, adjourned on June 29th without vote because of lack of quorum. A vote to take this land passed at a later Special Town Meeting on November 22, 1971, but because of advice from Town Counsel that the vote was questionable, it was voted by the Selectmen to hold another Town Meeting, which, as indicated, was scheduled for December 27, 1971, at which time the vote to take the land took place.

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It also appears that the developers, and its predecessor in Title D & B Home-builders, both of whom are owned by the same principle, had been negotiating with Town agencies to develop this land since 1968. (NOTE 2).

NOTE 2. The developer or its predecessor, presented a subdivision plan to the Planning Board, a cluster zoning concept to two Town Meetings, another subdivision in 1969 to the Planning Board, all of which were rejected. In 1970 they sought and in March 1971 received a permit from the Department of Natural Resources under the Hatch Act. On April 5, 1971 they submitted a third subdivision; which was eventually approved June 10, 1971. Thereafter the developer approached the Conservation Commission of the Town and negotiated with them on the basis of building multi-unit housing on half of the land and donating the other half to the Town for Conservation purposes. Similar negotiations took place with the Planning Board and the Board of Selectmen. After learning of the article in the warrant to take the land and after the abortive vote on November 22, 1971, the Developer ceased his negotiations with Town agencies and proceeded with this application for a comprehensive permit.

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At the hearing before the Board of Appeals on January 5, 1971, on the application for a comprehensive permit Town Counsel stated that in his opinion the Title to the land was now in the Town as a result of the eminent domain taking of the site for conservation purposes. Counsel for the Developer argued that the taking was not made in good faith, and was therefore a nullity and he insisted on proceeding with the hearing. The Board was faced with the dilemma that if it did not proceed with the hearing, the application might be deemed to have been allowed by operation of law. (See NOTE 3 below). The Board ruled, therefore, without pursuing on the question of Title, that the developer had such an interest in the site as to give the Developer standing to prosecute his application. The hearing was held, the application denied, and this appeal was taken under the statute to the Housing Appeals Committee.

NOTE 3. The application for the comprehensive permit was filed on December 6, 1971. The hearing was held on January 5, 1972. Chapter 40B, Sec. 21 provides in part, as follows:

"The Board of Appeals shall. . . within thirty days of receipt of such application, hold a public hearing on the same. . . If said hearing is not convened. . . within the time allowed. . . the application shall be deemed to have been allowed, and the comprehensive permit shall forthwith issue."

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ISSUES

By this motion to dismiss, Counsel for the Board brings before the Housing Appeals Committee the issue of the Title which he raised at the original hearing before the Board of Appeal. He argues that this is a jurisdictional matter which can be raised at any time and urges two grounds in support of his motion:

- (1) that the developer has not Title to the land in question in that the eminent domain taking divested him of his Title and vested the Title in the Town.
- (2) that this Committee has no jurisdiction to try Title.

In the event that the motion to dismiss is not allowed, Counsel for the Board seeks to have the hearing stayed, pending determinations of the state of the Title in the Equity Court or the land Court.

Counsel for the Developer argues:

- (1) that the taking was made in bad faith and is therefore a nullity.
- (2) that the Committee has jurisdiction to so rule.

Counsel argued that if this hearing is stayed, the consequent delays which will ensue will in effect defeat the project even if the developer is completely successful in all the litigation.

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RULINGS AND ORDERS

The disposition of this motion to dismiss does not require of us a ruling on the state of the Title. The developer is not required to establish Title. All he need do is show such color of Title as to establish standing to proceed with this petition. The facts agreed on in the pleadings and arguments support a ruling that a sufficient question exists as to the validity of the taking, and the state of the Title as to give the Developer color of Title

and standing to proceed with this petition. In essence we are agreeing with the position taken on this issue by the Board.

See Dion v. Board of Appeals of Waltham 344 Mass 547

Carson v. Board of Appeals of Lexington 321 Mass 649

Marinelli v. Board of Appeals of Boston 275 Mass 169

See also Decision of the Housing Appeals Committee in

Country Village Corporation v. Board of Appeals of the

town of Hanover, pp. 5, 6 duly 13, 1971.

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Our ruling on this issue does not imply agreement with the appellee's position that the Committee lacks jurisdiction to rule that the eminent domain taking was a nullity, should such a ruling have been necessary in disposing of this motion to dismiss. The cases clearly indicate that an eminent domain taking can be attacked for bad faith.

Poremba v. Springfield 354 Mass. 432 (and cases therein cited

Stockers b. B. H.A. 304 Mass 507

Dispatchers Cafe v. Somerville H. A. 332 Mass. 259

Moscow v. B.R.A. 349 Mass. 553

The intent of the legislature, in passing Chapter 774 is discussed in some detail in our decision in the Hanover Case (supra) and in our decision in Concord Homeowning Corporation v. Beard of Appeals of Concord November 19, 1971). In the light of such legislative intent, we cons true the statute to empower the Committee to rule that a particular action undertaken for the express purpose of circumventing the statute is a nullity.

See also: Cleary v. Cardullo 347 Mass. 337, 344

Opinion Atty. Gen. July 9, 1970

Opinion Atty. Gen. Sec. 17, 1964 at 153 and authorities cited therein.

St. Luke' s Hospital v. State Labor Relations Commission 320 Mass. 467

The denial of the motion to dismiss raises a second question argued by both counsel. If the issue of the validity of the taking

is to be litigated in the Equity Court or the Land Court, should we suspend this hearing pending such a determination?

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If we continue this hearing and the Title is sue is eventually decided adversely to the Developer, our proceedings would in effect be an exercise in futility.

On the other hand, as the Developer argues, all delays work out to the disadvantage of the Developer. To suspend this hearing means a hearing in another court with possible appeals to the Supreme Judicial Court. If the developer prevails, he then must come back to us with the prospect of another set of appeals to the Supreme Judicial court.

To continue with the hearing on this appeal means that the Title hearing could simultaneously be prosecuted in another court. All is sues could then be consolidated in a single appeal to the Supreme Judicial Court.

The delays involved in two consecutive appeals to the Supreme Judicial Court could easily spell the death knell of this project even if the Developer should prevail all the way. Such a result directly contravene legislative intent in Chapter 774.

The motion to dismiss is denied and it is ordered that this appeal be set down for hearing by the Housing Appeals Committee.

HOUSING APPEALS COMMITTEE

Maurice Corman
Hearings Officer

SUBSEQUENT HISTORY: Related eminent domain taking upheld, Chelmsford v. DiBiase, [370 Mass. 90](#), 345 N.E.2nd 373 (1976).

End Of Decision