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KO'ing *Kelo*

By William J. Ward

We're witnessing the *Kelo*-Effect — a corollary to Sir Isaac Newton's Third Law of Motion which states, "For every action there is an equal and opposite reaction." The public, waking up to the possibility that homes and small businesses could be taken for private gain, is galvanized as never before against the abuse of eminent domain. In fact, the *Economist* characterized the *Kelo* backlash as "potent as the anti-abortion movement."

More than any other contemporary issue, this one cuts across party lines and hits the mother lode: private property rights. Redevelopment attorneys are disingenuous when they express surprise at this reaction. There are, after all, more than 1,000 redevelopment projects in progress in 64 New Jersey towns. And the words of Justice Sandra Day O'Connor in her *Kelo* dissent continue to resonate: "As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result."

Heightened awareness

New Jersey court decisions, however, have evidenced a heightened awareness by trial judges to eminent domain abuse. The abuse for the most part comes about in redevelopment projects implemented under the Local Redevelopment Housing Law (LRHL) 40A:12A-1 *et seq.* through the relationships between developers and local municipal officials. The New Jersey Constitution, Article VIII, paragraph 3, says takings for blight are a public purpose. The abuse has come about through the legislature's broad definition of blight, most recently in the amendments to the LRHL in 1992:

> "Redevelopment area" or "area in need of redevelopment" means an area determined to be in need of redevelopment pursuant to sections 5 and 6 of P.L. 1992, c.79 (C.40A:12A-5 and 40A:12A-6) or determined heretofore to be a "blighted area" pursuant to P.L.1949, c.187 (C.40:55-21.1 et seq.) repealed by this act, both determinations as made pursuant to the authority of Article VIII, Section III, paragraph 1 of the Constitution. A redevelopment area may include lands, buildings, or improvements which of themselves are not detrimental to the public health, safety or welfare, but the inclusion of which is found necessary, with or without change in their condition, for the effective redevelopment of the area of which they are a part.
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> An area determined to be in need of redevelopment pursuant to this section shall be deemed to be a "blighted area" for the purposes of Article VIII, Section III, paragraph 1 of the Constitution. If an area is determined to be a redevelopment area and a redevelopment plan is adopted for that area in accordance with the provisions of this act, the municipality is authorized to utilize all those powers provided in section 8 of P.L. 1992, c.79 (C.40A:12A-8).

This definition could include just about any property — and it has. "Blight is in the eye of the beholder," Justice Kennedy said during the *Kelo* oral arguments. We have not seen a planning report yet where the consultant hired by the municipality rejected blight for the study area. Particularly problematic is the all-inclusive 40A:12A-5. Determination of need for redevelopment (section d):

> Areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.

Recent cases

Justice Kennedy, in his concurring opinion in *Kelo v. New London,* said the following: "A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit." This is exactly what Essex County Assignment Judge Patricia Costello and Judge Richard Donohue cite in the recent cases *Township of Bloomfield v. 110 Washington Street Associates,* ESX-L-2318-05 and *LBK Associates, L.L.C, et al v. Borough of Lodi*, BER-L-8766-03 and *Costa Realty Co., Inc. et al v. Borough of Lodi,* BER-L-8768-03. Although these decisions aren't published, they are available online and frequently requested.

The *110 Washington Street* case turned on two critical issues. Judge Costello found there was an impermissible conflict of interest in the Township of Bloomfield utilizing the

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services of the same attorney who represented the board of adjustment, the planning board, and the mayor and council. This is a blatant violation of the Municipal Land Use Law (MLUL). Thus, the conflict tainted the whole process underlying the municipality's eminent domain complaint. In addition, the court found that Bloomfield's consultant, Heyer & Gruel, did not include in its study a finding that the conditions complained of were detrimental to the public health, safety and welfare. All these defenses were properly raised with the trial judge on the return date of the order to show cause for the appointment of condemnation commissioners. The condemnation complaint and order to show cause were filed in a summary manner consistent with Rule 4:67-1.

Recent case law in *Hirth v. City of Hoboken,* 337 N.J. Super. 149 (App. Div 2001), and the unreported cases of *Township of North Bergen v. Shiva Properties, et als, (*HUD-L-6587-03) and *Township of North Bergen v. Spylen of North Bergen, Inc (*A-6868-03T2), clearly give a property owner the right to raise all these defenses to the eminent domain taking.

It should be noted there was a prerogative writ suit in the matter of *110 Washington Street v. Township of Bloomfield* that was heard by Judge Claude M. Coleman and dismissed because it was filed beyond the 45-days to contest municipal action. Judge Coleman made no findings of fact or conclusions of law on the merits of the prerogative writ case, which effectively prevented Bloomfield's counsel from arguing judicial estoppel.

In the consolidated *Lodi* cases — actions in lieu of prerogative writ contesting the municipality's determination of blight — Judge Donohue found the municipality had not established by substantial evidence the premises in question were in need of redevelopment. The court concluded the municipality's actions were arbitrary and capricious. The standard for judicial review of a blight declaration is limited to whether the municipality's action is supported by substantial evidence. See *Hirth v. City of Hoboken* Supra 337 N.J. Super. at 161; *Levin v. Township of Bridgewater,* 57 N.J. 506 (1971).

Consistent with the decisions of Judges Costello and Donohue cited above, the Appellate Division approved for publication an opinion by Judge Parker in the matter of *ERETC, L.L.C. v. City of Perth Amboy* A-2035-04T2, decided Nov. 15, 2005. The plaintiff, ERETC, owns a light manufacturing building located in the proposed redevelopment area. ERETC uses part of the building, which is in good condition, and rents the remainder. The preliminary report of the city's planner identified criteria D and E of the LRHL applicable to the area. At trial the plaintiff's expert testified she found the plaintiff's property to be neat, maintained and painted, with no apparent structural flaws. She concluded the city planner's report was "inadequate and void of any information that would lead to the conclusion that was obtained by the City which was that the area was in need of redevelopment." A mere recitation of the criteria of the statute without substantiation of the criteria is not enough to declare a property in need of redevelopment. In the appeal, the court states that nowhere in the report did the city planner "undertake an analysis of the statutory criteria as it applied to each of the properties in the designated area." The court reversed and remanded to the planning board for reconsideration.

This is an example of a win, but the redevelopment plan could proceed once the errors and defects in the report are corrected.

The developer behind the municipality will keep funding legal maneuvers. The power of eminent domain doesn't go away. Even if municipalities such as Bogota pass resolutions that they are not going to use it, they cannot abolish it. Agencies can't abolish it. Only the legislature can change it.

Federal legislative reform?

The U.S. House of Representatives Bill 4128 was passed Nov. 3, 2005. Also known as "Private Property Rights Protection Act of 2005," its purpose is to preserve property rights granted under the Fifth Amendment of the U.S. Constitution following the Supreme Court's decision in *Kelo* v. *City of New London.* Some key provisions:

SEC. 2. PROHIBITION ON EMINENT DOMAIN ABUSE BY STATES.

(a) In General — No State or political subdivision of a State shall exercise its power of eminent domain, or allow the exercise of such power by any person or entity to which such power has been delegated, over property to be used for economic development or over property that is subsequently used for economic development, if that State or political subdivision receives Federal economic development funds during any fiscal year in which it does so.

(b) Ineligibility for Federal Funds — A violation of subsection (a) by a State or political subdivision shall render such State or political subdivision ineligible for any Federal economic development funds for a period of 2 fiscal years following a final judgment on the merits by a court of competent jurisdiction that such subsection has been violated ...

SEC. 3. PROHIBITION ON EMINENT DOMAIN ABUSE BY THE FEDERAL GOVERNMENT.

The Federal Government or any authority of the Federal Government shall not exercise its power of eminent domain to be used for economic development.

SEC. 4. PRIVATE RIGHT OF ACTION.

(a) Cause of Action — Any owner of private property who suffers injury as a result of a violation of any provision of this Act may bring an action to enforce any provision of this Act in the appropriate Federal or State court, and a State shall not be immune under the eleventh amendment to the Constitution of the United States from any such action in a Federal or State court of competent jurisdiction. Any such property owner may also seek any appropriate relief through a preliminary injunction or a temporary restraining order.

The bill now proceeds to the Senate where its companion, S-1313, sponsored by Sen. John Cornyn (R-Texas), will be taken up by the Senate Judiciary Committee. The committee conducted its last hearing Sept. 20, 2005. This act may be cited as the "Protection of Homes, Small Businesses, and Private Property Act." Its objective is similar: to protect homes, small businesses, and other private property rights by limiting the power of eminent domain.

NJ's eminent domain reform bills

• **ACR 255** proposes a constitutional amendment to limit exercise of eminent domain to acquisition of land for essential public purposes. The amendment defines "essential public purposes" as transportation corridors, educational facilities, airports, correctional facilities, stormwater management facilities, in-patient health facilities and recreational facilities. The sponsors believe *Kelo* left New Jersey homeowners more vulnerable to overreaching government action that impairs private property rights. The resolution was introduced Nov. 10, 2005.

• **ACR 256** proposes a constitutional amendment to limit the use of condemnation to traditional public purposes; repeals constitutional provision allowing condemnation and long-term tax exemptions for redevelopment projects. Introduced Nov. 10, 2005 and referred to the assembly Housing and Local Government Committee, this resolution amends Article I, paragraph 1 and repeals Article VIII, Section III, paragraph 1 of the constitution. It restricts the use of eminent domain to condemn land and transfer the land to a private person or entity to projects that fulfill a traditional public purpose, and would repeal the provision that allows condemnation of properties in blighted areas for redevelopment purposes.

• **S-177** specifies *bona fide* negotiations in eminent domain proceedings and clarifies establishment of compensation for business owners. This amendment to the "Eminent Domain Act of 1971" would increase government responsibility and accountability in condemnation actions and clarifies how active businesses should be treated in condemnation actions. The burden would be on the municipality or redevelopment entity to demonstrate that the proposed use of the business property is of significant public interest to justify relocation or closure of the business at that location.

• **S-2739** prevents use of condemnation to acquire residential property under redevelopment laws. This bill seeks to prevent the taking of private homes and residential units by condemnation in order to accomplish economic development objectives, such as the construction of non-public office buildings, mega-stores and shopping centers. This amendment would require the governing body of the municipality to authorize the

planning board by ordinance — not resolution — to undertake a preliminary investigation to determine whether a proposed area is a redevelopment area. All notices of hearings must be sent to the property owners by certified mail.

• **S-2832** places a temporary moratorium on use of eminent domain for economic development purposes; and creates Eminent Domain Study Commission to examine its use statewide.

More than 30 states are reviewing or planning to review their eminent domain laws during upcoming legislative sessions. Since June 2005, Alabama, Texas and Delaware enacted laws that have revised their eminent domain procedures. Gov.-elect Jon S. Corzine addressed the power of eminent domain in a statement issued last summer during his campaign:

> "While there have been many legitimate and appropriate uses of eminent domain throughout history, we have also seen abuses of this power. We have seen a family lose their home and receive just $14,000, only to see the town quickly sell the property to a developer for $60,000. We have seen so-called redevelopment plans knock down housing that was affordable to long time community residents, only to displace them with luxury condominiums, without giving any thought as to where people with roots in the neighborhood would live. With dozens of New Jersey municipalities focused on redevelopment — we need to act decisively to protect our citizens as we revitalize our aging neighborhoods. A Corzine administration will not tolerate abuse in the name of economic development."

The eminent domain issue is on the front-burner with state and federal legislators. There will be changes made to state eminent domain acts, and prospects appear good for federal legislation that would severely limit federal funds to municipalities in violation of the act. This is a big stick.

The ball now is in the U.S. Senate's court. It is clear from the overwhelming vote in the House, which more closely reflects the will of the people, that representatives are ready for change. The Senate must be aware of this or they will risk the wrath of the voters when up for re-election.

In New Jersey, it's time for the governor to appoint an Eminent Domain Revision Committee to review the entire Eminent Domain Act of 1971 and the Local Redevelopment Housing Law. These acts should not be amended piecemeal. It has been almost 35 years since the eminent domain law was approved — it is now time for a comprehensive new act.