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In New Jersey, Property's Condition Is Still the Focus

Regardless of the outcome in *Kelo*, the controversy over 'public use' is unlikely to end

By Anne S. Babineau

As the United States Supreme Court considers the case of *Kelo v. City of New London*, 268 Conn. 1 (2004), debate has ensued regarding the use of eminent domain for redevelopment purposes. *Kelo* approved the use of eminent domain to redevelop a portion of New London's waterfront that had suffered economic and physical decline after the closing of a naval center. The Supreme Court's opinion in *Kelo* is likely to provide clarification and guidance. But the controversy surrounding whether acquisitions of private property for redevelopment constitute a "public use" can be expected to continue.

New Jersey has confronted this issue in its efforts to redevelop property. Notably, in New Jersey, the State

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Development and Redevelopment Plan (SDRP) encourages growth and revitalization in cities and older, developed suburbs, including the revitalization and reuse of dormant brownfields. N.J.S.A. 52:18A-196 to 208. In this regard, the SDRP — as well as the New Jersey Constitution and an extensive body of statutory and case law — supports the concept that redevelopment is a public use and a public purpose. Thus, absent a dramatic reversal of federal constitutional law, it is likely that exercises of the condemnation power granted in New Jersey's Local Redevelopment and Housing Law will be sustained for redevelopment projects, provided they are being undertaken primarily for a public use. Future challenges to redevelopment takings in New Jersey will maintain the focus on conditions in the area before the redevelopment is commenced.

Blight May Be a Factor in *Kelo*

The public debate regarding *Kelo* has largely ignored the evidence of conditions in the New London area that would have supported a finding of "blight" or "area in need of redevelopment" as that term has been defined in New Jersey.

As discussed below, and as New Jersey law mandates, the actual condi-

tion of property that is acquired for redevelopment can be important in sustaining condemnation for redevelopment. In *Kelo*, however, the Connecticut Supreme Court did not rely on the presence of "blight," i.e., the need for redevelopment in the area, to support its opinion. The Court's statement of the issue in the case does not focus on the characteristics of the property in question. Rather, the issue posed was "whether the public use clauses of the federal and state constitutions authorize the exercise of the eminent domain power in furtherance of a significant economic development plan that is projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." *Kelo*, 843 A.2d at 507.

Likewise, the Connecticut Court's holding does not rely in any major way on conditions in the area to justify the exercise of eminent domain. "We conclude that economic development projects created and implemented pursuant to chapter 132 that have the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use clauses of the state and federal constitutions." *Id.* at 520. "Under this broad and deferential con-

stitutional rubric, we conclude that an economic development plan that the appropriate legislative authority rationally has determined will promote significant municipal economic development, constitutes a valid public use for the exercise of the eminent domain power under both the federal and Connecticut constitutions." *Id.* at 528.

At the Feb. 22, 2005, oral argument of *Kelo* before the United States Supreme Court, however, the Justices did focus on conditions in the area. They questioned counsel about the fact that the city was suffering from an enormous lack of jobs and economic depression. Transcript of Oral Argument before U.S. Supreme Court in *Kelo* at 3, 4, 8 and 13. However, counsel for both parties resisted this line of questioning, preferring not to limit consideration of the issues to the characteristics of the property.

The facts documented by the record evidence in *Kelo*, however, would support a finding that there was a public use to the redevelopment beyond encouraging economic development. The 90-acre project area included a 32-acre closed naval facility. The environmental impact evaluation reflected the city's declining population, housing stagnation and rising unemployment, particularly in light of the closing of the naval facility. In the area, there was an 82 percent vacancy rate for nonresidential buildings and a 20 percent rate for noncommercial property. Nonresidential buildings were in poor shape, with only two ranked high in long-range market potential. Less than 12 percent of the residential buildings were in average or better condition in December 1998. The site had hazardous waste and geographic constraints. Development of the site was also made difficult by the fact the development plan area was comprised of approximately 115 land parcels.

The expert relied upon by the trial court had testified that "clearing of all of the parcels was necessary to the success of the development plan...because it would make the area far more attractive for the crucial private sector investment and development." The city also

had experienced serious employment declines, particularly with the loss of approximately 1,899 government sector positions, and the closure of the Naval Center in 1986. The state office of policy and management had designated the city a "distressed municipality." *Kelo*, 843 A.2d at 7, 8, 82-83. Thus, the facts of *Kelo* offer a strong argument for redevelopment in furtherance of a public use other than simple economic benefit, i.e., the correction of blighted conditions to protect the public health, safety and welfare.

It remains to be seen to what extent the United States Supreme Court will be influenced by the facts. If it does limit its decision to the facts before them, the question of whether a redevelopment taking can proceed for purely economic development purposes will remain to be decided in the next case: when, or if, a municipality determines to acquire a Motel 6 for the sole purpose of replacing it with a Ritz Carlton (facts suggested by counsel on oral argument at the Supreme Court). If the Supreme Court announces a rule that more than economic development is required to satisfy the public use requirement, and that there must be a public purpose as well in terms of ameliorating existing conditions in the area, such a decision may have little, if any, impact on redevelopment condemnations in New Jersey. This state's constitution and statutes already focus on the need for improving conditions in the redevelopment area.

Area in Need Designations

In New Jersey, public use is evidenced in large part by an initial designation of the area as being in need of redevelopment. The public use derives from the required, all-important statutory finding that the area is in need of redevelopment. This statutory requirement presents a crucial distinction between New Jersey's condemnation standards and those in *Kelo*: the Connecticut statutes involved in *Kelo* do not include a predicate finding that the area to be condemned is in need of redevelopment.

Condemnation of property for redevelopment projects in New Jersey is based upon a New Jersey constitutional provision:

The 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. Municipal, public or private corporations may be authorized by law to undertake such clearance, replanning, development or redevelopment; ... N.J.S.A. Const. Art. 8, § 3, ¶ 1.

Under the Local Redevelopment and Housing Law, a determination that the area is blighted or "in need of redevelopment" is required before the municipality may acquire the property by eminent domain for redevelopment. N.J.S.A. 40A:12A-8(c) and 15. Many places in the state, especially where the State Development and Redevelopment Plan encourages revitalization, have the conditions described in the statute. N.J.S.A. 40A:12A-5. One of the statutory "blight" criteria, N.J.S.A. 40A:12A-5(e), focuses on the "not fully productive" condition of the land. If the United States Supreme Court were to determine that redevelopment takings cannot take place where the sole purpose is to achieve the public purpose of economic development, arguments would no doubt be made that area in need designations based only on N.J.S.A. 40A:12A-5(e) are unconstitutional. Realistically, however, reported cases generally include multiple bases on which the area in need determination rests. Moreover, the courts have interpreted these criteria broadly, recognizing their remedial purpose, and have focused on the need to improve existing conditions in the area. For example, the New Jersey Supreme Court has stated:

... the legislative purpose is not confined to the elimination of "perceptually offensive slums."

... In recent years, recognition has grown that governing bodies must either plan for the development or redevelopment of blighted areas or permit them to become more deteriorated, obsolescent, stagnant, inefficient and costly. ... Nor is it questionable that the ultimate taking of such land for redevelopment for the benefit of the community as a whole is a constitutional taking for "public use." ... [C]ommunity redevelopment is a modern part of municipal government. Soundly planned redevelopment can make the difference between continued stagnation and decline and a resurgence of healthy growth. *Levin v. Tp. Committee of Tp. of Bridgewater*, 57 N.J. 506, 537-541, app. dismissed, 404 U.S. 803 (1971).

The Appellate Division has also recently observed " ... the Legislature had recognized, as early as 1951, ... that commercial blight embraced ... all the adverse physical conditions of property that individually or in combination impeded its reasonable productivity and resulted in its negative impact upon the general welfare and economic well-being of the community." *Forbes v. Bd. of Trustees of Tp. of South Orange Village*, 312 N.J. Super. 519, 525 (App. Div. 1998). Thus, the purpose of the statute, and each of the area in need criteria, is grounded in the general welfare, not only the economic advancement of the municipality that embarks upon a redevelopment program. For these reasons, a challenge to N.J.S.A. 40A:12A-5(e) based upon a narrow holding in *Kelo*, would be unlikely to succeed.

A few New Jersey cases have perceived that public takings were proposed primarily for a private purpose rather than a public one, and have rejected such takings. In *Casino Reinvestment Development Authority v. Banin*, 320 N.J. Super. 342, 354-59 (1998) (a non-redevelopment case) and *Quagliariello v. Tp. of Edison*, 2004 WL 842000, *7-8 (N.J. Super. 2004), they have rejected the condemnations. See *Kelo* at 40-45, 48-52, 52-54, 70-73 (discussing other states that relied upon their courts to monitor the use of eminent domain). The New Jersey courts can be expected to continue to provide an appropriate safeguard to ensure that the use of condemnation powers in redevelopment projects is primarily for a public use, consistent with this state's constitutional and statutory standards, regardless of the outcome in *Kelo*. ■