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SUPPLEMENTS

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Slaying the White Elephant

New Jersey must address
shortcoming in redevelopment
plan

By Michael A. Pane Jr.

In the North Korean capital of P'yongyang, stands a large cement pyramid protruding 1,083 feet in the air, consisting of 105 stories and roughly 3.9 million square feet. The dictator of North Korea, Kim Il Sung, in 1987 moved everything and everyone out of the way to build the world's largest five-star hotel, known as the Ryugyong Hotel, to be a shining example of development in progress for the entire world to see. It dominates the City's skyline and is listed as the seventh largest building in the world. During the five years of construction, approximately \$750 million was spent, or approximately 2 percent of the gross domestic product of the entire country of North Korea. Today the building is vacant. Neither windows nor any other fixtures were ever installed, and the structure is in danger of collapsing in on itself.

While a local governmental official

Pane is an officer and shareholder with Giordano Halleran & Ciesla of Middletown.

in New Jersey certainly does not wield the same amount of power as a communist dictator, the comparison may be warranted with respect to the current state of the redevelopment law. Local governmental officials can, thanks to the United States Supreme Court and the New Jersey State Legislature, undertake their own Ryugyong Hotel on a much smaller scale.

Last year, in *Kelo v. City of New London*, 125 S.Ct. 2655 (2005), the United States Supreme Court considered the legality of a taking in furtherance of the city's redevelopment plan and whether such condemnation was a valid taking for "public use" within the meaning of the Takings Clause of the Fifth Amendment to the Constitution. The Court considered the redevelopment plan in the City of New London. Pfizer Inc. announced that it would build a \$300 million research facility on a site within the city, and local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation. The city council authorized the redevelopment authority to formally submit its plans to the relevant state agencies for review in accordance with the Connecticut statutory scheme. The area to be redeveloped comprises approximately 115 privately owned properties, as well as the 32 acres of land formerly occupied by the naval facility. The development plan

proposed a waterfront conference hotel and a "small urban village" that will include restaurants, shopping, a pedestrian "riverwalk," approximately 80 new residences organized into an urban neighborhood, a new U.S. Coast Guard Museum and at least 90,000 square feet of research and development office space. While the redevelopment authority successfully negotiated the purchase of most of the real estate in the 90-acre area, its negotiations with petitioners in the case failed. As a consequence, the redevelopment authority initiated the condemnation proceedings that gave rise to this case. There was no allegation that any of the properties in the case was blighted or otherwise in poor condition; they were condemned only because they happen to be located in the development area.

A bitterly divided court narrowly approved by a 5 to 4 decision to uphold the city's right, through the redevelopment authority, to condemn the petitioner's properties. The majority, in its opinion written by Justice Stevens, introduced the issue as follows:

Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation. On the other hand, it is equally clear that a

State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example. Neither of these propositions, however, determines the disposition of this case.

The opinion examined precedents that expanded the definition of "public purpose" for purposes of a taking, including the case of *Berman v. Parker*, 348 U.S. 26 (1954), where the Supreme Court upheld a redevelopment plan targeting a blighted area of Washington, D.C., in which most of the housing for the area's 5,000 inhabitants was beyond repair. Under the plan, the area would be condemned and part of it utilized for the construction of streets, schools and other public facilities. The remainder of the land would be leased or sold to private parties for the purpose of redevelopment, including the construction of low-cost housing.

Quoting from *Berman*, the *Kelo* majority determined:

Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project. 'It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.'

While many state legislatures across the country received new-found authority to act in the area of redevelopment, New Jersey's legislature had already acted. The process of redevelopment within a municipality begins when the governing body of a municipality passes a resolution autho-

rizing the planning board to undertake a preliminary investigation to determine whether the proposed area is a redevelopment area. N.J.S.A. 40A:12A-6(a). The governing body is to assign the conduct of the investigation and hearing to the planning board of the municipality.

Prior to the Planning Board hearing, the Planning Board must, under N.J.S.A. 40A:12A-6(b)): (a) prepare a map showing the boundaries of the proposed redevelopment area and the location of the various parcels of property to be included in the proposal; (b) attach to the map a statement setting forth the basis for the investigation; and (c) specify a date for and give notice of a hearing to all persons interested in the matter or who would be affected by a determination that the area be designated as a redevelopment area. After public hearings, the Planning Board must recommend that the delineated area, or any part thereof, be determined to be a redevelopment area. This recommendation is forwarded to the governing body.

The determination by the governing body that the delineated area is in need of redevelopment, as expressed in its adopted resolution, must be based on a finding of one of the following conditions to determine an area to be in need of redevelopment under 40A:12A-5:

a) The generality of buildings are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living or working conditions.

b) The discontinuance of the use of buildings previously used for commercial, manufacturing, or industrial purposes; the abandonment of such buildings; or the same being allowed to fall into so great a state of disrepair as to be untenable.

c) Land that is owned by the municipality, the county, a local housing authority, redevelopment agency or redevelopment entity, or unimproved vacant land that has remained so for a period of 10 years prior to adoption of the resolution, and that by reason of its location, remoteness, lack of means of access to developed sections or portions of the municipality, or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital.

d) Areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.

e) 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.

f) Areas, in excess of five contiguous acres, whereon buildings or improvements have been destroyed, consumed by fire, demolished or altered by the action of storm, fire, cyclone, tornado, earthquake or other casualty in such a way that the aggregate assessed value of the area has been materially depreciated.

g) In any municipality in which an enterprise zone has been designated pursuant to the "New Jersey Urban Enterprise Zones Act," P.L.1983, c. 303 (C.52:27H-60 et seq.) ...

h) The designation of the delineated area is consistent with smart growth planning principles adopted pursuant to law or regulation.

The governing body must adopt the redevelopment plan by ordinance, and the plan must include, under N.J.S.A. 40A:12A-7, a statement of its relationship to definite local objectives, description of the proposed land uses and building requirements in the project area, provision for the temporary and permanent relocation of residents in the project area, identification of the property within the redevelopment area that is proposed to be acquired in accordance with the redevelopment plan, and a description of the plan's relationship to the local master plans and the state development and redevelopment plan (N.J.S.A. 52:18A-196). All applications for development or redevelopment must be submitted to the Planning Board for review and approval in accordance with the requirements of the MLUL. See N.J.S.A. 40A:12A-13.

Subsection (h) above is a catch all, allowing a finding that the delineated area is in need of redevelopment if "designation of the delineated area is consistent with smart growth planning principles adopted pursuant to law or regulation." Given the broad nature of the statute, it goes right to the heart of the concerns raised by the dissent in *Kelo*. Justice O'Connor began her dissent by writing:

Today the Court abandons this long-held basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded — i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property — and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment.

Since New Jersey's procedure is already well established, the Supreme Court has, by the *Kelo* decision, essentially gave its approval. It does not, however, resolve major areas of criticism of the cur-

rent state of redevelopment law in New Jersey:

One criticism is that the statute as it exists is sometimes inconsistent with the MLUL. Despite the requirement of consistency, there is a fear that local government officials may use redevelopment as a way to avoid some restrictions on the zoning power under the MLUL and other statutes. For example, a specific end user could be targeted to the exclusion of other similar uses. Another example is that in zoning, a municipality cannot discriminate between rental units and condominiums. That distinction can be made by contract in the redevelopment process. The statutes should be reconciled so that legislative intent in this area is clear.

Another criticism is that there are no safeguards against favoritism or even corruption. Under the Local Public Contracts Law and the Local Land and Buildings Law, public contracts are open to public bidding. In cases where public contracts are not open to public bidding, there are restrictions on the ability of parties entering into such contracts from making political contributions. See e.g. N.J.S.A. 19:44A-20.26. At this point, there is no restriction on political contributions from a potential redeveloper.

Finally, we reach the ultimate criticism of the New Jersey statute, which is also the major problem discussed in the *Kelo* dissenting opinions: that there is a lack of balance between the interests of the municipality and property owner's rights where there is a taking of land to be developed by private developers. It has long been settled that owners of blighted

properties sacrifice their rights by allowing their properties to become a hazard or a detriment to the municipality. However, the problem is that an "area in need of redevelopment" is no longer synonymous with the term "blighted area." Municipalities throughout the state can use the redevelopment statute under the "smart growth" provision to develop areas that have never been developed.

The Supreme Court has made it clear that well-kept and economically productive property can be taken for redevelopment, so compensation is the next important issue. Value, unfortunately for landowners, is determined at the point prior to which the redevelopment plan went into effect. Under normal circumstances, if a developer enters into a contract with the landowner contingent upon approvals to be obtained over a period of years, the price is typically much higher than if it was an "as-is" sale to occur in short order. The reason being is the parties both share a fair amount of risk, and the landowner has to wait for compensation. However, in the case of redevelopment, and ultimately condemnation, a landowner has to wait, still endures risk and ultimately may receive below market compensation, taking into account all associated costs.

Now that the Supreme Court has paved the way, the legislature must address some of these shortcomings so that the process can create what was intended: an engine to drive economic redevelopment where needed, rather than a white elephant that would serve as a monument to a failed redevelopment plan. ■