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# Local Government & Public Finance Law

## Redevelopment in a Down Market

### Establishing reasonable local priorities

By Michael A. Pane Jr

During the 2008 presidential campaign, many New Jersey voters learned more about the state of Alaska than we ever thought we would during a national election. We learned that the Gravina Island Bridge, better known as the "Bridge to Nowhere," was a proposed to replace the ferry that currently connects the town of Ketchikan to Gravina Island, an island which contains an airport as well as 50 residents, at a preconstruction estimated cost to taxpayers of $398 million. Of course, in New Jersey no matter where you build a bridge it will connect you to more than 50 residents, but that does not make us immune to "pie in the sky" redevelopment proposals that have little or no connection to the realities of the current needs of the community or the market as a whole.

Unless you have been living in a remote place like Gravina Island without television or Internet access for the last three years, you know that housing demand and prices have fallen more dramatically than many prognosticators dreamed possible. Developers have walked away from projects they had spent years and hundred of thousands, and in many cases millions, of dollars pursuing, and many of the commercial lenders that would have financed those projects have been teetering on the edge of collapse for the last year or longer. Now the recession has pushed many retailers to the brink, and vacancy rates in commercial properties seem to be rising daily. So given this backdrop, it might seem like the wrong time to focus on redevelopment. But the fact of the matter is that it may be the best time in recent memory to establish priorities for redevelopment. Any major project in this state usually takes several years from conception to the time building permits are issued, and since there is not much activity now, municipalities can be proactive in planning future development and setting priorities for the next 20 years rather than simply being reactive to developments that may be proposed.

Another criticism is that the redevelopment statute is frequently inconsistent with the Municipal Land Use Law ("MLUL"). Despite the requirement of consistency, 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 development could be targeted to the exclusion of other similar developments. Another example is that in zoning, a municipality cannot discriminate between whether or not a building will be rental units or condominiums. That distinction can be made by contract in the redevelopment process. The statues should be reconciled so that legislative intent in this area is clear.

The Local Redevelopment and Housing Law at N.J.S.A. 40A:12A-5 ("LRHL") provides that a delineated area in a municipality may be determined to be "in need of redevelopment" if, after investigation, notice and hearing, the governing body of the municipality concludes that any of the following conditions exist within a delineated area:

> (a) The generality of the buildings in the area are substandard, unsafe, or are so lacking in light, air or space that they are conducive to unwholesome living or working conditions.
>
> (b) The use of buildings previously used for commercial purposes has been discontinued; abandoned; or they are being allowed to fall into so great of state of disrepair as to be untenantable.
>
> (c) The land is owned by the municipality, a county, a local housing authority, a redevelopment agency, or a redevelopment entity...
>
> (d) The area has areas with buildings that are detrimental to the safety, the health, the morals, or the welfare of the community.

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(e) The area has areas in which there is a growing lack, or a total lack, of proper utilization caused by the condition of the titles, diverse ownership of the real property conditions, resulting in a stagnant or not fully productive condition of land

(f) Portions of the area, in excess of five (5) contiguous acres, have buildings or improvements that have been destroyed, consumed by fire, demolished, or altered by the action of storm, fire, cyclone, tornado, earthquake, or other casualty, in a way that the aggregate assessed value of the area has been materially depreciated.

(g) In a municipality in which an enterprise zone has been designated …

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

In its now infamous decision of *Kelo v. City of New London, Connecticut*, 125 S.Ct. 2655 (2005), the United States Supreme Court found that the condemnation of property in furtherance of the city's redevelopment plan was a valid taking for "public use" within the meaning of the Takings Clause of the Fifth Amendment to the United States Constitution. New Jersey's procedure under the Local Redevelopment and Housing Law was already well established, so it appeared that the United States Supreme Court had, through the *Kelo* decision, essentially given its approval to New Jersey's statutory scheme. However, two years later the New Jersey Supreme Court called that prevailing belief into question in *Gallenthin Realty v. Bor. of Paulsboro*, 191 N.J. 344 (2007). The *Gallenthin* Court found that the designation of a vacant 63-acre property consisting largely of wetlands was not justified on the basis of section (e) above based upon its under utilization. The Court concluded that section (e) could not used to justify potential condemnation of property not located in "blighted areas" within the meaning of Article VIII, Section III, paragraph 1 of New Jersey Constitution. The decision did not find the LRLH unconstitutional, but it did find that any interpretation of it to designate areas in need of redevelopment outside of blighted areas would be invalid.

Recent cases make it clear that the term "area in need of redevelopment" is no longer synonymous with the term "blighted area." Owners of blighted properties have always risked sacrificing their property rights by allowing their properties to become a hazard or a detriment to the community, but municipalities can not assume that eminent domain will be available to all "areas in need of redevelopment." Further, given the recent decision in *Harrison Redevelopment v. DeRose*, 398 N.J. Super. 361 at 362 (App. Div. 2008), which held that notice to property owner regarding property redevelopment under the LRHL was insufficient under the Due Process Clause, it will be more difficult to simply take property for redevelopment purposes.

So given the increasing difficulties in using the LRHL as a redevelopment tool, how are municipal officials and planners to set their priorities in the current environment? The first thing to keep in mind is the more grandiose or specific that a vision is for a redevelopment plan, the less likely it is that it will ever be constructed. Courts have traditionally viewed the adoption of a redevelopment plan under the Local Redevelopment and Housing Law as essentially a legislative function of a municipal government akin to the adoption of a master plan or a zoning ordinance. See e.g., *Milford Mill 128 v. Borough,* 400 N.J. Super. 96 at 98 (App. Div. 2008). It follows that it should be viewed as one step of the process in redevelopment.

Therefore, it is best for municipalities to start the process as they are required to do every six years: through the periodic re-examination of the master plan under N.J.S.A. 40:55D-89. Through the re-examination process, certain areas of the municipality can be identified and necessary changes to the zoning ordinance and utility service areas. Perhaps the major criticism of the LRHL and the major problem discussed in the *Kelo* dissenting opinions is the 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 follows that the first step is to let developers follow a path of least resistance and acquire favorably zoned property on their own. If it yields no results, then a municipality should consider using the procedures under the LRHL, if appropriate, to start a realistic redevelopment project as a catalyst to spur development. Eminent domain under the act may be appropriate under certain circumstances, but should always be viewed as a last resort.

If there is a market for the desired redevelopment, then in order for a project to come to fruition, it needs to begin with favorable zoning as well as the ability to obtain all necessary approvals to build the project, such as approval for sanitary sewer and water service, not to mention any environmental or other state and county requirements. In New Jersey, developers generally expect this process to consume several years and a few election cycles. While consistency is not always possible over that time frame, sound advance planning on the part of municipal officials can go a long way to ensure that some redevelopment will actually occur. All desired projects must be fully grounded in the realities of the marketplace: if there is no market for the type of project envisioned, it will never be built. After all, it seems that only governments are willing to consider building bridges to nowhere. ■