

Gallenthin: Reaffirming NJ's progressive views on redevelopment law

The *Gallenthin* decision isn't anti-redevelopment. Quite the opposite: Municipalities can continue to exercise their redevelopment powers to grow and improve their communities. Just so long as the conditions warrant it.

By **Anne S. Babineau and Melinda Colon**

New Jersey has long supported responsible efforts to redevelop the older areas of our state. The need for and importance of redevelopment, which the courts and legislature in New Jersey have acknowledged, continues to be recognized in the recent Supreme Court decision in *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, 191 N.J. 344 (2007). The public debate regarding property rights, fueled by the U.S. Supreme Court decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), has resulted in an overly broad interpretation of *Gallenthin*, and its impact on redevelopment and eminent domain in New Jersey. However, analysis of the limited nature of the holding in *Gallenthin*, and the support within the decision for redevelopment as an important tool for New Jersey's continued healthy growth, leads to the conclusion that the decision should not be read to chill municipalities from exercising their redevelopment powers to grow and improve where conditions warrant.

'Public purpose ... public use'

The debate over the powers of eminent domain and redevelopment reached a crescendo following *Kelo*, the case in which the U.S. Supreme Court sustained, as a legitimate "public purpose" under the United States and Connecticut constitutions, a taking of private property for economic development purposes. Finding that the record included considerable evidence of economic distress in the area, the court held that because the plan of the city of New London for economic development of a section of the city "unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment." Interestingly, although economic development was the

underlying basis for a finding that a "public purpose" and therefore public use existed, the court nevertheless addressed property conditions that evidenced a need for redevelopment based on conditions other than economic development objectives. Indeed, the area could have been deemed "blighted" under New Jersey's standards. The condemned area contained 90 acres, of which 32 acres comprised a closed naval facility. There was an 82 percent vacancy rate for non-residential buildings and less than 12 percent of the residential buildings were in average or better condition. The site had hazardous waste and environmental constraints, and development was problematic because the site consisted of 115 separate parcels. Moreover, there was evidence that the existing conditions resulted in significant economic and employment rate declines. Nevertheless, the court focused on the issue of "public purpose" in the context of economic development and ultimately held that purely economic development considerations were sufficient. Thus, the decision unleashed a groundswell of opposition.

Gallenthin as clarification

New Jersey is not Connecticut. When faced with what might be viewed as a redevelopment question similar to that addressed in *Kelo* — whether the objective of better utilization of an area can serve as the sole basis for taking private property for redevelopment — the New Jersey Supreme Court recently clarified that a municipality may not declare property to be "in need of redevelopment" based solely on a determination that a property, in isolation, is "not fully productive" under subsection "e" of N.J.S.A. 40A:12A-5, the Local Redevelopment and Housing Law (LRHL).

By way of background, under the LRHL, redevelopment area designation is appropriate only if there exists well-documented, substantial evidence that the area meets one of the enumerated eight conditions of a redevelopment area set forth in N.J.S.A. §40A:12A-5. That section of the LRHL describes negative conditions, such as areas with buildings that are dilapidated, substandard, or abandoned, conditions that render such buildings untenable, conditions that are not conducive to wholesome living and working conditions, or areas with vacant land unlikely to be developed through the instrumentality of private capital. One of the statutory criteria, the now-famous subsection “e,” allows the designation of an area as one in need of redevelopment if there exists:

[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.

[N.J.S.A. §40A:12A-5(e).]

The *Gallenthin* court held the “e” criterion “was meant to apply to areas that for a variety of reasons — such as diversity of ownership and conditions of title — were not susceptible to unified development.”

The court interpreted the words “other conditions” to refer “to circumstances of the same or like piece as conditions of title or diverse ownership.” Its interpretation precludes the use of the “stagnant or not fully productive” language of subsection “e,”

standing alone, to justify designation of property as an area in need of redevelopment, where the only record evidence is that the property is less than optimally utilized. For subsection “e” to apply, there must be substantial evidence that the stagnation and lack of fully productive use within the redevelopment area is the result of title and ownership conditions or other conditions of property “of the same or like piece” affecting land within the redevelopment area. In support of its holding, the court noted that New Jersey subscribes to the majority view by requiring more than a showing of underutilization or economic development as the basis for a redevelopment area designation or eminent domain taking.

Also of significance is the portion of the court’s decision that recognizes the serious implications that redevelopment may have on property owners. In this regard, the court emphasized that the substantial evidence standard of review is critically necessary and that the record cannot be based solely on the net opinion of an expert. Thus, *Gallenthin* confirmed that in New Jersey, more is required to justify a redevelopment area designation than the mere objective of achieving economic development.

Progressive here

In *Gallenthin*, the court adhered to its long-standing position regarding the value of redevelopment to further the public’s health, safety, and welfare. The court rejected a claim that N.J.S.A. 40A:12A-5(e) was inconsistent with the New Jersey Constitution. It also cited with approval cases such as *Levin v. Township of Bridgewater*, 57 N.J. 506 (1971), noting that “government redevelopment is a valuable tool for municipalities faced with economic deterioration in their communities.” In *Levin*, the court upheld the redevelopment area designation because of existing title problems and diverse ownership, and “fractionalization” of properties, which resulted in stagnation and underutilization that impeded the redevelopment of the area. The court confirmed that the focus of a redevelopment area designation is on the area as a whole, and not just the individual properties located within the entire area. In so doing, it acknowledged that properties may be included in a redevelopment area even if each property does not individually satisfy the required negative conditions, so long as the area as a whole satisfies the statutory conditions.

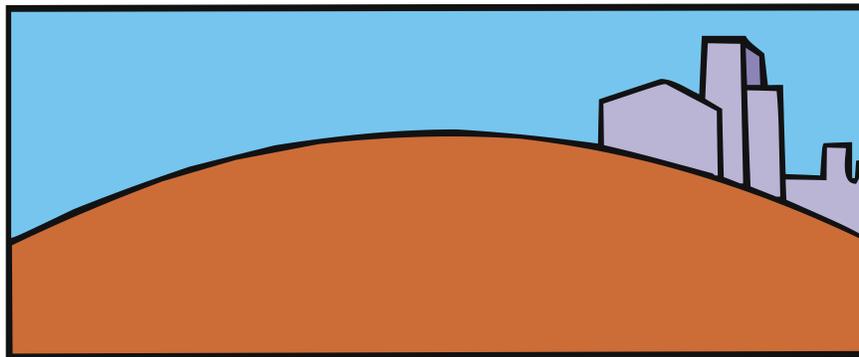
In addition, the court emphasized that, in its past decisions, it has expanded the definition of “blight” to include areas that were not necessarily contemplated by the framers of the constitution,

extending its application to more than “slum clearance” and “perceptually offensive slums.” Likewise, it noted that it had approved redevelopment plans aimed at “suburban and rural” areas. Significantly, the court reiterated the standard of review for municipal determinations regarding proposed areas in need of

redevelopment, confirming that municipal redevelopment designations are entitled to deference if they are supported by “substantial evidence.”

In *Gallenthin*, Paulsboro had relied solely on the “e” criterion, contending that the area was properly designated because it was “not fully productive.” Therefore, the designation was reversed because, as clarified by the court, such an interpretation was beyond the intended scope of the LRHL. Certainly, *Gallenthin* does not in any way suggest that municipalities should refrain from designating redevelopment areas when there is substantial evidence of the existence of the criteria set forth under N.J.S.A. 40A:12A-5. In fact, the *Gallenthin* court noted Paulsboro was not precluded from revisiting and redesignating the area as a redevelopment area, as long as the designation was legitimately based upon one or more of the negative conditions.

Some commentators contend that *Gallenthin* represents a narrowing of the definition and conditions of a redevelopment area, even where “e” is not a basis for designation. However, *Gallenthin* continues to support the progressive statutory view of redevelopment and eminent domain laws by reaffirming and clarifying traditional New Jersey principles and practices.



As stated by the court, the redevelopment provisions found in the constitution are “a living charter — designed to serve the ages and to be adaptable to the developing problems of the times.”

Overall, *Gallenthin* has influenced redevelopment law positively, providing guidance to planners and redevelopment entities alike. The court has eliminated the concern that the current version of subsection “e,” adopted in the 1992 LRHL, could be interpreted to authorize the taking of “any property.” The court upheld the Appellate Division’s conclusion in *Forbes v. Board of Trustees of South Orange Village*, 312 N.J. Super. 519, 526-27 (App. Div.), cert. denied, 156 N.J. 411 (1998), that “e” should be viewed as the substantial equivalent of the Blighted Areas Act subsection “e.” In *Forbes*, the Appellate Division stated:

It is of single importance to our analysis here that the blight definition of the Blighted Area Act was virtually unchanged by the LRHL. Thus, the Legislature may have taken the word “blight” out of the statute in favor of the more euphemistic “area in need of development,” and it may have taken the word “slum” out for the same euphemistic reason, but what is of paramount import is that the definitional standards were not changed in any material respect.

All branches see value

Certainly, all branches of the New Jersey government continue to acknowledge the value of redevelopment for New Jersey. For instance, in reaffirming its position from *Wilson v. Long Branch*, 27 N.J. 360 (1958), the *Gallenthin* court quoted: “In recent years, recognition has grown that governing bodies must either plan for the development or redevelopment of urban areas or permit them to become more congested, deteriorated, obsolescent, unhealthy, stagnant, inefficient and costly.” *Gallenthin*, 191 N.J. at 362.

In discussing and approvingly citing *Levin v. Bridgewater*, 57 N.J. 506 (1971), the court further noted:

We thus recognized that the Legislature intended subsection ‘e’ to apply in circumstances where the orderly development of a particular area is frustrated by its peculiar configuration. ... The subsection enabled State agencies and local government to facilitate redevelopment by eradicating impediments to sound land use planning.

Although a few unpublished cases have overturned redevelopment area designations in the wake of *Gallenthin*, post-*Gallenthin* courts have also continued to provide endorsement of redevelopment and, when necessary, eminent domain, for improving conditions in New Jersey for the benefit of the public. In *Mulberry Street Area Property Owner’s Group v. City of Newark*, No. ESX-L-9916-04 (N.J. Super. Law Div. July 19, 2007), although the court reversed the redevelopment area designation because of a lack of substantial credible evidence in the record to satisfy criterion “e,” the court nevertheless noted that a “City should be entitled to utilize the tools of redevelopment to allow it to once again take its place as the State’s most prominent City.” Similarly, in

Fanaro v. Borough & Council of South Bound Brook, No. L-380-05 (N.J. Super. App. Div. Nov. 14, 2007), a redevelopment area designation was affirmed, notwithstanding its inclusion of a few “well-maintained” properties, with the court recognizing the value of redevelopment, despite plaintiffs contentions that designation was improperly based on economic development and that their properties were unnecessary for implementation of the plan.

Additionally, proposed legislation, including A-3257 (June 8, 2006), S-1975 (June 12, 2006), and S-2088 (June 26, 2006), support the use of redevelopment and eminent domain, stating:

[T]he Legislature declares that redevelopment remains a valid and important public purpose and public use; that the implementation of redevelopment programs continues to be a vital tool for municipal officials that must be maintained to allow such officials to continue to meet their governmental responsibilities to arrest and reverse deleterious property conditions within their municipal borders; and the power of eminent domain remains necessary to effectively implement such redevelopment responsibilities and powers.

Furthermore, in discussing A-3257, Public Advocate Ronald K. Chen made the following statement in support of New Jersey redevelopment:

[R]edevlopment of truly blighted areas is a legitimate public purpose that serves the greater good by helping revitalize communities and create more opportunities for residents. The power to use eminent domain for private redevelopment is specifically enshrined in New Jersey’s Constitution. ... [T]he prosperity of New Jersey’s communities is more reliant on redevelopment than perhaps any state in the nation. Good community redevelopment projects can be particularly important to low- and moderate-income families in need of increased opportunities. ... And when used appropriately, eminent domain can be an important tool in making redevelopment possible in blighted areas.

Reforming the Use of Eminent Domain for Private Redevelopment in N.J., P. 4-5 (May 18, 2006), available at www.state.nj.us/publicadvocate/public/EminentDomainReport06.pdf.

Conclusion

In the wake of *Gallenthin*, New Jersey municipalities can continue to employ redevelopment as a tool to improve conditions, promoting the community’s health, safety and welfare, provided that they remain conscious of the need to document the bases for their decisions in doing so. ©

Anne S. Babineau is a partner at Wilentz, Goldman & Spitzer in Woodbridge. She leads the firm’s statewide, multi-disciplinary redevelopment practice. She is a frequent lecturer on redevelopment issues for the New Jersey Institute for Continuing Legal Education, and is a former chairwoman of the Public Utility Law Section of the New Jersey State Bar Association. Reach her at (732) 855-6057.

Melinda Colón is an associate at Wilentz on its Redevelopment Team, Redevelopment Strategic Business Unit Team and Commercial Real Estate Team. Reach her at (732) 855-6413.