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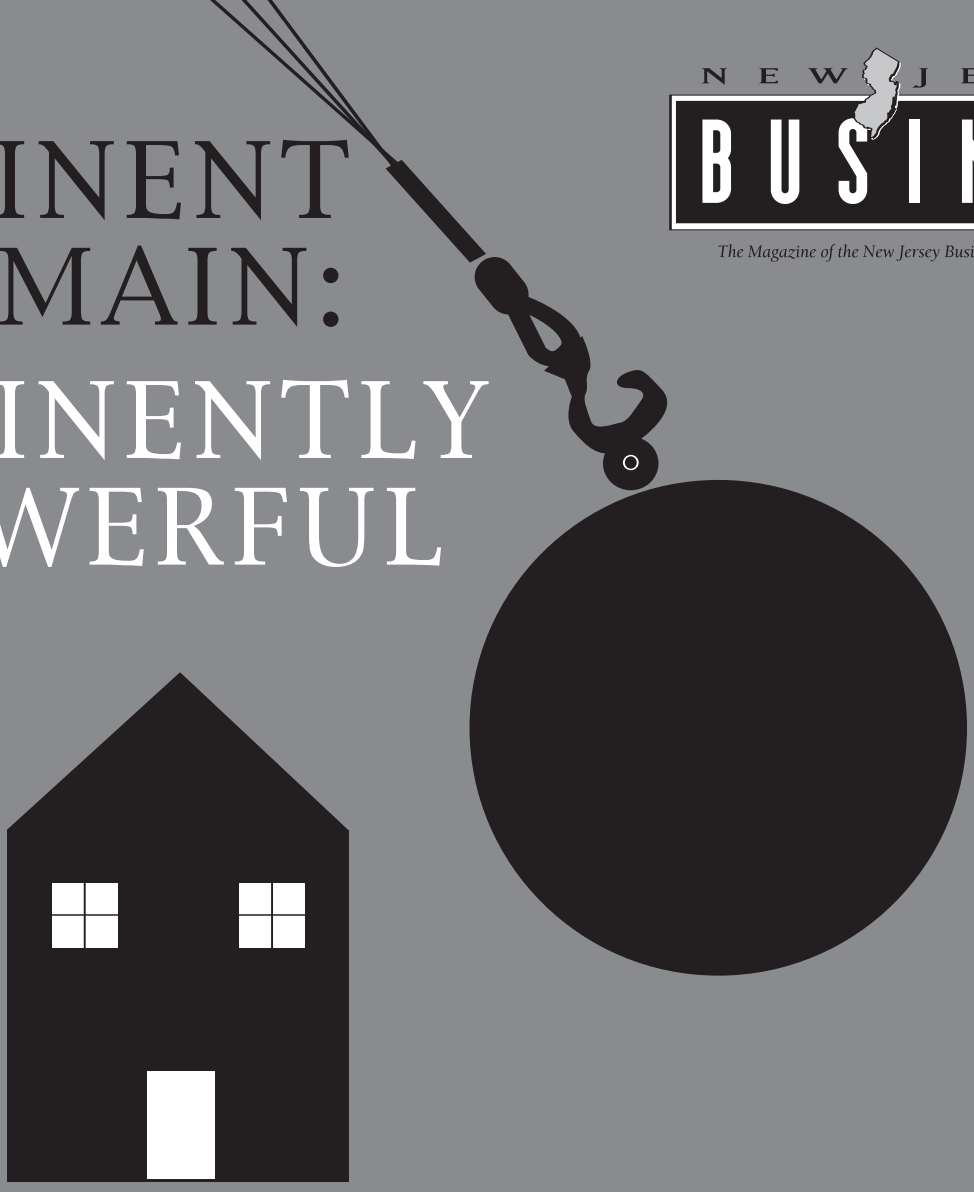
# EMINENT DOMAIN: EMINENTLY POWERFUL



***By Ilene Dorf Manahan, Contributing Writer***

They could easily provide plot lines for a novel series of reality shows. They pit Davids versus Goliaths – powerful government entities against the every-man (and sometimes the every-woman). They match the haves versus the have-nots. They set developers against governments, and, in some show-downs, against individual home- and business owners. The featured players don't realize, until it's too late, that their American dream of hearth and home or a successful commercial venture has become an incredible nightmare.

These are true stories involving eminent domain, the right granted by the Fifth Amendment of the U.S. Constitution that enables government entities to take private property for public uses, providing the government pays the owner "just compensation" or "fair market value" for their property. The 14th Amendment applied these same powers to the states with the same requirement that if property is taken for a public use, just compensation must be paid. Historically, such public uses have included infrastructure and facilities like roads, schools, libraries, government buildings, police and fire stations and parks.

Many states, recognizing their rights of home rule, have further specified how eminent domain can be exercised within their borders. For example, Article VIII, Section III, paragraph one of the New Jersey Constitution authorizes the use of eminent domain for the taking of private land for redevelopment for a "public purpose," provided that the properties are "blighted."

Over the years, the Legislature has attempted to define the word "blight" and to ascertain exactly what constitutes a public use. The "blight" issue was summarily addressed in 1992, when the Legislature deleted the word from the beginning of the 1949 Blighted Area Act statute and instead declared that blight exists when an area is determined to be "in need of redevelopment," a phrase that might apply to almost any neighborhood or business district, in a way that "blight" might not.

In addition to the state Constitution, two New Jersey statutes provide both the authority and framework to condemn properties under certain circumstances. The Eminent Domain Act of 1971 provides the steps to be taken by a government entity to condemn a property, and the Local Redevelopment and Housing Law (LRHL) of 1992 establishes a framework to designate an area as "blighted" or "in need of redevelopment."

One of New Jersey Public Advocate Ronald Chen's main criticisms of the LRHL is the lack of objective, meaningful criteria for designating property as being "blighted" or "in need of redevelopment."

Attention to the eminent domain issue was fueled last year, when the U.S. Supreme Court issued its close (5-4) and controversial ruling in the case of *Kelo v. City of New London, Connecticut*. The case involved the city taking private property for a redevelopment plan designed to revitalize the city's economy. When many of the property owners in the designated area refused to sell, the city initiated condemnation proceedings. The Supreme Court's ruling reaffirmed the right of governments to take private property for a "public use" and further determined that the use of eminent domain for economic development constitutes a valid "public purpose." Since such redevelopment typically means taking private property and conveying it to a private developer for redevelopment, the case raised a red flag on the use of eminent domain for other than public uses.

Nevertheless, the court based its decision on its conviction that local officials, not federal judges, know best in deciding whether a particular project serves a legitimate public purpose and contributes to the public good.

While Commissioner Chen notes that the New Jersey State Constitution allows eminent domain for private redevelop-ment only in blighted areas – so the state is not directly impacted by *Kelo* – when he took office in March 2006, Chen made eminent domain a priority and in May issued a report, "Reforming the Use of Eminent Domain for Private Redevelopment in New Jersey."

"Our research has left no doubt that the laws governing the use of eminent domain for private redevelopment in New Jersey must be reformed to adequately protect the rights of tenants and property owners," Commissioner Chen said. "The use of eminent domain for redevelopment must be limited to truly blighted areas. The process that a local government follows when it wants to redevelop or use eminent domain must be reformed to ensure that it is fair, ethical and transparent."

In his report, the Commissioner included reforms he believes are needed to protect the rights of New Jersey families and businesses including: better defining the term "blighted"; making it easier for municipalities to declare an area "in need of rehabilitation," which provides municipalities almost all the powers and benefits that come from designating an area as blighted, but does not allow the use of eminent domain; requiring notice to tenants and property owners well in advance of the hearing on the blight designation and explaining in plain language that a consequence of this designation is that their property can be taken under eminent domain; offering property owners a meaningful opportunity to appeal the blight designation; and strengthening ethics rules for the redevelopment process, including the enactment of pay-to-play reforms.

"The greater the power entrusted to government officials, the more safeguards should exist to ensure that (eminent domain) is used with care and discretion," Chen said in his report. "It is therefore crucial that the laws governing the use of eminent domain ensure (that) . . . the rights of tenants and property owners are fully protected and eminent domain is used rarely and only in very specific circumstances. This is particularly important in situations where eminent domain is used for private redevelopment because, in these cases, the opportunities for misuse, abuse and injustice are often even greater."

Chen believes that "redevelopment of truly blighted areas is a legitimate public purpose ... ."

## Towns Can Seize Developers' Land for Open Space

In a 6-2 decision, the New Jersey Supreme Court ruled that towns can use the practice of eminent domain to seize property from developers in order to preserve open space. The move is in contrast to the U.S. Supreme Court's 2005 ruling in *Kelo v. City of New London, Connecticut*, which reaffirmed the right of governments to take private property for a "public use," including giving property to private developers for the overall goal of economic development.

The New Jersey ruling involved the town of Mt. Laurel, Burlington County, which wanted to stop development of High Pointe Estates, a 16-acre property where 23 single-family homes were approved to be built by MiPro Homes of Medford.

The town condemned the property using eminent domain, claiming that the preservation of open space was a "public purpose." It has received Green Acre funding to acquire the site, which was a former farm.

Mt. Laurel's decision was based on its wish to limit development, traffic congestion, overcrowded schools and pollution. The court ruled there was enough of a motive here to drive "public interest in open space acquisition."

For builders in the state, the ruling may result in planned developments, under existing zoning laws, to be halted if there is enough political feedback against projects.

In favor of builders, however, the court did rule that towns must pay fair market prices for land, reflecting any existing development approvals and zoning possibilities.

Moreover, with fewer acres of developable land – partly resulting from regulations like the Highlands and Pinelands acts, skyrocketing property values, "smart growth" programs designed to channel growth into cities and towns with existing infrastructure, and the search for ratables, the use of eminent domain has been on the increase. But especially in light of *Kelo*, New Jersey must clarify the circumstances under which private property may be taken for redevelopment and refine the statutory process for doing so.

"The *Kelo* decision did not materially impact the eminent domain laws in our state," emphasizes David Brogan, New Jersey Business & Industry Association (NJBIA) vice president. "New Jersey and its municipalities already have the authority to use eminent domain for redevelopment purposes. What *Kelo* did was spur an examination into the use and possible abuse of eminent domain in our state. This is turning out to be good news for the business community because it can focus on correcting some of the flaws in the current system."

Like the Public Advocate, NJBIA also wants to see a clarification and strengthening of "area in need of redevelopment" or "blight" criteria and pay-to-play protections in terms of those named as private redevelopers who will reap the profits from a condemnation.

The most comprehensive reform bill appeared in June 2006, a year after *Kelo*. Sponsored by Assemblyman John Burzichelli, A-3257 incorporates many of the recommendations in the Public Advocate's report and from NJBIA, among other groups. Significantly, the bill eliminates some of the ambiguous language that the Public Advocate warned "could apply to any property." For example, a municipality would not be able to delineate a property as "in need of redevelopment," the equivalent of "blighted" under the LRHL, merely because its current condition is "not fully productive."

For the business community, the legislation would increase the maximum financial assistance for business relocation and compensate business owners for a business' "goodwill," which is the intrinsic value of a business beyond the buildings and real estate.

NJBIA would also like the bill to include protection for those property owners performing remediation in accordance with the New Jersey Department of Environmental Protection (DEP). Specifically, NJBIA is requesting wording that would create a distinction between negligent property owners who purposely delay the remediation process and those property owners who are actively remediating property in accordance with DEP directives, which can take a considerable amount of time.

A-3257 passed the Assembly on June 22, 2006 and was sent to the Senate Community and Urban Affairs Committee. Senator Stephen Sweeney has the identical bill in the Senate (S-2088) and Senator Ronald Rice, who chairs the Committee, introduced a similar bill (S-1975) in late June 2006. In October 2006, Senator Rice began hearings throughout the state to get public input on the bills. At press-time, there is no indication as to when the committee will act on them.

With increased awareness of eminent domain powers affirmed by *Kelo*, many more private property owners are challenging governmental condemnations of their homes and businesses. Unfortunately, many of those challenges are made after the property has been condemned. And with the long and detailed process required of municipalities before they can declare an area "in need of redevelopment" and take it through eminent domain, the courts have been reluctant to overturn local decisions.

"This process does not happen casually or behind a wall of secrecy, as has been suggested," states William Dressel Jr., executive director of the New Jersey State League of Municipalities (NJLM), which also provided significant input on the proposed legislation. "Certainly abuses occur, but they are not common," says Dressel. And a series of New Jersey court decisions have reconfirmed the eminent domain powers of local governments and largely deferred to their decisions on circumstances affecting their communities.

Dressel adds that the League was "pleased with the (*Kelo*) decision because redevelopment (is) an essential element in revitalizing our older, primarily urban areas" and is a part of the "smart growth" efforts to concentrate development into areas where infrastructure already exists. In order to accomplish such redevelopment, it is often necessary for government to acquire entire blocks, sometimes through eminent domain.

"Some have been critical of local governments' involvement with the private sector in development of our downtowns," Dressel notes. "In the late 1980s and 1990s, they called this the public-private partnership ... ." And such partnerships have been successful in many New Jersey communities. "Eminent domain is a tool of last resort," he states, "but an important tool nonetheless."

James Kinneally, a partner in Hoagland, Longo, Moran, Dunst, Doukas, in New Brunswick, reports his municipal clients "are extremely reluctant to resort to eminent domain." He says, "In most cases, municipalities are able to negotiate land purchases without resorting to eminent domain. Only after all negotiations have failed would they take such action."

In his practice, representing municipalities and government agencies in more rural Middlesex and Monmouth counties, most of the eminent domain cases have effected the preservation of open space "for a public use."

"But in New Jersey, I do see a conflict developing," he adds. "*Kelo* did not change the law, but I see popular opinion swinging against the use of eminent domain more than before *Kelo*. It seems that

mayors and councils are even more reluctant to use it."

Christopher Stracco, a litigation and real estate partner at Day Pitney LLP, Florham Park, notes there are avenues to challenging plans for redevelopment, but redevelopments often don't get challenged until the condemnation begins. "Once an area is determined to be 'blighted' and plans are drawn up that show how an area is slated for redevelopment, then people get agitated," Stracco laments. "The redevelopment process is a lengthy one, often taking several years, and those affected have ample opportunity to challenge the proposal along the way. Challenging a redevelopment declaration at the condemnation level is after the fact, and the courts are reluctant to second guess a process that has taken years to accomplish."

To protect themselves in eminent domain situations, Stracco urges businesses that lease property to have a condemnation clause that will entitle them to some compensation for being displaced and having to relocate.

"The fundamental problem people have with condemnations is taking someone's home or business property and giving it to another private developer and then not fairly compensating them," Stracco says.

Anthony Delle Pella of McKirdy and Riskin, P.A., Morristown, states, "While *Kelo* only impacts redevelopment projects, not takings for traditional public uses, it focused more scrutiny on municipalities in all of their eminent domain cases. It opened peoples' eyes, especially in redevelopment areas. They want the abuse of power to stop."

Indeed, *Kelo* apparently did open peoples' eyes. A year after the decision, over half of New Jersey voters surveyed by Fairleigh Dickinson University's Public-Mind poll said they have heard a "great deal" about eminent domain, slightly more than knew about the issue right after the *Kelo* decision, and most continue to disapprove of its use in most circumstances.

The respondents said their support of the use of eminent domain is highly contingent on what sort of property is being taken by the government. For example, 90 percent said they oppose the seizure of middle class housing in order to build upscale shops. While constructing buildings for public use such as a new school is an acceptable application of eminent domain, 64 percent said they feel taking houses and shops for such uses is unacceptable. Some 47 percent of voters said they would most likely support the state's use of eminent domain to replace dilapidated properties with better housing and shops. Only 16 percent said it is acceptable to take active farmland for a public use, such as a new school or ballfield.

**Howard Geneslaw**, a director in the real property and environment law group at **Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C.**, in Newark, asserts that since *Kelo*, the courts are looking more skeptically at condemnation decisions.

"It's become harder for municipalities to exercise their eminent domain and redevelopment powers, as there is a much greater focus on how municipalities undertake their 'area in need of redevelopment' studies," Geneslaw says. "Today the courts are not just rubber stamping projects. Since *Kelo*, they are requiring that municipalities prove that the statutory standards for redevelopment determinations and the exercise of condemnation have been met, and are looking more skeptically at whether their needs

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can be met in a way other than through eminent domain."

On the other hand, eminent domain often is the answer. "Eminent domain tends to be intertwined with and drive redevelopment," Geneslaw adds. "When a redevelopment designation is made for a major project, properties need to be assembled, which can be a complicated process. Eminent domain enables redevelopment that might not otherwise take place. It's its misuse that becomes the issue."

As a result of *Kelo*, nearly every state in the nation has either passed or is considering some sort of eminent domain reform. Consequently, members of governing bodies and planning boards, as well as home and business owners and those who lease property, need to be vigilant when the word "redevelopment" is uttered. Whatever legislation ultimately is passed, it is critical to understand a proposal from the outset and act swiftly and deliberately to protect an individual's Constitutionally-granted property rights.