COURT ESTABLISHES NEW PROCEDURE FOR REDEVELOPMENT CONDEMNATIONS: "THE GLASSBORO HEARING"

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U.S. Real Estate Alert

The New Jersey Appellate Division's recent decision in *Borough of Glassboro v. Grossman et al*, __ N.J. Super. ___ (App. Div.) (slip op., January 7, 2019) merits considerable attention. In terms of redevelopment law, it is arguably the judiciary's most significant calibration of the rights of property owners vis-a-vis municipalities since *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, 191 N.J. 344 (2007). While breaking new ground on the one hand, on the other it rests entirely on a plain reading of the relevant provisions in the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 *et seq*. ("LHRL"). Thus, in a sense the decision can be seen as merely foregrounding a statutory construct that previously went overlooked by many practitioners (including the author).

FACTUAL BACKGROUND

In May 2000, Glassboro designated a sizeable portion of its downtown as an "area in need of redevelopment," including defendants' largely vacant parcel. Redevelopment activity followed, mainly confined to the area just off the campus of Rowan University. The subject property is about a block away but had nonetheless lain fallow since the blight designation. Defendants, who were relatively recent contract purchasers, asserted a desire to redevelop it (along with other nearby parcels they had acquired) as a mixed use facility with residential, commercial and retail components. For reasons not clear from the opinion, Glassboro perceived an immediate need for the property and negotiated with the defendants for its acquisition throughout much of 2017. Unable to reach mutually agreeable terms, the Borough evoked its power of eminent domain in January 2018.

The stated public purpose in Glassboro's condemnation complaint was "redevelopment" generally, and "increasing the availability of public parking" specifically. Defendants conceded blight, though they presumably still had the right to challenge it as Glassboro's hearing notices would not likely have included the cautionary advice mandated eight years later in *Harrison Redevelopment Agency v. DeRose*, 389 N.J. Super. 361 (App. Div., 2008) that such a designation opens the door to condemnation (subsequently codified in N.J.S.A. 40A:12A-6(e)). They did, however, challenge Glassboro's resort to eminent domain on the ground that it was unsupported by any true necessity.

While public parking was identified as the specific need, Glassboro's counsel acknowledged at oral argument that no present plans existed for the construction of parking facilities, and, in fact, the property might ultimately be used for some other purpose related to the ongoing redevelopment. In the Borough's eyes, this satisfied the constitutional requirement of public purpose. Defendants acknowledged that, per the LHRL, a blight designation

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may sanction condemnation within a redevelopment area; however, they contended it is only permissible when the targeted properties are necessary for an identifiable redevelopment project. Thus, a municipal desire to "land-bank" property for future use is constitutionally insufficient, even if generally connected to a redevelopment plan.

LEGAL BACKGROUND

Glassboro's argument rested largely on a combined reading of Art. 8, §3, ¶1 of the New Jersey Constitution and §8(n) of the LHRL. The former provides that "[t]he clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use for which private property may be taken;" the latter allows a municipality to "[d]o all things necessary or convenient to carry out its powers." Glassboro's position was essentially that absent a valid basis for contesting blight (which had been conceded), the constitutional requirement of public purpose was definitively established, and the adoption of a redevelopment plan combined with the municipality's stated need of the property for future use in connection with it authorized the taking.

The defendants countered that the LHRL separately defines a "redevelopment plan" and a "redevelopment project." See N.J.S.A. 40:12A-3 ("Definitions"). They are clearly linked -- N.J.S.A 40A:12A-7 prohibits redevelopment projects from proceeding absent a redevelopment plan duly adopted by ordinance -- but they are not the same. The distinction is critical, however, because N.J.S.A. 40A:12A-8(c) provides only that "the municipality or designated redevelopment entity may …. [a]cquire, by condemnation, any land or building which is necessary for the redevelopment project ..." (emphasis added).

DECISION OF THE COURT

The court ultimately sided with the defendants, holding that the general language in N.J.S.A 40A:12A-8(n) could not be read to override the specific language in N.J.S.A. 40A:12A-8(c). Therefore, condemnation is only authorized when there is an identifiable redevelopment project, a link between it and the targeted property, and a "reasonable necessity" for the latter's acquisition. Echoing *Gallenthin's* sweeping rejection of bland recitations of the applicable statutory criteria as justification, the court similarly rejected Glassboro's vague assertions of necessity, unsupported by any expert reports such as a traffic study or other record evidence establishing the extent of the alleged parking demand, its connection to a discreet redevelopment project, and the necessity of acquiring defendants' property for its implementation. With due attribution to Justice Scalia's pithy quote, "[o]ne who lives by the *ipse dixit* dies by the *ipse dixit*," the court admonished that a "governmental authority cannot avoid its statutory obligation to establish necessity by simply asserting it."

Resting solely on a careful reading of the applicable statutes, the foregoing perhaps should have been foreseeable to those engaged in the redevelopment law practice. It is, however, fair to say that the court did break new ground in the procedure established for implementing its decision -- likely to become known as a "*Glassboro* hearing." The court observed that a municipal decision in this regard is "legislative" in nature, meaning there is no obligation to establish a record in advance to demonstrate that it will withstand judicial scrutiny; rather, a municipality is afforded the opportunity to defend its decision based on reasons that may be developed after a legal challenge. This necessarily involves a plenary proceeding in any instance where a landowner responds to a condemnation complaint with a defense that the invocation of eminent domain is unsupported by the three

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components outlined above, i.e., an identifiable redevelopment project, a link to the subject property, and reasonable need for its acquisition.

In most instances, this will presumably involve courtroom testimony by the municipality's experts, to whom *Glassboro* assigns the burden of coming forward with evidence of reasonable necessity, thereafter to be countered by the landowner's experts, to whom *Glassboro* assigns the burden of disproving the municipality's case by a preponderance of the evidence. Given that resolution of the issue goes to the very jurisdiction of the municipality to maintain the action and take the defendant's property, it is further likely that appeals would need to be resolved before proceeding to the next phase, determining just compensation for the taking.

CONCLUSIONS

From the foregoing, the following key points can be gleaned.

- The LHRL distinguishes a municipality's redevelopment designation functions from its acquisition functions, and the mere fact that a property is located within a designated redevelopment area does not mean the municipality may condemn that property at any time without restriction.
- Therefore, even if (a) all procedures have been properly followed to designate an "area in need of redevelopment," (b) the enhanced notice outlined in *Harrison Redevelopment Agency v. DeRose* was utilized, and (c) a redevelopment plan was duly adopted, a municipality must nonetheless be able to substantiate its need for a particular property if a landowner asserts lack of necessity in defense to a condemnation complaint.
- Proof of the aforesaid "need" must be specifically tethered to an actual redevelopment project, not just generically to a redevelopment plan.
- The determination of necessity is an inherently legislative (rather than quasi-judicial) endeavor; thus, a municipality is not required to demonstrate in advance that its decision will withstand judicial scrutiny, and if challenged, it is afforded the opportunity to develop a record before the court in a plenary proceeding.
- In any such proceeding, however, the burden shifts to the municipality to (a) identify the "redevelopment project" supporting its alleged need to acquire a particular property, (b) demonstrate the linkage between the project and the targeted property, and (c) articulate a "reasonable necessity" for its acquisition. Once a municipality has done so, the burden then shifts back to the landowner to disprove by a preponderance of evidence that any such necessity exists.
- Finally, although a presumption of validity attaches to the municipal determination thus meriting judicial deference, a court's review of its legal sufficiency is nonetheless *de novo*. Accordingly, the court will make its own findings as to (a) whether the municipality has satisfactorily met its burden of coming forward with sufficient proofs supporting its determination of necessity, and if so, (b) whether the property owner has negated those proofs and satisfactorily established that no discernible rational basis supports it.

A point not made in the decision but about which practitioners must remain cognizant is that a court's dismissal of a condemnation complaint has consequences beyond a municipality merely being sent back for a "do over" as when a blight designation is judicially overturned. Per N.J.S.A. 20:3-26(b), a landowner in the former instance is

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entitled to reimbursement of all costs reasonably incurred, including reasonable attorney, appraisal and engineering fees. Thus, while the municipality need not establish a record in advance that it perceives will withstand legal challenge, it is nonetheless well advised to do so, particularly as its potential reimbursement obligation in the future must anticipate the possible costs to a landowner of participating in a "*Glassboro* hearing."

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