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Defining Blight

Step one in New Jersey's redevelopment process

By William J. Ward

"Blight is in the eye of the beholder," Justice Kennedy said during oral arguments in the *Kelo* case. Two years after *Kelo* shocked the public with the realities of eminent domain acquisitions, New Jersey legislators continue to wrestle with basic concepts and language. The Assembly passed *A-3257* on June 22, 2006, but its companion bill, *S-1975*, languishes in the Senate. The bills attempt to reform the 1992 Local Redevelopment Housing Law (LRHL), N.J.S.A. 40A:12A-1 et seq., which expanded the constitutional use of the word "blight" to be synonymous with "area in need of redevelopment." Recent case law suggests that more than a few municipalities declare blight based on reports that cite statutory language without analysis of the property and the categories selected, and most importantly, without linking the criteria to the health, safety and welfare of the community.

As noted in the Public Advocate's report, "In Need of Redevelopment: Repairing New Jersey's Eminent Domain Laws," issued May 29:

> [T]he legislature has amended the Local Redevelopment and Housing Law over the years to broaden how it defines blight. The legislature has added criteria such as 'faulty arrangement or design,' 'lack of proper utilization,' and 'not fully productive.' The legislature also eliminated the word 'blighted' and substituted the more obscure and seemingly benign term, 'area in need of redevelopment.' Whatever the label, however, the consequence remains the same: once a town designates an area 'in need of redevelopment,' it can condemn the properties located within that area.

The New Jersey Constitution of 1947, Article VIII, Section III, Paragraph 1 states:

> The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired. Municipal, public or private corporations may be authorized by law to undertake such clearance, replanning, development or redevelopment; and improvements made for these purposes and uses, or for any of them, may be exempted from taxation, in whole or in part, for a limited period of time during which the profits of and dividends payable by any private corporation enjoying such tax exemption shall be limited by law. The conditions of use, ownership, management and control of such improvements shall be regulated by law.

Is blight limited to its constitutional definition, and if so, is the LRHL unconstitutional? This question was central before the New Jersey Supreme Court in *Gallenthin Realty v. Borough of Paulsboro,* decided June 13. The Court was asked to review whether the Legislature overstepped its constitutional bounds in defining blight as "an area in need of redevelopment" per N.J.S.A. 40A:12A-5 (a-h): (1) whether a designation of a property as "in need of redevelopment" can be based solely upon a bare assertion that the property is "vacant" or

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not "fully productive" without any analysis or finding that such property is part of a "blighted area" as required by the N.J. Constitution; and (2) whether a municipal designation of a property as "in need of redevelopment" is to be judicially reviewed according to a very deferential standard, or according to a true "substantial evidence" standard, or a standard based upon heightened scrutiny because of the severe interference with property rights secured by N.J. Constitution, Article I, ¶ 1 and the substantial powers acquired by a municipality as a consequence of such a designation?

The Court held that "the Legislature did not intend N.J.S.A. 40A:12A-5(e) to apply in circumstances where the sole basis for redevelopment is that the property is 'not fully productive.'" The Court invalidated the municipality's redevelopment classification concerning the property and held that N.J.S.A. 40A:12A-5(e) applies "only to areas that, as a whole, are stagnant and unproductive because of issues of title, diversity of ownership, or other similar conditions."

The courts insist on more than a cursory review of the properties or a recitation without substantiation of the statutory blight criteria; thus, there is a trend toward a more restrictive interpretation of the law. But it is apparent that many experts presented by the municipalities do not provide substantial, credible evidence to support a conclusion that the study area is in need of redevelopment.

Prior to the *Kelo* case, Camden County Assignment Judge Francis J. Orlando Jr. set aside a municipal decision designating an apartment complex as an area in need of redevelopment in *Spruce Manor Enterprises v. Borough of Bellmawr,* 315 N.J. Super. 286 (Law Div. 1998). No evidence was presented to show how obsolescence, faulty design, excessive land coverage or obsolete layout was detrimental to the safety, health, morals or welfare of the community.

In *Winters v. Township of Voorhees,* 320 N.J. Super. 150 (Law Div 1998), Judge Orlando reversed a blight designation on an 18-acre municipal-owned tract that the township intended for construction of an ice rink. Voorhees argued that the revision of the statute in 1992 created two categories of land eligible to be designated as in need of redevelopment: land that is used by public entities and unimproved land that is not likely to be developed by private capital. The township argued that municipal ownership is all that is needed in order to declare the site a redevelopment area. Judge Orlando disagreed, concluding that ownership of a tract of land by a municipality is not, standing alone, sufficient to support a redevelopment designation; it additionally requires substantial evidence that the land is not likely to be developed through the instrumentality of private capital in order to declare a site a redevelopment area.

In a post-*Kelo* case, *ERETC LLC v. City of Perth Amboy,* 381 N.J. Super. 268 (App. Div. 2005), the blight designation was reversed because the city's decision to designate the property as in need of redevelopment was not supported by substantial evidence. The court noted:

> You can't just say by reason of dilapidation you're in an area of redevelopment. You have to indicate how that's detrimental to the safety, health, morals, or welfare of a community. And in order to demonstrate that … that's where the evidence comes into play. That could have been demonstrated or possibly demonstrated through zoning violations, building code violations, fire reports, something of that nature. Again, that wasn't present in the report.

Similarly, in *Quagliariello v. Township of Edison (L2922-02*), Middlesex County Superior Court Judge James Hurley set aside the township's determination that the property, a charter bus facility, was an area in need of redevelopment. Edison was unable to demonstrate any public purpose for the taking and would have used its eminent domain powers for private purpose to build a Walgreen's Pharmacy. The township's expert only made exterior inspections of the property. As Judge Hurley noted in his opinion:

> The totality of the Township's complaints essentially amount to a pothole in the pavement, two boarded-up windows, a few cracks, and a gutter that needed to be cleaned. The Subject Properties were kept in better condition than many people keep their own homes.

Judge Richard J. Donahue dismissed a blight designation for a Bergen County trailer park in 2005, concluding that the municipal planner failed to address the important criteria of the LRHL. In *LBK Associates, LLC and Save Our Homes v. Borough of Lodi,* (Law Division, A-001829-05), now in the Appellate Division, the planner failed to do interior inspections of the trailers or cite specific safety violations. Judge Donahue said that a mere finding of a need for redevelopment is not enough, and there would have to be an additional showing of public purpose.

In an unreported decision, *Township of Bloomfield v. 110 Washington Street Associates,* Essex County Assignment Judge Patricia Costello dismissed the eminent domain complaint against 110 Washington Street. None of the criteria cited by Bloomfield were connected to health, safety, or welfare of the community:

> In essence, the municipality took the brief description of the property (which arguably was underutilized, vacant and externally neglected as a result of the municipalities' own actions, see supra), and concluded without any further analysis that this condition equated to a detriment to the public health, safety and welfare.

Costello's decision was unanimously upheld by the Appellate Division, and Bloomfield's petition for certification was denied by the Supreme Court, 188 N.J. 578 (2006). In a companion case,

Lardieri v. Township of Bloomfield (ESX-L-8929-06), five plaintiffs challenged Bloomfield's attempt to address the same deficiencies in the blight designation identified in Costello's *110 Washington Street* opinion. Resolutions of both the Bloomfield planning board and mayor and council recently approved a consent order whereby the township agreed not to condemn the properties of the plaintiffs in the *Lardieri* case. The tool of eminent domain has been removed.

Blight designations impact valuation, continued ownership and tenancy of property under the cloud of condemnation. Once declared, blight remains open-ended. For example, Jersey City recently sought to approve its Monticello Avenue Redevelopment project. These properties were blighted in 1987, before the LRHL existed; therefore, no notice was given to affected property owners. Additional properties were selected for inclusion in the redevelopment area in 2007, without notice, hearing or any further study being conducted.

The notice process is of grave concern. Passaic resident Charles Shennett's property was seized without proper notice. In *City of Passaic v. Charles Shennett*, 390 N.J. Super. 475 (App. Div. 2007), the city acknowledged that it never attempted to serve defendant personally nor did it meet the requirements set forth in Rules 4:4-3 and -4 for service by mail or publication. The inadequate notice requirements in the present statutes are critical because a property owner only has 45 days to contest the blight designation. This date tolls from the adoption of the recommendation of the planning board by the mayor and council.

Case law states that a reviewing judge must give deference to municipal action per *Concerned Citizens of Princeton, Inc. v. Mayor and Council of the Borough of Princeton*, 370 N.J. Super. 429 (App. Div. 2004); however, the courts should not tolerate a municipality's willful disregard of the rules. Legislative reform must address open-ended blight and put a reasonable cap on how long the designation can remain effective, before the municipality selects a developer, approves and implements a redevelopment plan. This solution was suggested in *Downtown Residents for Sane Development v. City of Hoboken,* 242 N.J. Super. 329 (App. Div. 1990). The Appellate Division recognized that a blight designation does not last in perpetuity. The court stated:

> Residents take issue with what they perceive to be an indication by the trial judge that a declaration of blight necessarily continues in perpetuity. We do not think that this was the intent of his [trial judge's] opinion. To the extent it may so be read, we disagree. The appropriate legislative authority may reconsider such declaration. Courts, however, should not interfere when the legislative process recognizes remaining areas of previously identified blight which can be addressed by redevelopment serving valid municipal goals. "Rome wasn't built in a day," goes the old saying. Neither could it be rebuilt in a day. Mere passage of time does not erase validity of a blighted area designation. See *Freeman v. Paterson Redevelopment Agency,* 128 N.J. Super. 448 (Law Div. 1974).

It is clear from the language of the Supreme Court in the *Gallenthin* opinion that the municipal powers under the LRHL remain intact and constitutional:

> Because Paulsboro's sole basis for classifying the Gallenthin property as "in need of redevelopment" was that the property, in isolation, was "not fully productive," that designation was beyond the scope of N.J.S.A. 40A:12A-5(e), and must be invalidated. However, our holding does not prejudice a future inquiry by the Borough concerning whether the Gallenthin property is "in need of redevelopment" based on some other legitimate grounds.

The municipality can revisit blight issues in a manner consistent with the Court's opinion regarding the substantial evidence test required in order to declare properties in need of redevelopment. The Court has taken a more restrictive view of the standard of proof necessary to substantiate blight.

The *Gallenthin* opinion will be read carefully by trial and appellate judges when they consider municipal attempts to blight properties under the criteria in N.J.S.A. 40A:12A-5 (a-h). Substantial evidence will be examined in pending prerogative writs suits and cases which are presently on appeal when the statutory standards are questioned. ■