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## A New Twist in Eminent Domain

**M**ount Laurel Township first made national land development and planning news in 1975 with the New Jersey Supreme Court's determination that people should be able to afford to live in the communities where they work (*Southern Burlington County N.A.A.C.P. v. Mount Laurel Township*, 67 N.J. 151). Until then, exclusionary zoning had precluded low- and moderate-income workers from either buying or renting housing within the Township's boundaries. The Court reaffirmed the Mount Laurel doctrine and resolved some of the practical and procedural questions Mount Laurel I raised in 1983 (*2 N.J. 158*) in a case by the same name.

Fair housing acts now exist far beyond New Jersey's boundaries as a result of that early litigation. "Mount Laurel housing", as it is sometimes referred to, is a stony issue that many developers prefer to throw money at rather than actually include affordable units in their construction plans. Now the Township is poised to take the nation's land use arena by storm again, particularly if the defendant chooses to appeal to the federal Supreme Court, based on a December 2006 decision of the Supreme Court of New Jersey.

*Mount Laurel Township v. MiPro Homes, LLC* was argued in May of 2006 and the NJ State Supreme Court issued its opinion on December 7, 2006 (citation not yet available as of this writing). In 2001, MiPro bought 16.3 acres in an area zoned for residential use. On May 9, 2002, MiPro obtained final subdivision approval from the Township's planning board to place 23 single-family homes on

the land. Meanwhile, the Township was trying to acquire the site from MiPro for open space. When a "voluntary acquisition" obviously was not going to happen, it filed a condemnation action on May 24, and on May 31 filed its declaration of taking. Within the 22 days between approval of its subdivision and condemnation by Mount Laurel, MiPro had

issues 11 times since 1961 to provide funds for open space acquisition and park development.

Notable to me is MiPro's argument that no active recreation plans existed for the site. But not all open space is destined for "active" recreation. Passive recreation areas serve a dual purpose: preservation of areas for activities such as hiking or

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performed a "significant amount of site preparation" for its planned construction. MiPro filed suit. The trial court ruled against the Township's right to exercise eminent domain powers for land acquisition that the court saw as primarily intended to prevent residential development from further stressing municipal services and infrastructure. Keep in mind that Mount Laurel's population exploded from just over 5,000 residents in 1961 to about 40,000 in 1999.

Most of the case's details are in the dissenting opinion to the recent decision and in the appellate court opinion (*878 A. 2d 38, 2005*). Here we find that a single house had occupied MiPro's tract at purchase, and that MiPro's grantor had intended to construct an assisted living facility on site that would have included affordable housing units. We learn some of the history of zoning and planning regarding open space, and that New Jersey voters have approved ballot

bird watching, and protection of natural resources. This is not a new concept. The creation of the Fairmount Park system in Philadelphia, now encompassing nearly 9,200 acres, had its roots in the recognition that the city's water supply became toxic as it passed through various industrial areas in the watershed. The *Consolidation Act of 1854* granted Philadelphia the power to acquire areas within the city as open public space.

MiPro protested the Township's right to exercise eminent domain powers to preserve open space, especially without a plan to create active recreation areas. The appellate opinion outlines a broad legislative background to refute this argument. In its attempts to acquire the land, Mount Laurel had applied for and received a \$400,000 grant from the State's open space preservation program, not an overnight process. The appellate court found, and the state's supreme

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court affirmed, that not only did Mount Laurel have authority to condemn, but in this instance in particular it had acted in the best interest of its residents.

An interesting point to ponder is the appellate court's analysis of whether it would have been more acceptable for Mount Laurel to condemn the land if MiPro's intended use had been of "greater social benefit", such as a hospital or the initially intended fair market housing. Does the court have the right to balance the social good of each planned land use? Here is where we as active citizens must become involved with zoning and land use decisions in our communities.

Newspaper articles abound with press releases on both sides of the decision. The state's Builders League has declared that acquisition of land for open space purposes signified intent to block legal construction, and could prove the death knell for development throughout New Jersey. The Township, on the other hand, has stated that it is not anti-development, but has a mandate to provide open space to residents. True, it is under severe stress to provide the facilities necessary to accompany residential construction. Commercial sites, on the other hand, do not require schools or trash pick up. But voters have approved spending for open space time and again.

The appellate court noted that "even if the primary goal of Mount Laurel's open space acquisition program in general, and the condemnation of the MiPro site in particular, is to slow down residential development in the municipality, this does not provide a foundation for finding that the municipality's use of eminent domain for this purpose constitutes fraud, bad faith or manifest abuse" (878 A. 2d 49) – and thus there were no legal grounds to overcome the condemnation action.

*Kelo v. New London* instigated many state and local governments to legislate private property protection from eminent domain proceedings. The *MiPro* cases may trigger additional legal reviews, particularly if the developer pursues a hearing in federal court. The dissenting judge in the New Jersey Supreme Court expressed his view that if the Township wishes to purchase property for open space, that it could only do so from willing sellers, not through condemnation. He further pointed out MiPro's reliance on permits and vested rights accruing from those permits that should have had compensable value. 