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HEADLINE: Redevelopment Reform in N.J.: What Does It Mean and Will It Work?;

Many see new legislation as a much-needed opportunity for development without the controversy associated with eminent domain;

RESIDENTIAL & COMMERCIAL REAL ESTATE

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BODY:

Last September, Gov. Chris Christie signed into law P.L. 2014, C. 159, legislation that received nearly unanimous support from both houses of the State Legislature, which amends certain provisions of the Local Redevelopment and Housing Law, *N.J.S.A. 40A:12A-1, et seq.* (LRHL).

This legislation was intended to reform New Jersey law to: (a) make it consistent with judicial precedent which had been created in the past 10 years; (b) to address some of the concerns about the use of eminent domain in local redevelopment matters while simultaneously providing municipalities ways in which economic initiatives could be promoted by facilitating real estate development and job creation in certain areas of the state.

Since the 2005 ruling of the *U.S. Supreme Court in Kelo v. City of New London, 125 S.Ct. 2655 (2005)*, there has been significant public outcry throughout the country against eminent domain abuse, especially in cases involving the use of eminent domain by local governments for "redevelopment" purposes. After *Kelo*, more than 40 states adopted legislation restricting or even prohibiting the use of eminent domain for municipal redevelopment. New Jersey was not one of those states, until last September. In addition, since *Kelo*, courts around the United States have carefully scrutinized the exercise of eminent domain in order to provide greater accountability and transparency for local government agencies.

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In New Jersey, eminent domain is not supposed to be permitted purely for the promotion of economic development-the New Jersey Constitution recognizes that the elimination of blight is a public purpose and authorizes redevelopment takings for that specific purpose. *New Jersey Constitution, Article 8, § 3, ¶ 1*. However, it was somewhat common, especially since the late 1990s, for New Jersey municipalities to undertake redevelopment designations and projects in areas that would not traditionally be thought of as "blighted," such as Princeton, Livingston, Englewood, South Orange and many others. As a result, a public perception arose that those kinds of projects were undertaken not for a valid public purpose, but rather as the result of actions of political favoritism, and to allow private developers to profit where no valid public purpose otherwise existed.

In the absence of any legislative reform in New Jersey, our state courts increasingly scrutinized and invalidated redevelopment designations and projects in areas where government abuse was apparent, or where important public property rights were threatened without due process of law. While some redevelopment projects have resulted in successful transformation of the areas around them, many had only limited success or failed, and those failed projects may have actually created, increased, or at least perpetuated, blight. Several New Jersey legislators proposed bills since 2005 which would modify or curtail eminent domain and redevelopment powers in New Jersey. Those prior efforts failed, but beginning in 2012, the bill that became law last September, and which purports to provide New Jersey with meaningful redevelopment and eminent domain reform, began to take shape.

A-3615 was introduced in the State Assembly on Dec. 13, 2012, and its Senate companion, S-2447, was introduced in the Senate on Jan. 8, 2013. The bill was signed into law by the Governor on Sept. 6, 2013.

As evidenced by its legislative declarations, the bill alludes to the constitutional basis for redevelopment, the prior municipal use of redevelopment and, significantly, the Kelo holding and two significant holdings in New Jersey subsequent to *Kelo, Gallenthin Realty Development v. Borough of Paulsboro, 191 N.J. 344 (2007)*; and *Harrison Redevelopment Agency v. DeRose, 398 N.J. Super. 361 (App. Div. 2008)*, both of which resulted in judicial scrutiny of the use of eminent domain in local redevelopment projects. It further recognizes the recession that has impacted the real estate market and economy in recent years, while concomitantly recognizing that the proper use of municipal redevelopment purposes continue to be a vital tool which could not only arrest and revert blight, but which could also stimulate economic development. The bill thus provided for the following amendments to New Jersey's LRHL:

It codified the holdings of the Gallenthin and DeRose opinions to make the legislative authority consistent with binding case law; and

It provides municipalities with an option to proceed with local redevelopment with eminent domain, or without having the power of eminent domain.

Notice Provisions

In *Harrison Redevelopment Agency v. DeRose, 398 N.J. Super. 361 (App. Div. 2008)*, the court concluded that the adequate notice in redevelopment proceedings must clearly inform existing property owners that the proceedings could result in the use of eminent domain to take their properties and, where such adequate notice has not been provided, the owners constitutionally preserve the right to contest the designation, by way of affirmative defense to an ensuing condemnation action, even where the owner has not previously challenged the redevelopment proceedings. (In *Harrison v. DeRose*, the redevelopment designation was approved approximately nine years before the challenge was raised in the condemnation proceeding.)

The new legislation amends the relevant provisions of the LRHL to be consistent to with *DeRose* and to provide repose with respect to local redevelopment proceedings. *N.J.S.A. 40A:12A-6* was amended to provide that the notice provided to the local planning board by its governing body to have the board investigate a possible redevelopment area must indicate: (i) that the determination operates as a finding of public purpose and authorizes the municipality to utilize

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eminent domain to acquire property in the area; and (ii) that legal action to challenge the determination must be commenced within 45 days of receipt of such notice, and that failure to do so shall preclude the owner from later raising such challenge. *N.J.S.A. 40A:12A-6(b)(5)(e)* and *N.J.S.A. 40A:12A-6(b)(5)(h)*. This notice must also be included in the notice provided to affected property owners of the investigative hearings before the local planning board, which can result in the recommendation as to whether the area in question qualifies as an area in need of redevelopment. *N.J.S.A. 40A:12A-6(b)(3)*.

Gallenthin Provisions

Gallenthin Realty Development v. Borough of Paulsboro, 191 N.J. 344 (2007), clarified and limited the conditions which constitute "blight" and held that the use of eminent domain to acquire property for local redevelopment purposes cannot be justified unless it is blighted, rather than merely not being put to an optimal use.

In keeping with Gallenthin, the new legislation amends *N.J.S.A. 40A:12A-5(e)* to specifically provide: (i) that the condition of the title, diverse ownership or other similar conditions of the properties in question must "impede land assemblage or discourage the undertaking of improvements," resulting in a stagnant and unproductive condition of land; and (ii) that such condition of the land "is presumed to be having a negative social or economic impact or otherwise being detrimental to the safety, health, morals or welfare of the surrounding area or the community in general."

Redevelopment Without Eminent Domain

Perhaps the most significant provision of the new legislation is that it now enables municipalities to undertake local redevelopment without having the power of eminent domain. This option was intended to allow towns to engage in economic development and to provide the incentives and opportunities available in designated areas "in need of redevelopment," such as long-term tax abatements and new or overlay zoning as set forth in a redevelopment plan that is adopted after the designation. While past efforts in some towns included redevelopment plans stating that the town did not intend to utilize eminent domain, property owners were never fully protected because those towns could, at any time, amend their redevelopment plan to include and authorize the use of eminent domain, without having to personally notify the affected owners or to undertake a new blight study.

To avoid this uncertainty and to protect the property owners, municipalities now have two options: they can undertake redevelopment by creating a "noncondemnation redevelopment area"-where all the powers provided by the legislature for use in a redevelopment area are available except for the use of eminent domain-or it can create a "condemnation redevelopment area," in which eminent domain can be used. Significantly, if the town wants to proceed with a noncondemnation redevelopment area, it must provide clear notice in the governing body resolution authorizing the planning board to undertake its preliminary investigation, *N.J.S.A. 40A:12A-6(a)*; and in the notice of hearing before the planning board, *N.J.S.A. 40A:12A-6(b)(3)(b)*. Notices of redevelopment proceedings where the use of eminent domain is intended shall also contain clear language of the same. *N.J.S.A. 40A:12A-6(b)(3)(c)*. The new legislation is prospective, and any area designated prior to Sept. 6, 2013, automatically includes eminent domain powers. *N.J.S.A. 40A:12A-8(c)*.

What if a municipality tries a non-condemnation redevelopment area and effective redevelopment does not occur? The new legislation provides the town with an opportunity to employ redevelopment with eminent domain powers, but-importantly-it needs to "start over." The town can initiate a new redevelopment study and process, which must contain the requisite notices advising that the town intends to undertake a new redevelopment initiative where eminent domain would be utilized. Furthermore, the redevelopment determination must be based upon the then-existing conditions, not based upon the condition of the area at the time of the prior noncondemnation redevelopment area determination. *N.J.S.A. 40A:12A-6(b)(5)(g)*.

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Implications for the Future

After receiving nearly unanimous support from the State Legislature, the new legislation was widely hailed by members of New Jersey's development community and by many municipal officials as a much-needed action that would provide towns with the opportunity to experience redevelopment without having to involve the controversies created by the use of eminent domain. Property rights advocates have been more measured. Some indicate that these are positive steps but are limited to redevelopment proceedings, and that there are many other shortfalls in the eminent domain process in New Jersey that require a more comprehensive review and reform. With the knowledge that several prior efforts at comprehensive legislative reform were unsuccessful until the recent legislation was adopted, this may be all we can realistically expect for the near future.

The most likely way to measure the impact of the legislation is to observe whether the noncondemnation redevelopment area designation becomes an effective option for New Jersey's municipalities. To date, within the first few months after the enactment of the legislation, more than a dozen towns around the state commenced investigations for noncondemnation areas, including Berkeley Heights, Chester Township, East Rutherford, Flemington Borough, Freehold Township, North Bergen, Parsippany, Somerville, Union and Westhampton. Some of these towns have already designated noncondemnation areas, while others remain in the planning process. As time passes, the efficacy of the legislation will be tested. Tangible signs of successful redevelopment without eminent domain will include new redevelopment applications, construction and projects where existing owners are either designated as redevelopers for their own properties, are equity participants in projects with neighboring property owners and/or redevelopers, or voluntarily selling their properties to make them available for redevelopment by others.

Will the noncondemnation option result in more successful redevelopment projects being undertaken in New Jersey? If a municipality chooses the noncondemnation option, will it be easier for that town to proceed with redevelopment, or will its resulting designation still be the target of challenges that suggest that substantial evidence of blight exists, which is required to determine that an area is "in need of redevelopment"? Will existing owners object if their properties are not subject to condemnation? And will the value of their properties be considered to recognize any impact upon the value of the new or different uses permitted by redevelopment plans which result? Only time will tell, but the out-of-the-gate indications are that local redevelopment has been given a kick start, and we'll see how far down the road it proceeds.

DellaPelle is a Certified Civil Trial Attorney and a shareholder at McKirdy & Riskin in Morristown. He assisted in the origination and drafting of P.L. 2014, C. 159, and he and other attorneys at his firm represented property owners in the Harrison redevelopment project, including the DeRose case.

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