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New Jersey Appellate Court Seeks to Balance Property Owners' Rights and Municipal Redevelopment Effort

By Philip J. Morin III and Jane Kozinski

Property owners scored a victory in court recently in their ongoing struggle to protect private property rights against government-driven redevelopment projects. In *Harrison Redevelopment Agency v. DeRose* __ N.J. Super. __ (App. Div. Feb. 25, 2008), the New Jersey Appellate Division held that a property owner that does not challenge a municipality's redevelopment designation within the 45-day time limit set forth in the Local Redevelopment and Housing Law ("LRHL") or pursuant to New Jersey Rules of Court, may nonetheless retain its right to challenge a redevelopment designation when defending against a future condemnation action. Although this ruling is protective of property owners' rights, we believe it does not create overly burdensome impediments to municipal redevelopment projects, but merely raises the standard for public notice.

What Are The Facts?

DeRose owns property in a section of Harrison that was designated as an area in need of redevelopment in 1997. The town commenced the redevelopment process before DeRose acquired his property. Thus, when the Harrison Planning Board notified property owners of a public hearing to discuss its redevelopment area recommendation, DeRose did not receive any notice. The town officially designated the area (including DeRose's property) as an area "in need of redevelopment" following the Planning Board's recommendation (four days before DeRose closed on the property), and in 1998, after an advertised public meeting, adopted a redevelopment plan. In 2007, the town filed an action to condemn DeRose's property.

DeRose never appealed the redevelopment designation within the 45-day limitation period set forth in the LRHL or under Rule 4:69-6 of the New Jersey Court Rules. Nonetheless, in defending the condemnation action, DeRose challenged the town's redevelopment designation. He argued that the LRHL's 45-day limitation period would deprive him of his right to due process because he did not have personal notice of the designation of his property and was not informed that the designation allowed the town to condemn his property or that he had a time limit in which to challenge the town's action. DeRose claimed that if he had been so

informed, he would have filed a timely challenge. The trial court disagreed with DeRose and dismissed his affirmative defenses as time-barred. DeRose appealed, contending, among other things, that the notice provisions of the LRHL deprived him of due process. DeRose sought a remand to the trial court, with an instruction that the court be required to analyze the validity of the township's redevelopment designation under the rigorous test set forth in the New Jersey Supreme Court's decision in *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 191 N.J. 344 (2007).

What Did The Appellate Division Decide?

The appellate court found that the notice provision of the LRHL, N.J.S.A. 40A:12A-6, is constitutionally deficient (commenting that the notice requirements were "spotty and incomplete") because it fails to inform property owners of the full consequences of the inclusion of their property in a redevelopment area and of the time limits for contesting redevelopment designations. Rather than invalidating this provision of the LRHL, the Appellate Division interpreted the statute as allowing property owners who never received adequate notice to challenge redevelopment designations in the context of later condemnation proceedings:

We are convinced that, in the absence of a fuller notice that fairly informs property owners of the consequences of a municipal redevelopment designation, minimal compliance with the notice provisions set forth in [the LRHL] is simply not enough to extinguish a property owner's right to contest a blight designation as a defense in a future condemnation action.

Under this decision, a property owner can challenge a redevelopment designation more than 45 days after the municipality adopted the redevelopment designation. However, if the municipality's notice to the property owner went above and beyond the LRHL notice requirements (i.e., explanation of the consequences of the redevelopment designation and of time limits in which to challenge such designations), then the property owner is limited to the 45-day period for challenging such actions. The exception only applies if the property owner received "contemporaneous individual written notice that fairly alerts the owner that (1) his or her property has been designated . . . for redevelopment, (2) the designation operates as a finding of public purpose and authorizes the municipality to take the property against the owner's will, and (3) informs the owner of a presumptive time limit within which the owner may take legal action to challenge the designation." However, the decision would not prevent a court from extending the 45-day limitation period in the "interests of justice."

According to the Appellate Division, its holding accommodated "the appropriate balance between municipal redevelopment and property owners' rights."

What Are The Implications Of The Decision?

The *Harrison* decision certainly increases the burden on municipalities as they seek redevelopment of their communities. Whether a municipality's notice to affected property owners meets the *Harrison* standard will become a contested issue of fact in court proceedings. Further, if a municipality does not provide timely individual written notice that meets the *Harrison* standard, a property owner would have standing to challenge the procedural or substantive facts underlying a redevelopment designation years down the road.

Developers should carefully evaluate the process the municipality undertook as well as the factual underpinnings of a particular property's designation as an "area in need of redevelopment" as it is likely that no municipality in the State of New Jersey has, prior to the *Harrison* opinion, taken the steps outlined by *Harrison* to foreclose future challenges to a redevelopment area in condemnation proceedings. As a result, if eminent domain powers are ultimately

used, the original redevelopment designation could be voided based upon procedural or substantive deficiencies in the evaluation of a redevelopment area or the inclusion of a particular property in the area, even if the designation was ratified many years prior.

For more information on this decision and other matters involving land use and environmental issues please visit our latest blog entries at www.njzoningwatch.com.

This Bulletin was written by Philip J. Morin III, Special Counsel in Saul Ewing's Real Estate Department and Jane Kozinski, a Partner and Vice Chair of Saul Ewing's Environmental Department. If you have questions or wish to discuss the contents of this Bulletin, please feel free to contact Mr. Morin at 973.286.6721 or pmorin@saul.com or Ms. Kozinski at 215.972.7981 or jkozinski@saul.com.

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