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The New Rules of Redevelopment

Courts more skeptical of 'area in need of redevelopment' designations

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The summer of 2007 marked a significant turning point in the evolution of redevelopment law in New Jersey, as the New Jersey Supreme Court, and subsequently several lower courts, invalidated "area in need of redevelopment" designations by five different municipalities.

The Local Redevelopment and Housing Law (LRHL), N.J.S.A. 40A:12A-1 et seq., affords municipalities the ability to use the power of eminent domain to take properties within their borders so long as a determination is made that the relevant area is "an area in need of redevelopment." The statutory criteria typically relied upon require a finding that the property in question suffers from blight. Among the factors to be considered are the presence of substandard, unsafe, dilapidated or obsolescent buildings; abandoned buildings; existence of municipally owned or

vacant land, which is not likely to be developed privately due to location, remoteness, lack of means of access, soil or topographic conditions; areas with buildings which, due to dilapidation, design, excessive coverage, deleterious use or obsolete layout, are detrimental to the public safety, health, morals or welfare; or areas exceeding five contiguous acres that have suffered a casualty loss resulting in depreciation of the area. The criteria on which this article specifically focuses is set forth in N.J.S.A. 40A:12A-5(e), which provides that an "area in need of redevelopment" may be designated based on the following finding:

A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

With the exception of the phrase "or other conditions" in criteria (e), all of the other criteria focus on what are at least arguably blighting conditions. So it is not surprising that designations of areas being in need of redevelopment resting on criteria (e) alone have not been unusual. For example, some municipalities have determined that a property improved with a building having fewer stories or lower building coverage than allowed by the applicable zoning regulations suffers from underutilization and, therefore, should be designated as an "area in need of redevelopment." It is worth noting that for the first 10-plus years after the LRHL was adopted in 1992, the courts in almost every instance upheld the redevelopment designation as a valid exercise of municipal discretion. This was true even in cases where the designation was based on a cursory recitation that the statutory criteria were met despite a lack of any comprehensive analysis or detailed findings.

The increased scrutiny accorded redevelopment designations and the use of eminent domain to implement them can be traced back to the U.S. Supreme Court's decision in *Kelo v.*

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City of New London, 545 U.S. 469 (2005), which upheld the use of eminent domain to implement a redevelopment project intended to stimulate economic development. The properties in question had not been designated as blighted and the taking was not for a typical public purpose like a road, school or government building. This case garnered national attention, resulting in a public debate concerning the appropriate use of eminent domain. Whether or not influenced by this public debate, the courts in New Jersey have recently become much more receptive to challenges by property owners to the designation of their properties as “areas in need of redevelopment” and much more rigid in demanding findings which comply with the statutory criteria and are supported by a comprehensive investigation.

In *Gallenthin Realty Development v. Borough of Paulsboro*, 191 N.J. 344 (2007), the New Jersey Supreme Court held that underutilization does not, in and of itself, constitute a valid basis for an “area in need of redevelopment” designation. *Gallenthin* involved a 63-acre tract in the Borough of Paulsboro, consisting largely of vacant wetlands. The Borough of Paulsboro established a series of redevelopment areas, several near Gallenthin’s property, and ultimately designated the property an “area in need of redevelopment,” in reliance on N.J.S.A. 40A:12A-5(e), because its undeveloped condition rendered it “not fully productive.” Both the Law Division and the Appellate Division upheld the designation, which is not surprising given the then state of the law. The Supreme Court reversed, however, after reviewing Article VIII, Section 3, Paragraph 1 of the New Jersey Constitution, which provides that “[t]he 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” and after an extensive analysis of what constitutes a “blighted area.” The Court concluded that the constitutional man-

date whereby property acquisition for redevelopment is permitted only in “blighted areas” rendered the redevelopment designation (and the accompanying right to exercise power of eminent domain) unconstitutional because a finding of lack of full utilization does not constitute a determination of blight.

As the Supreme Court noted, were lack of full utilization a valid basis on which to declare a property in need of redevelopment, then “most property in the State would be eligible for redevelopment” and would be subject to the exercise of eminent domain. This observation is reminiscent of Justice O’Connor’s warning in her *Kelo* dissent, that “[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”

To avoid holding criteria (e) unconstitutional, the Supreme Court held that it “applies only to areas that, as a whole, are stagnant and unproductive because of issues of title, diversity of ownership, or other *similar* conditions,” notwithstanding the absence of the word “similar” in the statute.

In the weeks following *Gallenthin*, the lower courts invalidated a series of redevelopment designations, finding in each instance that either underutilization was improperly relied upon as the sole basis for designating the properties at issue, or that the preliminary investigation did not adequately evaluate the proposed redevelopment area and whether it met the statutory criteria. For example:

In *HJB Associates v. Council of Borough of Belmar*, A-6510-05T5, the Appellate Division reversed the Law Division and concluded that under criteria (d), the municipality failed to prove that the “faulty and obsolete layout” it found to exist was “detrimental to the safety, health, morals or welfare of the community” as criteria (d) requires. In view of *Gallenthin*, the Appellate Division ruled that criteria (e) also had not been satisfied, and invalidated the redevelopment designation with respect to plaintiff’s property.

In *Mulberry Street Area Property Owner’s Group v. City of Newark*, ESX-L-9916-04, the Law Division, in a 72-page opinion, invalidated the City of Newark’s redevelopment designation of an area consisting of nine blocks and 166 lots for a redevelopment project near the new arena. The redevelopment area consisted principally of parking lots, vacant lots and storage yards, most of which either were found to meet criteria (e) based on underutilization, or were found not to meet any of the statutory criteria. In reliance on *Gallenthin*, the Law Division found that the underutilization asserted was not related to issues of title, diversity of ownership or other similar conditions. As a result, the constitutional requirement of blight did not exist. The city’s admissions further undercut its case, among them: 33 percent of the lots met none of the redevelopment criteria; no investigation of the number or extent of code violations or variance applications was undertaken; no investigation of the scope or extent of private market real estate transactions within the redevelopment area was conducted; no inquiry was made into the parking needs of the various nearby government buildings; no consideration was given to whether parking lots were permitted by the zoning ordinance or whether variances had been granted for them; no investigation was done concerning the scope or extent of criminal complaints occurring within the redevelopment area; no interviews of property owners were conducted; and no examination of title to the properties within the redevelopment area was undertaken.

In *LBK Associates v. Borough of Lodi*, the Appellate Division upheld the Law Division’s decision that designation of a redevelopment area consisting primarily of two trailer parks did not meet criteria (e) because the conditions cited as justifying the designation were not sufficiently specific, were superficial in nature, and amounted to general dissatisfaction with access and other conditions. Moreover, the designation

was not shown to advance a public purpose. In refusing to order a remand, the Appellate Division expressed the unsatisfactory nature of the municipal proceedings in commenting that “[t]he shortcomings in the determinations under review were too basic and too far at variance with current principles governing the redevelopment process to be amenable to repair through further hearings.”

In *Evans v. Township of Maplewood*, L-6910-06, two properties were included as part of a larger redevelopment area despite the Planning Board’s own consultant having given sworn testimony that neither property met the statutory criteria or was needed for the overall redevelopment of the area. The Law

Division concluded that the inclusion of those properties was based on underutilization only and, in reliance on *Gallenthin*, invalidated their inclusion within the area designated as in need of redevelopment.

After *Gallenthin*, any redevelopment criteria not grounded in traditional blight — such as underutilization pursuant to criteria (e) when not related to title, diversity of ownership or other similar conditions — likely does not pass constitutional muster. These recent decisions indicate the courts now examine a municipal designation of an area as being in need of redevelopment much more thoroughly, if not skeptically, than in the past, looking not only at whether the statutory criteria have been met, but also at

whether the preliminary investigation addressed all relevant factors and constituted a comprehensive evaluation of those factors.

One thing is for certain: the days of courts simply accepting municipal recitations of compliance with the statutory criteria, absent any underlying analysis or factual basis, are a relic of the past. Municipalities will have to be more selective as to the nature of the sites they designate, and will have to undertake and document a comprehensive evaluation of the relevant factors in designating a site, or allow for the possibility that if the designation is challenged, there is an excellent likelihood the challenge will be successful. ■