

# *Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1 (Nev. 2003)*<sup>1</sup>

## PROPERTY – EMINENT DOMAIN

### Summary<sup>2</sup>

In November 1985, the City of Las Vegas Downtown Redevelopment Agency (Agency) was created to evaluate and determine whether redevelopment was necessary to combat physical, social, or economic blight in various sections of the city. The Agency identified conditions in downtown Las Vegas constituting “blight” within the definition of NRS §279.388, and considered and approved a redevelopment plan (Plan) with the purpose of eliminating blight and to encourage businesses and individuals to return to a safe downtown area with adequate parking and facilities. Although the Pappases’ property was included within the Plan, no one, including the Pappases, challenged the Plan within the ninety-day period following its adoption, as required by statute.

Several years passed before the Agency entered into an agreement with a consortium of downtown casinos to develop the Fremont Street Experience (FSE). The FSE required construction of a parking garage on property owned by thirty-two individual parcels, three of which were owned by the Pappases. In November 1993, the Agency filed an eminent domain complaint to acquire the Pappases’ property, and gained possession of the Pappases’ land in January 1994 after the Pappases failed to oppose the Agency’s motion for immediate occupancy pending entry of judgment. The Pappases filed a counterclaim alleging six causes of action, and then filed a motion for rehearing regarding the Agency’s immediate occupancy, which was denied. The Agency took possession of the property, demolished the existing building, and constructed the parking garage.

More than three years after the district court had granted the motion for occupancy and the garage had been constructed, the Pappases filed a motion to dismiss the Agency’s eminent domain complaint. The district court dismissed the Agency’s eminent domain complaint, concluding, among other things: that the ninety-day statute of limitations in NRS §279.609 did not preclude judicial review of the taking; that the Agency lacked authority to use eminent domain because there were other less restrictive means to obtain the property; that the Agency acted in bad faith; and that the Agency’s taking of the Pappases’ property was not a public use.

The Agency appealed, arguing the district court erred in entering an order dismissing the Agency’s eminent domain complaint. The Pappases cross-appealed, contending the district court erred in entering an order dismissing their counterclaims.

The Nevada Supreme Court concluded that the Agency’s use of eminent domain was constitutionally permissible because both the Federal and Nevada Constitutions allow the taking of private property for public use, because the Agency acted under a clearly defined economic redevelopment statute, and because a court cannot substitute its judgment when a legislative body determines a specific project furthers economic redevelopment and supports that decision with substantial evidence. The majority concluded the district court erred in dismissing the Agency’s eminent domain complaint.

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<sup>2</sup> *Pappas* was heard *en banc* by the Nevada Supreme Court, with Justice Becker writing the opinion. Justices Agosti, Rose, and Shearing concurred; Justices Leavitt and Maupin filed dissenting opinions. Justice Gibbons voluntarily recused himself from the decision.

However, two strong dissents were filed in this case. Justice Leavitt's dissent was based on his conclusion that the Agency's taking of the Pappases' property was not for a proper public use. Under NRS §279.586(1)(a), a redevelopment area must include a "blighted area, the redevelopment of which is necessary to effectuate the public purposes." Justice Leavitt pointed out that the Pappases' property was not a slum, as was the case in *Berman v. Parker* where the U.S. Supreme Court upheld the transfer of property taken by eminent domain from one private party to another private party. Nor, contended Justice Leavitt, did the Agency demonstrate that the taking of the Pappases' property was necessary, rather than desirable, for effective redevelopment as required by NRS §279.586(1)(a). Thus, Justice Leavitt concluded the taking of the Pappases' property was unconstitutional and void.

Justice Maupin's dissent was based upon his dissent in the related case of *Las Vegas Downtown Redevelopment v. Crockett*. Justice Maupin reasoned that the vacation of four downtown streets and the relocation of a public park constituted a material deviation from the redevelopment plan involved in both *Crockett* and *Pappas*, and the Agency failed to obtain formal amendment of the Plan to incorporate those material changes, contrary to NRS §279.572 and NRS §279.608. It was Justice Maupin's view that, even though there is not an absolute requirement that redevelopment plans be formally amended to accommodate any redevelopment project, the scope of this particular project required it to be formally amended because in that way, the affected landowners would have had a full opportunity to administratively air their views and have those views considered by the Agency prior to undertaking the project.

## **Issues and Disposition**

### **Issues**

1. Whether a landowner is procedurally barred from challenging the legality of eminent domain proceedings three years after the motion for occupancy was granted, based on the doctrines of estoppel or waiver?
2. Whether an eminent domain proceeding involving the transfer of land from one private individual to another private individual can constitute a "public use" under the Nevada and Federal Constitutions?
3. Whether a taking of unblighted property for a parking garage furthers the purpose of eliminating blight under the community redevelopment statutes?
4. Whether the taking was necessary to further a public use?

### **Disposition**

1. Yes. Although not applied in this particular case, the court held that for all eminent domain cases filed after the date of this opinion, such challenges must be raised prior to occupancy and material demolition, alteration or construction on the subject property. Failure to timely assert lack of public use or necessity will constitute a waiver of these issues.
2. Yes. Under Nevada law, possessory use by the public is not an indispensable prerequisite to the lawful exercise of the power of eminent domain. In addition, the U.S. Supreme Court has soundly rejected the notion that transfer of land ownership from one private individual to another automatically falls outside the power of eminent domain.
3. Yes. For an area to be included in a redevelopment plan, there must be a finding that the general area suffers from some form of blight and that redevelopment is necessary to

eliminate that blight. If an agency’s finding of blight is supported by substantial evidence, it is not subject to judicial review. Substantial evidence is that which a “reasonable mind might accept as adequate to support a conclusion.” Additionally, any challenge to the validity of a redevelopment plan must be raised within ninety days after the “adoption of the ordinance adopting ... the plan.”

4. Yes. Unless a court concludes fraud or bad faith were involved in the government entity’s decision of how to accomplish the public purpose, a court may not substitute its own judgment simply because the legislative branch has other methods at its disposal to accomplish the public purpose.

## **Commentary**

### **State of the Law before *Pappas***

Before this case, the Nevada Supreme Court never held that a party seeking dismissal of an eminent domain complaint based on lack of public use or necessity grounds must raise the issues in opposition to a motion for occupancy or in a motion to dismiss filed before the subject property is significantly altered.<sup>3</sup> Nor had the court indicated that the failure to file a petition for extraordinary relief from an order granting a motion for occupancy or denying a motion to dismiss implicates the doctrines of waiver or estoppel.<sup>4</sup> Because the court had not set forth the above requirements prior to *Pappas*, the court declined to apply those doctrines to the facts of this case.

### **Effect of *Pappas* on Current Law**

All eminent domain cases filed after *Pappas* that challenge the proceeding based on lack of public use or necessity grounds must be raised prior to occupancy and material demolition, alteration or construction on the subject property.<sup>5</sup> The court stated that failure to timely assert lack of public use or necessity will constitute a waiver of these issues.<sup>6</sup> Because issues regarding whether the proposed taking constitutes a “public use” under the Nevada and Federal Constitutions and whether the taking is necessary to accomplish that public purpose are issues to be addressed at the early stages of an eminent domain proceeding, such issues need to be resolved before the existing property is substantially altered.<sup>7</sup>

## **Unanswered Questions**

In its discussion of what constitutes “public use,” the court noted that the Legislature has declared that a community can exercise the power of eminent domain “whenever the redevelopment of blighted areas cannot be accomplished by private enterprise alone.”<sup>8</sup> The court stated that “... so long as a redevelopment plan, or any individual redevelopment project, *bears a rational relationship to the eradication of physical, social or economic blight, it serves a public*

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<sup>3</sup> Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1 (Nev. 2003).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, citing NEV. REV. STAT. 279.424(2).

*purpose* within the power of eminent domain. The focus of the inquiry is whether the plan or project serves the public purpose ....”<sup>9</sup>

With the court’s admittedly broad definition above, it could be argued that any redevelopment project that could be posited to serve a public purpose—no matter how minimally it might serve that public purpose—would be grounds for a governmental entity to exercise its right of eminent domain. Thus, reading the above broad definition along with the court’s statement that “... even the relocation of one business through condemnation to make way for a new business is still considered a public purpose,”<sup>10</sup> it is conceivable that a municipality could decide to condemn a small, non-tax producing service business and replace it with a retail tax-producing business on public purpose grounds.

However, it doesn’t appear the court intended to provide such generous leeway to governmental entities, as the court differentiated between other cases that concluded a taking was not for a public use and those that did find public use.<sup>11</sup> The court stated that a project “intended to attack blight, such as creating a significant increase in jobs in an area suffering from high unemployment....” would support a public purpose designation.<sup>12</sup> Nonetheless, clarification regarding what is sufficient to allow an entity to exercise its considerable power through eminent domain in the state of Nevada requires further exploration.

### **Survey of the Law in Other Jurisdictions**

The difference between the Nevada Supreme Court’s conclusion in *Pappas* and eminent domain decisions in other jurisdictions is primarily due to the interpretation of the term “public use.” Broad interpretations of what constitutes public use result in decisions in accord with that of the Nevada Supreme Court in *Pappas*, while narrow interpretations eventuate in different results.

Courts that apply a narrow interpretation of what constitutes public use require that the public actually use the condemned property.<sup>13</sup> In contrast, those courts that adopt a broad interpretation recognize any “use that concerns the whole community or promotes the general interest in its relation to any legitimate object of government.”<sup>14</sup>

The Nevada Supreme Court itself noted that the U.S. Supreme Court has rejected the requirement of actual public use of the property by broadly interpreting the term “public use.”<sup>15</sup> The Nevada Supreme Court also noted that other jurisdictions with constitutional language similar to Nevada’s have adopted broad interpretations of “public use” consistent with that of the Nevada Supreme Court.<sup>16</sup>

The court additionally looked to California for guidance in interpreting the Nevada redevelopment statutes, noting the language in NRS §279.609 and NRS §279.589(1) was taken from similar California statutes.<sup>17</sup> Thus the court’s holding that judicial review of a finding of

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<sup>9</sup> *Id.* (emphasis added).

<sup>10</sup> *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 458-59 (Mich. 1981).

<sup>11</sup> *Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1 (Nev. 2003).

<sup>12</sup> *Poletown*, 304 N.W.2d at 458-59.

<sup>13</sup> *Thornton Dev. Auth. v. Upah*, 640 F. Supp. 1071, 1077 (D. Colo. 1986).

<sup>14</sup> *S. Cal. Edison Co. v. Rice*, 685 F.2d 354, 356 (9th Cir. 1982) (quoting *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 841 (Cal. 1982) (quoting *Bauer v. County of Ventura*, 289 P.2d 1, 6 (Cal. 1955))).

<sup>15</sup> *Rindge Co. v. L.A.*, 262 U.S. 700, 707 (1923); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 159-62 (1896).

<sup>16</sup> 2A *Julius L. Sackman, Nichols on Eminent Domain* §§ 7.01[1], 7.02[3] (rev. 3d ed. 2003).

<sup>17</sup> *Las Vegas Downtown Redev. v. Crockett*, 34 P.3d 553, 559 (Nev. 2001).

blight (and therefore public use) must be commenced within the statutory period (ninety days in Nevada), and that once the statutory period has expired, no new action to challenge the findings may be filed, resulting in a conclusive presumption of blight, is in accord with the law of California.<sup>18</sup>

The court's decision also appears to be consistent with other jurisdictions regarding its acknowledgement that a property owner may raise the issue of blight as an affirmative defense to the taking.<sup>19</sup> A property owner may raise as issues: 1) that blight originally identified in the plan or project no longer exists;<sup>20</sup> 2) that the particular project is the product of fraud or collusion between the governmental agency and the private entities who will develop the project;<sup>21</sup> 3) that the avowed public purpose is merely a pretext;<sup>22</sup> 4) or used in bad faith.<sup>23</sup>

## **Conclusion**

The Federal and Nevada Constitutions allow the taking of private property for public use as long as the private property owner is justly compensated.<sup>24</sup> The Nevada State Legislature has defined economic redevelopment as a public purpose.<sup>25</sup> When substantial evidence supports a governmental agency's determination that a specific project furthers economic redevelopment under NRS Chapter 279, the project is for a public purpose, and the agency's use of eminent domain is constitutionally permissible.<sup>26</sup> Public ownership of condemned property is not essential to a determination of public use.<sup>27</sup> So long as a redevelopment plan, or any individual redevelopment project, bears a rational relationship to the eradication of physical, social or economic blight, it serves a public purpose within the power of eminent domain.<sup>28</sup> If an agency's finding of blight is supported by substantial evidence, it is not subject to judicial review.<sup>29</sup> Courts may not question the wisdom of how to accomplish the public purpose absent a showing of fraud or bad faith.<sup>30</sup>

All eminent domain cases filed after *Pappas* challenging the proceeding based on lack of public use or necessity grounds must be raised prior to occupancy and material demolition, alteration or construction on the subject property.<sup>31</sup> Failure to timely assert lack of public use or necessity will constitute a waiver of these issues.<sup>32</sup>

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<sup>18</sup> Sweetwater Valley Civic Ass'n v. Nat'l City, 555 P.2d 1099, 1102-03 (Cal. 1976).

<sup>19</sup> Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1 (Nev. 2003).

<sup>20</sup> See 99 Cents Only Stores v. Lancaster Redev., 237 F. Supp. 2d 1123, 1130-31 (C.D. Cal. 2001); Aposporos v. Urban Redev. Com'n, 790 A.2d 1167, 1175-77 (Conn. 2002).

<sup>21</sup> See 99 Cents Only Stores, 237 F. Supp. 2d at 1130-31; Aposporos, 790 A.2d at 1175-77; see also Southwestern Ill. Development Auth. v. NCE, 710 N.E.2d 896 (Ill. App. Ct. 1999).

<sup>22</sup> Earth Management, Inc. v. Heard County, 283 S.E.2d 455, 459-61 (Ga. 1981); Armendariz v. Penman, 75 F.3d 1311, 1320-21 (9th Cir. 1996).

<sup>23</sup> Pheasant Ridge Assoc. v. Burlington Town, 506 N.E.2d 1152 (Mass. 1987); Denver W. Metro. Dist. v. Geudner, 786 P.2d 434, 436 (Colo. Ct. App. 1989).

<sup>24</sup> U.S. CONST. amend. V; NEV. CONST. art. 1, §8, cl. 6.

<sup>25</sup> NEV. REV. STAT. 37.010(17).

<sup>26</sup> Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1 (Nev. 2003).

<sup>27</sup> Urban Renewal Agency v. Iacometti, 379 P.2d 466, 472-73 (Nev. 1963).

<sup>28</sup> *Pappas*, 76 P.3d.

<sup>29</sup> *In re Bunker Hill Urban Renewal Project 1B*, 389 P.2d 538 (Cal. 1964).

<sup>30</sup> *Port of Umatilla v. Richmond*, 321 P.2d 338, 350-51 (1958); *Denver W. Metro. Dist.*, 786 P.2d at 436; *Thornton Dev. Auth.*, 640 F.Supp. at 1076.

<sup>31</sup> *Pappas*, 76 P.3d.

<sup>32</sup> *Id.*

