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Not All Ripe for the Taking

A judge's ruling puts the brakes on condemning property for developers' use

By Lisa Brennan

Bloomfield property targeted for redevelopment.

If anyone thought the U.S. Supreme Court's ruling in *Kelo v. City of New London* was a license to steal for municipalities, last Wednesday's ruling in an Essex County case is a lesson that eminent domain still has its limits.

A Superior Court judge voided Bloomfield's attempted condemnation of commercial property, near a rail line to Manhattan, for which developers planned a condominium complex.

Assignment Judge Patricia Costello found that the township's designation of the site as "blighted" did not comport with the state Local Redevelopment Housing Law. "The record in this case is devoid of any finding that the property is detrimental to the public health, safety or welfare," as the statute requires, Costello said.

The proposed condemnation is a *Kelo*-type taking. The property at 110 Washington St., a one-story masonry industrial building formerly used by a toy manufacturer, is sought as part of a downtown redevelopment plan. Since the company moved, the building has been vacant and boarded up, with weeds breaching the pavement and ivy climbing the outside walls.

The building's co-owner, David Mandelbaum, had tried to sell the building to a frame manufacturer but it took more than a year to get a use variance.

Then, with the prospect of the township becoming a stop on New Jersey Transit's Midtown Direct train line, developers flooded town hall with proposals. After some administrative wrangling, the buyer's use variance was rescinded.

There followed a blight designation of a swath of downtown. The redevelopment plan accepted, a joint venture of

Forest City Ratner and Toll Brothers, would build 650 residential units and a 65,000-square-foot shopping center with three parking levels in the redevelopment zone, running from Bloomfield Avenue to Washington Avenue and from Ward Street to Glenwood Avenue.

Downtown merchants and residential property owners objected to the blight designation, the redevelopment plan and the process used in picking developers. They allege that Bloomfield issued flawed blight reports, failed to get sufficient public input, devised an unworkable redevelopment plan and appears to be taking its cues from developers.

Costello also sustained the opponents' challenge to assistant township attorney Steven Martino representing the township planning board, the mayor and council during consideration and approval of the redevelopment plan by the municipality.

"Clearly, the attorneys should not have represented both public entities at the same time," she said. "Such representation is expressly barred by statute, N.J.S.A. 40:55D-24. In addition there are numerous opinions criticizing the same conduct." For instance, she noted, a municipal lawyer can't represent a planning board because the two bodies may have different views of the same subject.

Costello said "the entire statutory scheme contemplates independence and the possibility of disagreement between and among the public entities."

While Bloomfield dismissed the attorney conflict issue, saying the standard should be actual taint, Costello said: "The chronology and the facts give rise to an appearance of conflict and impropriety that cannot be sanctioned."

Costello even took a page from *Kelo*, quoting Justice Anthony Kennedy's concurrence that said, "There

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may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.”

What Costello found most troublesome involved the granting and later rescinding of the use variance sought by the prospective buyer, Framework Inc. The company initially applied for the variance with the township zoning board on June 1, 2000. The zoning board, represented by Martino, first stated it had jurisdiction over the application, held hearings and approved it on Sept. 14, 2000.

The same month, Bloomfield’s planning board was asked to explore whether an area in the township that included 110 Washington St. qualified as an area of redevelopment in accordance with the local development law, N.J.S.A. 40A:12A-1. The planning board and township council, each advised by Martino, approved hiring Heyer, Gruel & Associates to conduct the study.

On Oct. 12, 2000, the zoning board rescinded its approval of the use variance for Framework, saying the planning board had jurisdiction. Mandelbaum and his co-owners appealed the rescission to the state attorney general’s Division of Law. Martino represented the zoning

board on appeal. On June 20, 2001, the zoning board was reversed upon the stated reason that Martino had erroneously advised it.

During the intervening time, Heyer, Gruel issued its report, stating the area qualified as “blighted” under the statute, and the development plan was approved. While all this went on, the property stood vacant and neglected: the very conditions that were used as a basis for the study.

“The tortuous and complex path this process took and the interconnected relationships lay bare the very dangers in having municipal boards charged with different and independent functions operate under the same attorney,” wrote Costello.

Martino said Friday that his job description at the time, which has since changed, required him to represent all the entities. “I was just serving my function,” says Martino. “If you read the transcripts from the hearings, you’ll see I had no input. I was just there.”

Bloomfield had argued that the opponents should be barred from challenging the township’s underlying basis for condemnation because of earlier rulings in the case. Superior Court Judge Claude Coleman dismissed actions in lieu of prerogative writ brought by the same chal-

lengers and by four other Bloomfield property owners contesting blight designations, finding each time-barred.

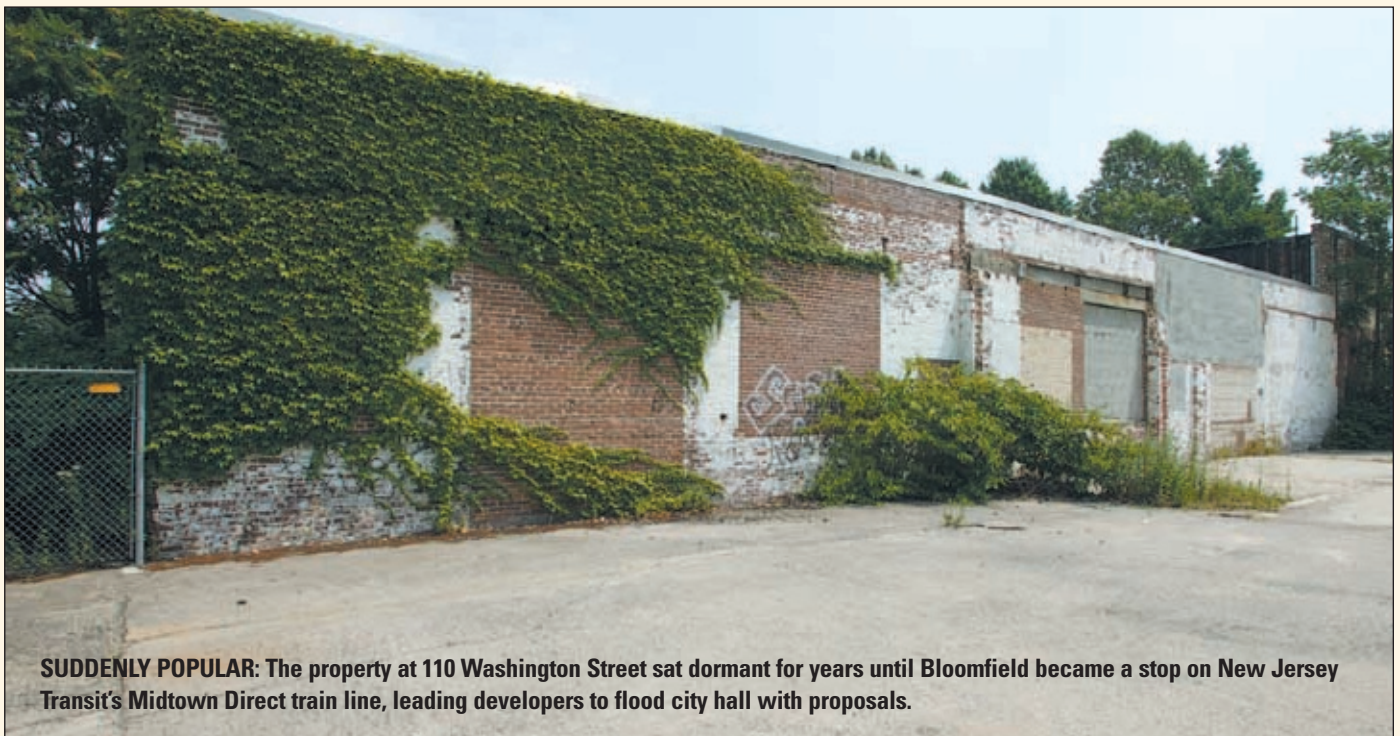
But Costello found that Coleman’s rulings never got into the property owners’ substantive claims.

The challengers’ lawyer, William Ward, says Coleman made the wrong call. “If the prerogative writ suit were allowed to go forward with limited discovery and a hearing on the record, the plaintiffs could establish, through sworn testimony, the facts necessary to throw out the municipal action,” says Ward, of Florham Park’s Carlin & Ward.

Ward’s partner and co-counsel, James Turteltaub, says Costello’s ruling is fair. “We’re very pleased for our client that the court listened to their argument and made a sound decision which vindicated the property owners’ rights,” he says.

Catherine Tamasik, a former Essex County counsel who has handled Bloomfield’s redevelopment work for several years, says the township has not decided how to respond to the ruling, though she does see an appealable issue in the finding on the blight designation.

“We’re discussing various options,” says Tamasik, of Teaneck’s DeCotiis, FitzPatrick, Cole & Wisler. “We’re looking at federal court and other options, including an appeal.” ■



SUDDENLY POPULAR: The property at 110 Washington Street sat dormant for years until Bloomfield became a stop on New Jersey Transit’s Midtown Direct train line, leading developers to flood city hall with proposals.