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Dealing with *Kelo*: New Jersey legislature considers redevelopment reforms

A storm of protests and rhetoric followed the 2005 decision of the U.S. Supreme Court in *Kelo v. City of New London*, 125 S. Ct. 2655, reh'g denied, 126 S. Ct. 24 (2005). The decision, which held that the City of New London's exercise of eminent domain power in furtherance of an economic development plan satisfied the constitutional requirement that such takings be made only for a "public use," was castigated as an attack on private property rights. Even in New Jersey, where the use of eminent domain in the redevelopment context requires a showing of blight, i.e., that the property is "in need of redevelopment," *Kelo* has resulted in intense scrutiny of the eminent domain process, particularly in the redevelopment context.

The scarcity of undeveloped land and the existence of significant monetary and other incentives for reusing land have made redevelopment a burgeoning industry in New Jersey. Condemnation is a critical tool in the redevelopment process. But the eminent domain process in New Jersey has been the subject of sharp criticism, especially in the wake of *Kelo*. Critics charge that the eminent domain process:

- allows for municipalities to condemn properties in areas that do not meet the requirement of being "in need of redevelopment;"
- requires little meaningful notice to affected tenants and property owners;
- offers few opportunities for real public participation;
- allows for condemnation based on vague redevelopment plans that lack community input and are potentially unlimited in duration;
- tends to undervalue the property that has been condemned, especially in the commercial context, with the result that the property owner may not be able to purchase comparable property in the same area;
- increases the property owner's



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remediation costs at contaminated properties without allowing the owner to benefit from any increase in value;

- tends to increase tort litigation;
- allows the developer a low cost, interest-free option to buy if the process is lengthy; and
- is governed by weak ethics rules that allow or even encourage a "pay to play" system.

In response to these concerns, the New Jersey Assembly passed Assembly Bill 3257 in June 2006. The bill provides for more definite and objective criteria for determining that an area is "in need of redevelopment." Owners of industrial properties have raised concerns over one of the new proposed criteria, which allows designation of property vacant or substantially underutilized for 24 months due to environmental contamination. Such sites are frequently vacant or substantially underutilized during clean up efforts, which in the case of complex sites, can rarely conclude within 2 years. The bill limits the amount of property that does not meet the criteria that can be included in the designation.

A-3257 would also institute procedural protections, including clear notice of the potential eminent domain consequences of the designation of a property as being "in need of redevelopment." It would require that this be accomplished by ordinance rather than resolution and be approved by the Commissioner of the Department of Community Affairs. The relevant Planning Board would

have to hold a public hearing on the designation, giving interested parties the right to submit evidence, bring witnesses and pose questions to specific witnesses. All testimony would be under oath, with the proceedings transcribed and made publicly available. If the designation is challenged in court, the municipality would bear the burden of proving that the designation meets the statutory criteria. The redevelopment designation would expire after 10 years, unless extended.

The bill would also make substantive changes to the law governing redevelopment. It would increase the level of specificity with which a redevelopment plan correlates with the municipality's master plan and other official documents, and require certain studies and analyses on relocation and of the social and economic impact of the designation on adjacent areas and low- and moderate-income residents. The governing body would have to hold a public hearing on the redevelopment plan prior to its adoption. In response to "pay to play" concerns, the bill would establish new limitations on the selection of a redeveloper, including a prohibition on negotiating with or entering into a redevelopment agreement with a redeveloper that had made a reportable contribution to any political party or candidate in the municipality within a specified period of time.

The proposed legislation also addresses a number of the concerns voiced about compensation and valuation. It provides that the valuation must be the higher of the value of the property on the date of the filing of the declaration of taking and the value on the date of the adoption of the redevelopment plan (and, in the case of residential property, the replacement value, which would have to be paid if it is higher than either of the two other values). Property owners would be entitled to receive better notice and a copy

of the appraisal, to seek clarification and additional information, and to be compensated for moving expenses and business relocation expenses. The redeveloper would also be required to pay a business owner the value of good will.

The proposed legislation addresses many of the criticisms of the current process, but it is not yet law, and property owners facing redevelopment issues may not want to wait. In the meantime, property owners concerned about potential or actual designation of their property as being in an area "in need of redevelopment" and thus subject to condemnation should consider:

- getting involved in the process early, and following all redevelopment discussions in the town;
- challenging the factual underpinnings of the designation; and
- teaming up with a redeveloper in order to influence the process. A reputable redeveloper may be able to assist in dealing with the New Jersey Department of Environmental Protection if the property is contaminated. Financial incentives are available to an "innocent party" redeveloper that are not available to the property owner, but could make the property more attractive.

The redevelopment process remains a potential minefield for property owners. The Legislature may eventually step in to reform the process, but in the interim, prudent landowners should monitor all redevelopment discussions and use existing tools to shape those efforts.

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