

**11 YEARS DOWN THE REDEVELOPMENT ROAD - DEFECTIVE
NOTICE PUSHES HARRISON BACK TO THE STARTING LINE**

By: Edward J. Trawinski, Esq.

The Kelo Progeny in New Jersey

The United States Supreme Court's decision in Kelo v. City of New London¹ changed the discourse between State legislatures and local governing bodies with respect to the issue of seizing private property for redevelopment purposes. In Kelo, the Supreme Court held that the government has the power to "take" private property in order to promote economic development.² In analyzing the City of New London's development plan, the Court stated the following:

"Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us...to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment."³

The Kelo Court was careful to note however, that its decision should not be read so as to restrict states from further limiting the exercise of their takings power through legislation.⁴ Thus, the Court intended Kelo to be a guideline or "federal baseline" for "public use" requirements.⁵

¹ Kelo v. City of New London, 545 U.S. 469 (2005).

² Id. at 484.

³ Id.

⁴ Id. at 489.

⁵ Id.

Following the United States Supreme Court’s pronouncement that Kelo serve as a guideline for state courts, our Supreme Court in Gallenthin Realty Dev., Inc. v. Borough of Paulsboro limited the purposes for which local government can seize property.⁶ The Gallenthin Court invalidated a redevelopment plan for an area of land that was classified as in need of redevelopment because it was not fully productive.⁷ The New Jersey Supreme Court held that while the Local Redevelopment and Housing Law (“LRHL”), N.J.S.A. 40A: 12A-1 to -49, applies to property that is stagnant or unproductive, it does not apply to property “where the sole basis for redevelopment is that the property is “not fully productive.”⁸

The Harrison Decision

Harrison Redevelopment Agency v. DeRose, the most recent addition to the Kelo progeny in New Jersey, was issued by the Appellate Division in February 2008.⁹ In Harrison, the Appellate Division held that a property owner has a constitutional right to contest the designation of his or her property as “in need of redevelopment” if the municipality fails to provide the owner with constitutionally adequate written notice, as set forth below.¹⁰ The Court found that the notice Harrison provided to property owners was constitutionally inadequate because it failed to individually notify property owners that their property was designated as a “blighted” area for purposes of redevelopment.¹¹ Thus, in light of this inadequate notice, DeRose’s defenses to the condemnation of his property were not time-barred, as the lower court had held.¹²

DeRose’s property was among the parcels of land designated as “in need of redevelopment” pursuant to the Harrison Mayor and Township Council’s issuance of

⁶ 191 N.J. 344 (2007).

⁷ Id. at 348.

⁸ Id.

⁹ 398 N.J. Super. 361 (App. Div. 2008).

¹⁰ Id. at 367-68.

¹¹ Id.

¹² Id. at 368.

resolutions in September 1997.¹³ The Township Council adopted an ordinance in which it approved the redevelopment plan in November 1998.¹⁴ After adopting this ordinance, the Council continued discussions about the redevelopment plan, which resulted in its adoption of several additional ordinances. The Council acted again in 2003 by passing an amended resolution for redevelopment.¹⁵ In 2004, Harrison requested DeRose's permission to enter his property for the purpose of conducting environmental testing. DeRose initially granted Harrison's environmental experts permission to enter and conduct testing on his property. However, in March 2006, he denied them access on the ground that they had denied him his due process rights.¹⁶

As a result of DeRose's action, Harrison sued DeRose asserting its right to continue environmental testing on DeRose's property. In addition to filing his answer, DeRose filed a third-party complaint and counterclaim asserting that his due process rights were violated because he did not receive individual notice that the Township designated his property as "blight" or being in need of redevelopment. DeRose further argued that the Township failed to individually notify him that it had adopted the 1998 redevelopment plan or the 2003 amended plan.¹⁷

During the pendency of DeRose's claims, Harrison successfully obtained the right to exercise its power of eminent domain to acquire DeRose's property. However, the Agency was prohibited from seeking actual possession of DeRose's property for thirty days.¹⁸ This court order, which limited the Agency's power, was significant because it allowed DeRose to obtain a stay pending appeal. Although DeRose's stay was denied, at the time that the Appellate Division heard oral arguments, DeRose remained in possession of his property.¹⁹

¹³ Id. at 380.

¹⁴ Id. at 381.

¹⁵ Id. at 383.

¹⁶ Id.

¹⁷ Id. at 384.

¹⁸ Id. at 386-88.

¹⁹ Id. at 388.

According to the Appellate Division, “Nothing in Kelo authorizes governmental bodies to ignore norms of due process and procedural fairness in going about the acquisition of private land in the name of redevelopment.”²⁰ Thus, a property owner may contest the designation of his or her property as in need of redevelopment unless “the municipality provides the property owner with contemporaneous written notice that 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 acquire the property against the owner’s will, and (3) informs the owner of the time limits within which the owner may take legal action to challenge that designation.”²¹ If a municipality fails to include these “constitutionally-essential components” in its notice to property owners, the property owner who seeks to challenge the municipality’s designation of his or her property can bring an action long after the municipality adopts the “blight” designation. Indeed, this was the case here, where DeRose asserted his challenge some nine years after Harrison initially adopted the redevelopment plan that included his property.²²

Notably, a property owner is not limited to bringing such an action within forty-five days of the designation of his or her property as a “blighted” area in need of redevelopment. However, if a municipality provides a property owner with notice that contains these “constitutionally essential components,” the property owner is then limited to bringing an action, in lieu of prerogative writs, to challenge the designation of his or her property within forty-five days of the municipality having adopted the “blight” designation.²³

Harrison in Practice

The Appellate Division’s opinion in DeRose follows the United States Supreme Court’s intention that Kelo serve as guidance for state courts when deciding issues

²⁰ Id. at 403.

²¹ Id. at 368.

²² Id.

²³ Id.

concerning redevelopment. Arguably, the stringent notice requirements that DeRose imposes on municipalities benefits property owners who are similarly-situated to DeRose because it protects them from the potential for overreaching by municipalities, who like Harrison Township, act “swiftly” in adopting redevelopment plans.²⁴ In fact, the Court alluded to such overreaching when it emphasized the importance of preserving a property owner’s right to contest a blight designation. The Court stated, “Although a select group of residents in the targeted redevelopment area may understand what is actually going on, far too many citizens are left in the twilight zone of ignorance.”²⁵ (emphasis added).

In adopting redevelopment plans, municipalities should be especially cognizant that potentially affected property owners receive adequate notice. Accordingly, property owners who, prior to this decision, received notices that did not contain these constitutionally essential components, and failed to object, may wish to consult with an attorney about the procedure for raising objections in light of DeRose. Likewise, municipalities would benefit from revisiting the past notices they sent to property owners informing them that their property was designated as a “blighted” area in need of redevelopment. In revisiting these past notices, municipalities will be better able to determine whether such notices contain the constitutionally essential components. Should the notices fail to contain any of these components, municipalities should consider issuing amended notices that conform to the DeRose requirements. Municipalities that fail to provide this requisite constitutionally essential notice, risk the possibility of costly consequences, both monetarily and with respect to timeliness.

Concluding Thoughts

Upon an initial reading of the DeRose decision, it appears as though the Appellate Division strives to provide greater protection to property owners compared

²⁴ Id. 380.

²⁵ Id. at 408.

to municipalities. However, the “balanced, notice-based approach” essentially works to the advantage of municipalities and redevelopment agencies when one considers that, “The better the notice to property owners, the better the municipality’s chances of achieving finality sooner. On the other hand, if public entities fail to supply residents with fair notice, then they bear the risk of encountering more opposition later on at the condemnation stage.”²⁶

²⁶ Id. at 416.

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