Issue Brief

Metropolitan Mobility Authority Act (SB 3937) and Eminent Domain

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for the Metropolitan Planning Council

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Issue:

The issue presented is whether the Metropolitan Mobility Authority ("MMA") in SB 3937 impacts the ability of local municipalities to enforce their zoning and land use laws (Collectively "zoning laws") against property owned or "taken" by eminent domain (a/k/a condemnation) proceedings (and thus subsequently owned) by the proposed authority.

Statutory language:

The relevant language of SB 3937 is as follows:

Section 4.09. Eminent domain.

(a) The Authority may take and acquire possession by eminent domain of any property or interest in property which the Authority may acquire under this Act. The power of eminent domain may be exercised by ordinance of the Authority and shall extend to all types of interests in property, both real and personal, including, without limitation, easements for access purposes to and rights of concurrent usage of existing or planned public transportation facilities, whether the property is public property or is devoted to public use and whether the property is owned or held by a public transportation agency, except as specifically limited by this Act.

(b) The Authority shall exercise the power of eminent domain granted in this Section in the manner provided for the exercise of the right of eminent domain under the Eminent Domain Act, except that the Authority may not exercise quick-take authority provided in Article 20 of the Eminent Domain Act providing for immediate possession in such proceedings and except that those provisions of Section 10-5-10 of the Eminent Domain Act requiring prior approval of the Illinois Commerce Commission in certain instances shall apply to eminent domain proceedings by the Authority only as to any taking or damaging by the Authority of any real property of a railroad not used for public transportation or of any real property of other public utilities.

(c) The Authority may exercise the right of eminent domain to acquire public property with the approval of the Board. In a proceeding for the taking of public property by the Authority through the exercise of the power of eminent domain, the venue shall be in the circuit court of the county in which the property is located. The right of eminent domain may be exercised over property used for public park purposes, for State forest purposes, or for forest preserve purposes with the approval of the Board, after public hearing and a written study done for the Authority, that such taking is necessary to accomplish the purposes of this Act, that no feasible alternatives to such taking exist, and that the advantages to the public from such taking exceed the disadvantages to the public of doing so. In a proceeding for the exercise of the right of eminent domain for the taking by the Authority of property used for public park, State forest, or forest preserve purposes, the court shall not order the taking of such property unless it has reviewed and

concurred in the findings required of the Authority by this paragraph. Property dedicated as a nature preserve pursuant to the Illinois Natural Areas Preservation Act may not be acquired by eminent domain by the Authority.

(d) The acquisition by the Authority by eminent domain of any property is not subject to the approval of or regulation by the Illinois Commerce Commission, except that any requirement in Section 10-5-10 of the Eminent Domain Act requiring in certain instances prior approval of the Illinois Commerce Commission for taking or damaging of property of railroads or other public utilities shall continue to apply as to any taking or damaging by the Authority of any real property of such a railroad not used for public transportation or of any real property of such other public utility. (e) Notwithstanding any other provision of this Act, any power granted under this Act to acquire property by condemnation or eminent domain is subject to, and shall be exercised in accordance with, the Eminent Domain Act. *(Emphasis added)*

It should be noted that this language was imported directly from the existing Regional Transportation Authority Act 70 ILCS 3615/2.13 and 70 ILCS 3615/2.13a, by the drafters.

Analysis:

Initially, it bears noting that the proposed language specifically limits the use of eminent domain in several ways under the MMA Act. While some limits are not relevant to this discussion, the most important limitation is that any such use of this power is subject to and must be done "in the manner provided for the exercise of the right of eminent domain under the Eminent Domain Act,". As such, no attempt is being made by the MMA to expand on the authority that already exists under the Eminent Domain act. Thus, looking at the Eminent Domain Act, and the case law that surrounds that Act, can answer the question of whether this proposed bill somehow abrogates existing zoning laws.

For the reasons stated herein, it is our conclusion that the MMA Act does not abrogate existing zoning laws. All existing zoning laws would remain in place even after a property is taken under this MMA Act. This means that a municipality (or other governmental entity regulating land use, e.g., counties or others) has all existing powers to regulate, permit, permit with conditions or deny a proposed use. All procedures to seek modification of zoning laws by the MMA of acquired property, would have to be adhered to including, but not limited to, petitions to the local government that regulates zoning laws, public notice, mailings to adjacent landowners, payment of fees, and others.

Existing case law makes clear that eminent domain does not abrogate existing zoning regulations on a property. Moreover, zoning has long been held to affect the value of the property. As long ago as 1954, Illinois Courts recognized that the zoning of a property affects its valuation for purposes of condemnation[1]. One of the key considerations in any condemnation for eminent domain is that the owner of the property be compensated for the value of the highest and best use of the property. Courts have repeatedly held that evidence as to 1) exiting zoning and 2) the reasonable probability of a favorable rezoning has been held admissible in determining value in a condemnation proceeding[2].

Moreover, courts have held that the zoning ordinance that regulates the property is presumed valid[3]. And courts have gone further in prohibiting a petitioner in a condemnation case, from attempting to attack the

[1]Forest Preserve Dist. v. Wike, 3 Ill,2d 49 (1954)
[2] United States v. 50. 8 Acres of Land, 149 F. Supp. 749, 752 (E. Dist., N.Y., 1957),
[3] Kinney v. City of Joliet, 4ll Ill. 289, l03 N.E.2d 473 (l952); Bohan v. Village of Riverside, 9 Ill.2d 56l, l38 N.E.2d 487 (l956).

validity of the existing zoning on a property[4]. The courts' logic is that if a landowner has an objection to the validity of a given zoning provision as it affects their property, there is an existing avenue to challenge such a zoning provision (through a direct claim against the zoning authority). As such, the court has not allowed a collateral attack (or one might say a second bite at the apple) through the condemnation proceeding. Fundamentally, the concept articulated in these cases is that property taken is taken with the zoning restrictions in place.

These concepts are also not unique to Illinois. The concepts articulated herein are common throughout the United States.

Additional authority for this proposition can be found in Illinois law that expressly limits a municipality's zoning laws. Perhaps the best example of this is that under normal circumstances, a municipality's zoning laws also encompass their building regulations, i.e. property zoned for a given use must still build that use in compliance with existing building codes. However, the General Assembly expressly carved out an exception to this proposition for schools in Illinois. Under Illinois law, when a school district erects a school, it is not required to conform to the municipalities building codes. Indeed, school districts are not even required to consult with the municipality on such a project (although the municipality may offer comments). 105 ILCS 5/2-3.12(c), 23 Ill. Adm. Code 180; 105 ILCS 5/2-3.12, 3-14.20, 3-14.21

The point here is that in order to avoid the municipal regulation against a school, the General Assembly had to expressly carve out that exception. Ipso facto, if such an exception exists it must be expressly stated. In the context of the Eminent Domain Act, no such exception to the zoning laws of municipalities has been provided for. Similarly, the Act has no provision that expressly exempts the MMA from local land use laws, which means that the MMA are subject to such laws.

Moreover, the case law relating to this school code exception the building code is likewise illustrative. The case of *Gurba v. Community High School District No. 155*[5]provides that while the school is afforded complete relief from the building codes, the less related a regulation is to construction of a school building the less likely this exception will apply. Specifically in this case, the court held that a municipality could enforce its zoning regulations against a school district's desire to construct a playing field. The court held that: "The issues involved in zoning—the size, height, and location of buildings, setbacks from property lines, and the due process rights of neighboring property owners—are not addressed by a building code. The Health/Life Safety Code is concerned with building and construction standards to protect the health, safety, and welfare of those who use public school facilities. ... Thus, the Health/Life Safety Code does not preempt or limit the City's authority over zoning and land use issues within its jurisdiction[6]."

Again, this code and case law continues to reaffirm the municipality's right to enforce its zoning laws against other public bodies. Public bodies are not exempt from the zoning laws of the municipality they find themselves in.

One might question the additional language of Section 4.09(c), which authorizes the condemnation of <u>other public property</u>. Due to case law on the subject of cross-public takings, the language explicitly allowing a taking of another jurisdiction's "public land" needed to be included. Thus, the MMA could conceivably condemn a public park owned by another public entity (example a park district). However,

[4] Robinson v. Commonwealth,141 N.E. 2d 727 (Mass., 1957)
[5]2015 IL 118332 (2015)
[6] Id.

this power does not expand the limits placed on all condemnation proceedings that when property is condemned, the zoning regulations are NOT condemned. Nothing about the earlier analysis is affected by the nature of a public-to-public taking. In fact, in order to use this subsection, additional, more exacting criterion is required to be fulfilled including a) a public hearing, b) a written study, c) proof that such taking is necessary to accomplish the purposes of this Act, d) proof that no feasible alternatives to such taking exist, and e) proof that the advantages to the public from such taking exceed the disadvantages to the public of doing so. Again, no change is made to the power of a municipality to enforce its zoning laws against such an acquired property.

Also, reviews of other provisions of the MMA Act do not reveal any preemption of local zoning laws. For example, Section 4.01(11) provides that "The Authority may ...(11) develop or participate in residential and commercial development on and in the vicinity of public transportation stations and routes to facilitate transit-supportive land uses, increase public transportation ridership, generate revenue, and improve access to jobs and other opportunities in the metropolitan region by public transportation".

While this provision permits the MMA to develop land, it does not change any of the existing zoning laws on such property. The purpose of this grant of power is to explicitly give the Authority the power to be a land developer. Thus, it is proper to explicitly grant this power as opposed to being implied within its general mandate of authority[7]. This avoids any challenges to the Authority's corporate powers. It is not an abrogation of the municipal zoning laws.

A similar provision exists at Section 4.27 of the Act, which permits the MMA to establish a Transit-Supportive Development Incentive Program. That program provides for commercial or residential development that is designed to expand the public transportation ridership base or to effectively connect transit users to such developments. But again, nothing in this Section eliminates local zoning approval requirements. The municipality retains such powers.

Lastly, the MMA has a mandate included within it regarding land development. It provides in Section 4.28 that the "Authority **shall cooperate** with the various public agencies charged with the responsibility for long-range or **comprehensive planning** for the metropolitan region." (*Emphasis added*) Comprehensive planning is what the zoning laws are founded upon. The comprehensive plan is the first step in enacting valid zoning laws. 65 ILCS 5/11-12-4. They are a part of the structure of zoning laws regulated by each municipality. This mandate expressly requires that cooperation with existing local zoning laws be made by the MMA.

In conclusion, no statutory authority or case law suggests that the MMA Act or related statutes can override municipal zoning authority in Illinois. A property condemned by the MMA's eminent domain power remains subject to all applicable zoning laws.

For more information on the MMA and related work, click here.

[7] See generally Dillon's Rule: https://content.next.westlaw.com/Glossary/PracticalLaw/I0d95a6c617a211e698dc8b09b4f043e0?transitionType=Default&contextData=(sc.Default)