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Eminent Domain Update

In a significant decision, the New Jersey Appellate Division in *Harrison Redevelopment Agency v. DeRose* for the first time articulated a set of clear standards which define the parameters under which an owner of property in a designated redevelopment area can contest the use of eminent domain based on defects in the redevelopment designation process. The court's opinion provides a comprehensive analysis of the interplay between the Local Redevelopment and Housing Law (LRHL), the Eminent Domain Act and constitutional due process requirements.

The Harrison Redevelopment Plan envisions revitalizing the municipality with a variety of uses and property along the Passaic River. Implementation necessitated the use of eminent domain, which a property owner contested.

The central issue involved the adequacy of notice prescribed by the LRHL. The Town of Harrison designated an "area in need of redevelopment" in 1997 and adopted a redevelopment plan in 1998, but did not begin eminent domain proceedings until 2006. In contesting the use of eminent domain, the property owner sought to challenge the 1997 "area in need of redevelopment" designation as failing to satisfy statutory requirements. The problem was that the 45-day appeal period applicable to such challenges had elapsed.

The LRHL only requires notice to property owners of the public hearing concerning the preliminary investigation conducted by the planning board precedent to its recommendation of whether the properties investigated should be declared in need of redevelopment. There is no statutory requirement that property owners be notified that a designation has been made or that it carries with it the right to exercise the power of eminent domain and that the property owners' right to contest the designation lasts for only 45 days.

According to the *Harrison* decision, the LRHL notice requirements do not meet constitutional parameters because they fail to sufficiently advise property owners of possible drastic consequences of a redevelopment designation. To avoid invalidating the LRHL, the Appellate Division crafted a creative decision allowing the statutory notice requirements to stand while also curing the statute's constitutional deficiencies.

Harrison holds that a property owner may contest a redevelopment designation in an eminent domain proceeding, even if it's brought after the 45-day appeal period expires, unless the municipality provides individual written notice that fairly alerts the property owner that (1) the property has been designated by

the governing body as being "in need of redevelopment"; (2) the designation operates as a finding of public purpose and authorizes the exercise of eminent domain against the property owner's will; and (3) that the property owner has 45 days to challenge the designation.

If the municipality elects not to provide this additional notice, the property owner retains a constitutional right, after the 45-day limitations period expires, to challenge the redevelopment designation in defense of an eminent domain proceeding.

Harrison has the potential to directly affect every ongoing redevelopment project in New Jersey requiring use of eminent domain because, if property owners did not receive notice as

dictated by the *Harrison* decision, they will be given a second chance to contest the designation. Since these new requirements go beyond the LRHL, it is unlikely that such notice was given in most cases. Thus, redevelopment projects may see delays and, in some cases, redevelopment designations may be invalidated.

Harrison is also significant because, to the extent it allows challenges to redevelopment designations after expiration of the 45-day appeal period, those challenges are more likely to be successful because of last year's decision in *Gallenthin Realty Development v. Borough of Paulsboro*, which held that eminent domain could not be used in cases where the sole basis for the redevelopment designation is that the property is "not fully productive." If a designation is successfully challenged under *Harrison*, the municipality may have more difficulty meeting the statutory criteria if it makes a second attempt at designation.

At this time it is difficult to anticipate the long-term impact that *Harrison* will have on redevelopment in New Jersey. However, one thing is clear: Municipalities, redevelopment agencies and developers need to consult with counsel with respect to notice requirements and determine, in situations where notice does not comport with *Harrison*, how to address those defects and whether to exercise eminent domain. —RENU

The views expressed here are those of the authors and not of Real Estate Media or its publications.

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