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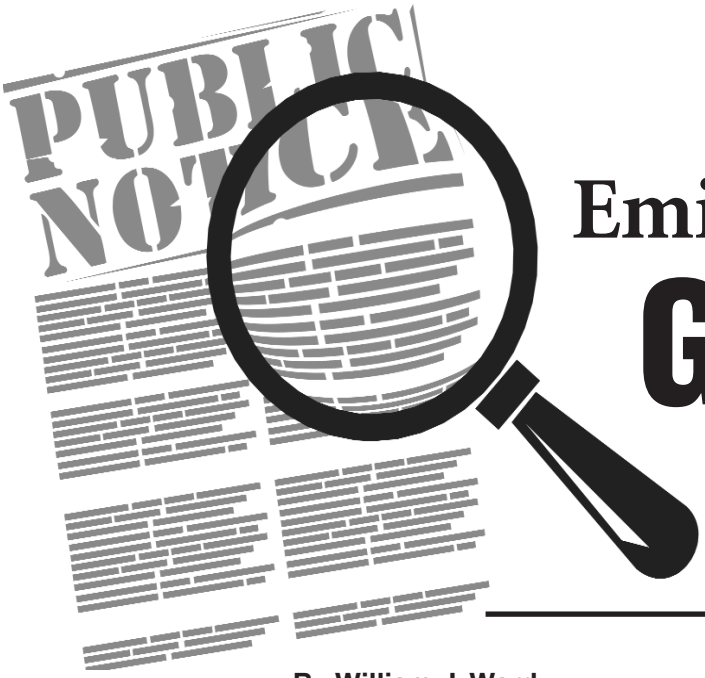


Eminent domain: GETTING NOTICED

By William J. Ward

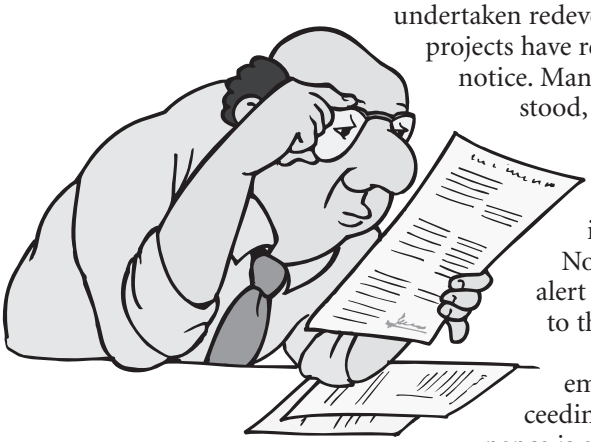
"Your Honor, I think there's one very compelling issue that's presented in this complaint, and hopefully it was presented in our motion for summary judgment. And that compelling issue is the question of the timeliness or perhaps I should say, the untimeliness of plaintiff's complaint … The rule in the courts as they have been interpreted in Rule 4:69-6 have been unequivocal in their holdings that unless there are compelling, exceptional, extraordinary reasons, the time in which one may bring an action in lieu of prerogative writs to challenge a municipal determination is 45 days." Catherine Tamasik, attorney for Bloomfield, oral argument May 27, 2005 before Judge Claude M. Coleman in *110 Washington St. v. Township of Bloomfield* (ESX-L-1860-05).

Municipal attorneys routinely oppose any prerogative writ action filed beyond the 45 days permitted in the Local Redevelopment Housing Law (LRHL) 40A:20-1 *et seq.* In order to challenge a municipal action, a property owner must file a prerogative writ suit within 45 days of the action of the municipality declaring the property to be within "an area in need of redevelopment."

This presupposes the property owner has received appropriate notice pursuant to the Local Redevelopment Housing Law. As the law presently exists, those notice requirements are deficient: There is no requirement, for instance, to alert the property owner that the action by the municipality could result in condemnation by eminent domain. If the words *condemnation* or *eminent domain* were in the notice, they would surely get the property owner's undivided attention in the post-*Kelo* environment. But the typical notice reads something like this:

> **TO: ALL PROPERTY OWNERS WITHIN THE BOUNDARIES OF THE PROPOSED RICHLAND REDEVELOPMENT AREA; AND; TO: PROPERTY OWNERS AND PARTIES IN INTEREST WITHIN 200 FT. OF THE BOUNDARY OF THE RICHLAND REDEVELOPMENT AREA PLEASE TAKE NOTICE** that on Monday July 18, 2005, at 8:00 p.m. a hearing will be held before the Buena Vista Township Committee at the Municipal Building, 890 Harding Highway, Buena, New Jersey, to determine whether certain property more fully described below, or any part thereof, should or should not be designated a 'Redevelopment Area' in accordance with the New Jersey Local Redevelopment and Housing Law, N.J.S.A, 48:12A-1 et seq."

Property owners in Bloomfield, Long Branch, Union and other municipalities that have



undertaken redevelopment studies or projects have received this kind of notice. Many have not understood, ignored, or simply not been served personally with notice of the pending municipal action. None of the notices alert the property owner to the prospect of condemnation through eminent domain proceedings after the ordinance is adopted.

City of Passaic v. Charles Shennett (A-1311-05T5) is an egregious example of how property owners are deprived of their constitutional rights through inadequate notice and lack of personal service.

Mr. Shennett, grandson of sharecroppers, inherited property from his aunt. Later, the house burned down and the lot was vacant, but Shennett paid his taxes every year, until one year when he did not receive a tax bill. When he investigated why he didn't receive the bill, he learned he didn't own the property any longer as it had been condemned. Mr. Shennett never received a notice. The municipality subsequently condemned the property, set aside $14,730 as compensation, and subsequently sold the lot for $60,000, transferring title to a former Passaic city councilman, developer Wayne Alston, who built a house on the lot and sold it to a third party.

In a unanimous opinion delivered by Judge Lorraine C. Parker and issued Feb 9, 2007, the Appellate Division reversed Passaic County Assignment Judge Robert J. Passero's ruling regarding the propriety of the procedures used by Passaic to acquire Shennett's property.

Even though Shennett's attorney was out of time appealing the final judgment appointing condemnation commissioners, the court considered the appeal because of what it characterized as "the egregious circumstances" of this case:

> "In exercising their powers of eminent domain, government entities must strictly comply with the rules and statutes governing condemnation. The circumstances here are so egregious that no remedy will suffice but to void the judgment and require the City to properly serve defendant with the requisite precondemnation notice pursuant to N.J.S.A. 20:3-6 and proceed from that point forward in accordance with the rules and statutes governing condemnation proceedings. The intervenor has not cross-appealed but nevertheless argues that (1) the May 31, 2004 order was final and defendant failed to appeal timely; (2) defendant failed to seek relief within one year of the final order barring his right to recovery; and (3) the appeal is interlocutory because its complaint to quiet title has not been adjudicated. We have addressed each of these issues previously and need not revisit them here. R. 2:11-3(e)(1)(E). Reversed and remanded for proceedings in accordance with this opinion."

The practical effect of the court's decision is to revest title of the subject property to Shennett. If the City of Passaic tries to reinstitute eminent domain, it will be problematic: there is a new house built on the property and the cost of acquisition will be far greater than the initial appraised value of $14,730 that was deposited into Superior Court trust funds for Shennett's lot. The legal battle doesn't end here: Former Passaic Councilman Wayne Alston sold the property to a third party after building the house on Shennett's land. All of these issues will be sorted out in new litigation in the law division among Shennett, the City of Passaic, Wayne Alston, the owners of the new house, and the title companies of the respective parties.

Property owners who do receive notice often ignore it. The implications for declaring an "area in need of redevelopment" — which the statute says is synonymous with blight — are not clear. It is particularly disingenuous when mayors and council members say, "Don't worry, we'll only use eminent domain as a last resort," "Redevelopment is a good thing, and you'll be part of it" or "The lawsuit is premature, we don't even have a plan yet."

Three years later, you could be in court hearing something like this:

"For plaintiffs to stand here and say they were waiting because in 2003 they read a sentence in a redevelopment plan [which] said private owners would be encouraged to benefit? By that time, as plaintiffs well know, the township had already selected a developer who would be assigned and obligated under a redevelopment agreement to redevelop all of the property including plaintiff's property." (Catherine Tamasik, May 27, 2005).

In 2005, Passaic Redevelopment Agency Executive Director Donna Rendeiro told *The Star-Ledger*, "I don't believe we stole this property. We did what we were legally required to do."

What are the legal requirements of the municipality? The Local Redevelopment Housing Law (40A:12A-6) states:

(3) The hearing notice shall set forth the general boundaries of the area to be investigated and state that a map has been prepared and can be inspected at the office of the municipal clerk. A copy of the notice shall be published in a newspaper of general circulation in the municipality once each week for two consecutive weeks, and the last publication shall be not less than ten days prior to the date set for the hearing. A copy of the notice shall be mailed at least ten days prior to the date set for the hearing to the last owner, if any, of each parcel of property within the area according to the assessment records of the municipality. A notice shall also be sent to all persons at their last known address, if any, whose names are noted on the assessment records as claimants of an interest in any such parcel. The assessor of the municipality shall make a notation upon the records when requested to do so by any person claiming to have an interest in any parcel of property in the municipality. The notice shall be published and mailed by the municipal clerk, or by such clerk or official as the planning board shall otherwise designate. Failure to mail any such notice shall not invalidate the investigation or determination thereon.

The current practice is for the notice to list the properties by lot and block. Sometimes only the street boundaries are given, like the above notice published in the Press of Atlantic City about the Richland Redevelopment Project in Buena Vista Township in Atlantic County. To make matters even more difficult, notices often are published in a font size that can be read only with a magnifying glass.

If they received such a notice in the mail, would your 80-year-old mother or father understand it? Would they think they should hire an attorney? Would they go to the municipal meeting to learn what is going on? More than likely, the 45 days would expire long before they realized their property was in jeopardy. Most people realize the danger when the developer's appraiser knocks on their door to perform an inspection in anticipation of offering the property owner "fair market value." By this time, it often is too late to challenge the blight designation, or "area in need of redevelopment," adopted by the municipality for the properties in the study area.

Nevertheless, the next important step for the property owner is to attend the hearing, preferably with an attorney, and ideally with a planner who can rebut the recommendations being presented by the municipality's planning expert.

(4) At the hearing, which may be adjourned from time to time, the planning board shall hear all persons who are interested in or would be affected by a determination that the delineated area is a redevelopment area. All objections to such a determination and evidence in support of those objections, given orally or in writing, shall be received and considered and made part of the public record.

(5) After completing its hearing on this matter, the planning board shall recommend that the delineated area, or any part thereof, be determined, or not be determined, by the municipal governing body to be are development area. After receiving the recommendation of the planning board, the municipal governing body may adopt a resolution determining that the delineated area, or any part thereof, is a redevelopment area. The determination, if supported by substantial evidence, shall be binding and conclusive upon all persons affected by the determination. Notice of the determination shall be served, within 10 days after the determination, upon each person who filed a written objection thereto and stated, in or upon the written submission, an address to which notice of determination may be sent. (LRHL)

If you didn't file a written objection, or put something on the record during the meeting in opposition to the blight designation, you will not receive notice of the determination within 10 days. This means all those octogenarians and other individuals who ignored the first notice they received in the mail will no longer hear from the municipality regarding plans for redevelopment of their property.

(7) If a person who filed a written objection to a determination by the municipality pursuant to this subsection shall, within 45 days after the adoption by the municipality of the determination to which the person objected, apply to the Superior Court, the court may grant further review of the determination by procedure in lieu of prerogative writ; and in any such action the court may make any incidental order that it deems proper. (LRHL)

Now we are at the point in the process where the property owner must take action to contest the blight designation. This action must be taken with 45 days. The action includes the filing of a complaint in lieu of prerogative writs. The court is generally limited to the record before the planning board; so if the property owner didn't appear, object, and present testimony, the record will not contain the opposing point of view regarding the blight designation. And if the property owner does not contest the blight designation, the municipality is free to pursue or develop its redevelopment plan which will inevitably include acquisition by eminent domain.

The *Shennett* case is a prime example of flaws in the notice provision of the Local Redevelopment Housing Law (LRHL) and why the law must be changed. The notice provision must mandate personal service by certified mail to the property owner and, when there is publication in the newspapers, both notices must say clearly that the properties included may be acquired by eminent domain proceedings by the municipality.

Sen. Ronald Rice's Community and Urban Affairs Committee is considering changes to LRHL in bill S-1975. The boldfaced sections below include changes to the notice provisions referenced above.

(3) The hearing notice shall set forth the general boundaries of the area to be investigated and state that a map has been prepared and can be inspected at the office of the municipal clerk. A copy of the notice shall be published in a newspaper of general circulation in the municipality once each week for two consecutive weeks, and the last publication shall be not less than ten days prior to the date set for the hearing. **If the municipality has an Internet web site, the notice shall be posted thereon. A copy of the notice shall also be posted in such other places within or proximate to the proposed redevelopment area as may be available and appropriate.**

A copy of the notice shall be mailed **by the municipal clerk** at least ten days prior to the date set for the hearing to the last owner, if any, of each parcel of property, **and to any legal tenant of a residential rental dwelling unit** within the area according to the assessment records of the municipality. **The municipal clerk shall make a diligent effort to ascertain the names and addresses of legal tenants of rental dwelling units by contacting the legal owner of the rental property or a management company identified by such owner, but if unable to do so shall have a copy of the notice posted on properties known to be rental dwelling units.** A notice shall also be sent by the municipal clerk to all persons at their last known address, if any, whose names are noted on the assessment records as claimants of an interest in any such parcel. The assessor of the municipality shall make a notation upon the records when requested to do so by any person claiming to have an interest in any parcel of property in the municipality. The notice shall be published and mailed by the municipal clerk [, or by such clerk or official as the planning board shall otherwise designate]. Failure to mail any such notice shall not invalidate the investigation or determination thereon.

…

(9) **The municipality shall not finally adopt an ordinance adopting a redevelopment plan in accordance with section 7 of P.L.1992, c.79 (C.40A:12A-7) until 60 days have passed since the ordinance making a determination under this section has been finally adopted.**

At a recent town hall meeting in Union, Gov. Jon S. Corzine said he anticipated signing an eminent domain reform bill this year. The public notice issue is just one of many that property owners have sought to address in the revisions to the Local Redevelopment Housing Law.

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