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Kelo Fallout

New Jersey legislators and the state public advocate launch efforts to reform the use of takings for private development

By Lisa Brennan

Last June's blockbuster takings decision by the U.S. Supreme Court had little direct impact in New Jersey — a state where, unlike others, use of eminent domain for private redevelopment is a power provided in the constitution.

But *Kelo v. New London* is nonetheless causing aftershocks here, as the legislative and executive branches are mobilizing to regulate takings that seek to declare property "blighted" so that it can be put to private developers' use.

A bevy of bills have been introduced in the Legislature, some of which call for constitutional amendments to either limit or outright ban takings of property for redevelopment.

And Public Advocate Ronald Chen, in a May 18 report to Gov. Jon Corzine, called for a comprehensive reform of the use of eminent domain for that purpose.

Chen warned against drastic measures like a total proscription, noting that "redevelopment of truly blighted areas is a legitimate public purpose that serves the greater good by helping revitalize communities and create more opportunities for residents."

But he also said that New Jersey's Local Redevelopment and Housing Law, N.J.S.A. 40A:12-1, falls short of protecting the rights of property owners and tenants, and called for reforms.

Specifically, Chen noted that two of the law's criteria for blight impermissi-



'MEND IT, DON'T END IT':
Theodore Zangari, who represents developers, says takings law may only need a little tinkering.

PHOTO BY CARMEN NATALE

bly expand its definition to the point where property that isn't blighted can be seized. To fix that problem, Chen advocates narrowing the definition of blight. He also seeks to open up the designation system.

The process "must be transparent and fully noticed, and must provide a meaningful opportunity for affected persons to participate early in the process," says Chen.

Chen recommends applying pay-to-play rules to redevelopment projects, requiring competitive bids for contracts and barring municipal officials and their lawyers from participating if they have a personal financial interest in the project.

Chen pitched his proposals to a receptive Assembly Commerce and Economic Development Committee, which next month will recommend a series of reforms suggested by Assemblyman John Burzichelli, D-Gloucester, the committee chair, and state Sen. Ron Rice, D-Essex.

Lawyers for condemning authorities have more tepid reactions.

John Curley of Jersey City says

Chen's call for improved notification is the most important recommendation. "Under the current system, everybody in an area gets a notice of hearing," he says. "The notice says, 'Redevelopment is being studied.' But it doesn't go on to say their properties could be condemned. It blows right by them. We definitely need a more effective notification process."

But Curley opposes Chen's recommendation that municipalities bear the burden of proof of defending a blight designation by clear and convincing evidence. Historically, courts have given great deference to the validity of municipal declarations of blight, leaving challengers to bear the burden of proving the municipality wrong.

Curley says the presumption of validity should not be changed, and adds it wouldn't need to be changed if municipalities become more deliberative and transparent in the process. Moreover, he says, shifting the burden would impede municipalities from engaging in important redevelopment projects.

Theodore Zangari of Newark's Sills Cummis Epstein & Gross, who

represents designated developers, says that only a little tinkering may be needed.

“The message to state legislators must be ‘mend it, don’t end it,’” he says. “Tighten the definition of ‘blight,’ particularly when residences or small businesses are at stake. Require towns to follow a more deliberative process. Encourage more public participation. Disqualify redevelopers who engage in pay to play. Better compensate landowners for replacement and relocation costs. But don’t eliminate this ultimate smart growth tool,” Zangari adds.

William Ward of Florham Park’s Carlin & Ward, who represents property owners, supports all of Chen’s report and says it will be useful to all three branches of government. “It lays open the house of cards our legislators have built, allowing developers free pickings in large portions of the state,” he says.



PHOTO BY CARMEN NATALE

PREACHING TO THE CHOIR: Public Advocate Ronald Chen pitched his proposals to an Assembly committee that next month will recommend a series of reform measures.

“What is shocking to me are the implications of smart growth as a tool to define

‘areas in need of redevelopment.’”

He would go further, placing notices on billboards in affected neighborhoods.

For Ward, the best solution would be a committee of retired judges, academics, condemnation practitioners, municipal officials, state Department of Transportation representatives and other condemning authorities.

“Anything short of a comprehensive review will be mere window dressing,” says Ward, who is awaiting an Appellate Division

decision on a blight-designation challenge by residential and business property owners against Bloomfield Township in Essex County.

Still, individual legislators are trying their hand at reforms.

Among the bills, the most all-encompassing is the consolidated package suggested by Burzichelli and Rice, which would subject takings for redevelopment to strictures similar to Chen’s proposals.

The measure would require more public notice and public hearings/input, tighten definitions of commercial and residential buildings, increase the percentage of blighted property needed before an area is designated for redevelopment, require better compensation for property owners, and require proof of extensive negotiation with the landowner before a condemnation proceeding is instituted.

Since *Kelo* was decided, the eminent domain issue has struck a chord with the public to such an extent that lawyers who try condemnation cases say it has become more difficult to pick a jury.

Paul Fericola of Red Bank’s Bowe Fericola, who won a \$2.265 million verdict last Thursday in Hunterdon County, says it took an extra day to find jurors who had not been biased by the well-publicized *Kelo* ruling.

“Many potential jurors said they could not be fair to towns, that they were biased against towns for taking a homeowner’s property,” says Fericola, who represents property owners but also serves as special condemnation counsel in Long Branch. ■

Eminent Domain Bills in the Hopper

The following bills have been introduced in the Legislature:

- *ACR-138*, sponsored by Assemblyman Richard Merkt, R-Morris, calls for a constitutional amendment to limit takings to only “essential public purposes.”
- *A-161*, sponsored by Assemblyman Michael Carroll, R-Morris, is the same as the Merkt amendment with the added proviso of repealing long-term tax exemptions for redevelopment projects.
- *ACR-168*, sponsored by Assemblyman Christopher Connors, R-Ocean, calls for a constitutional amendment banning takings of nonblighted property for redevelopment.
- *A-3178*, sponsored by Assemblyman Michael Panter, D-Monmouth, calls for a 24-month moratorium on takings by the state, counties and municipalities.
- *A-582*, sponsored by state Sen. Thomas Kean, R-Union, establishes minimum amounts for eminent domain relocation assistance and additional homeowner payments.
- *A-1220*, sponsored by Assemblyman Patrick Diegnan, D-Middlesex, requires Department of Community Affairs approval for blight designations and a referendum before condemnations for redevelopment.
- *A-1290*, sponsored by Assemblyman Louis Manzo, D-Hudson, requires just compensation for condemnation of single-family residences to be based on cost of comparable relocation properties.
- *A-2017*, *A-2018* and *A-2019*, sponsored by Assemblyman Sean Kean, R-Monmouth, increases notice to affected property owners and provides for payment of an extra \$100,000 to owners whose property is taken for redevelopment.
- *A-2423*, sponsored by Assemblywoman Charlotte Vandervalk, R-Bergen, requires a 48-month ban on takings for redevelopment, while a commission studies its use statewide. ■