

Public Advocate Ronald Chen
Remarks for the League of Municipalities

November 14, 2007

I would like to thank the League of Municipalities for hosting today's event and inviting me to participate in a discussion on this important topic.

Let me begin at the outset by discussing noting the frame of reference that we in New Jersey operate within in relation to the U.S. Supreme Court's decision in the *Kelo* case.

Kelo was a decision based upon the Fifth Amendment to the United States Constitution. This decision, however, actually has little direct bearing on our state because in New Jersey, we have a set of independent constitutional norms, and in particular the Blighted Areas Clause of the New Jersey Constitution, which states "The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired."

Perhaps my relatively new status as a state government official has given me a better appreciation of the concepts of "Our Federalism," but it seems to me very possible that the policy issues that confront us in this area may be well suited to the flexibility that Federalism affords: allowing each state to adjust its own constitutional norms to suit its particular needs and concerns.

Thus South Dakota, with its relatively generous amount of undeveloped open space, can declare that eminent domain will never be used for redevelopment, and Connecticut, on the other end of the spectrum, can allow use of eminent domain for redevelopment to spur general economic development even if the areas the government seeks to take are not themselves blighted.

New Jersey has, as a constitutional matter, struck a balance by allowing the tools of redevelopment, including eminent domain and long term tax abatements, but only if the area concerned is “blighted.”

The Department of the Public Advocate has been investigating the use of eminent domain for private redevelopment in New Jersey for more than 18 months.

Based on this investigation, we have advocated in the courts in areas that we believe required renewed judicial attention, and we also strongly believe legislative reform is necessary to better protect the rights of tenants and property owners.

Since we began our reform efforts, opponents of reform have advanced the proposition that “if it ain’t broke, don’t fix it.” We disagree with the premise of this position – something is broken with our current laws and practices governing the use of eminent domain for redevelopment in New Jersey.

Thus, neither the recent adverse judicial reaction to use of eminent domain for redevelopment in New Jersey nor the public outcry for reform are an over-reaction to the *Kelo* decision, or part of an anti-government agenda, or the product of media hype.

They are appropriate reactions to the fact that current laws and practices do not always reflect the norms and values embodied in our state constitution, and the fact that the rights of tenants and property owners are not being adequately protected.

These are facts that we have documented in two comprehensive reports and three amicus briefs, and it is a fact we will continue to document through further investigations.

For example, as our reports and briefs document, towns have been gaining the power to use eminent domain for private redevelopment in areas where they should not have this power.

Although the New Jersey Constitution limits eminent domain for private redevelopment to “blighted areas,” the statutory definition of blight is too subjective and broad.

In Lodi, a perfectly safe and healthy neighborhood of affordable trailer homes was deemed to be not “properly utilized,” and thus blighted, based on a cursory and solely external examination of the homes.

In Edison, a locally-owned business was deemed blighted because of its “obsolete layout” and lack of productivity, but this conclusion was based on scant evidence, such as potholes and clogged gutters.

And in Paulsboro, undeveloped wetlands were deemed blighted because they were “not fully productive.”

As you know, in June of this year, the New Jersey Supreme Court issued a ruling on this Paulsboro case that helped reign in the overly broad definition of blight.

This was a very important decision, and I will discuss this in greater detail later, but it only addressed one of several areas where reform is needed.

Other instances we have discussed in our reports and briefs highlight the need for reforms that extend beyond the definition of blight.

In Passaic, a property was condemned without the owner ever receiving any notice – one day when the owner went to pay his taxes the town told him he no longer owned the property.

In Long Branch, residents claim they were shown vivid mockups of the redevelopment effort that clearly indicated that their homes would remain untouched. After the statutory time limit on their ability to appeal the blight designation had expired, the town began attempting to acquire those properties.

In Mount Holly, there is a redevelopment project that will likely displace hundreds of residents, who are primarily low-income and minority. Despite the fact that the town has begun to demolish buildings, and hundreds of residents have already vacated the area, the town still does not have a comprehensive relocation plan. The Appellate Division, unfortunately from our perspective, ruled that questions about the adequacy of the town's relocation planning were not yet ripe.

Our Department supports redevelopment, and believes eminent domain can be an important tool in that process.

I say that with the utmost conviction because I truly do believe that the constitutional balance struck in Article VII, Section III, para. 4 of our 1947 state constitution between the need for redevelopment and protection of the rights of the public to own and enjoy their homes and property is the right one for New Jersey.

It was in 1947 and it remains so today. Of course I know I can say that from the convenient perspective of knowing that there is no practical way in today's political context that the people would ever vote to amend or repeal the Blighted Areas clause

But nevertheless reforms are still needed to make sure that this tool is used fairly and only under specific circumstances – the law must

provide more protections both for property owners and also for tenants.

Some have argued that such reforms would protect suburban homeowners at the expense of low-income urban communities in desperate need of redevelopment. We reject this notion on two counts.

First, our experience has shown that it is very often low-income residents who need greater protections under the law.

The bogus blight designation in Lodi would have displaced a community of low- and moderate-income residents and left them with no affordable housing options in their community. And in Mount Holly, the concerns about a lack of relocation planning impact primarily low-income families.

If eminent domain for private redevelopment is limited to truly blighted areas, more often than not it will be low-income residents who will benefit from greater protections.

Second, we believe stronger protections for tenants and property owners and effective redevelopment can, and must, coexist.

In fact, we believe reform can help redevelopment by reducing uncertainty in the process.

Under the current law, the combination of subjective blight criteria and inadequate procedural protections often cause courts to reopen blight designations months and years after the statutory time limit for challenging the designation has expired.

These projects often end up stalled in court after the redeveloper has obtained financing and started building – this is very costly and hurts efforts to redevelop.

We believe a clearer and more objective definition of blight, combined with reforms that make the redevelopment process more fair and transparent and help address disputes at the outset, will make it easier for towns to successfully redevelop blighted areas.

Moreover, our reform proposals are based on basic principles of fairness that are consistent with good redevelopment:

- Tenants and property owners deserve clear, plain language notice that clearly indicates the potential consequences of a blight designation.
- The redevelopment process should be open and transparent. Citizens should be allowed to ask questions and to present their own evidence.
- Redevelopment plans should be more specific, and should provide more detail on the proposed project, plan objectives, plans for temporary and permanent relocation and the impact of the project on affordable housing.
- When a blight designation is challenged in court, the town has access to the best evidence as to whether the area is truly blighted or not, and thus should bear the burden of proving by a preponderance of the evidence that the designation is appropriate.
- Relocation planning for redevelopment projects should be more detailed, and should be completed earlier in the process, particularly when low-income residents are being displaced.
- Relocation assistance levels, which have not been increased in more than three decades, should be adjusted to account for inflation.
- And when a home is condemned, the family should be compensated enough to own a comparable home in their community again, and should if necessary be given

replacement value of their home if “fair market value” is insufficient to make them whole.

While many towns conduct redevelopment in a manner that is consistent with these principles, the current law does not mandate these principles. That is why we need legislative reform.

Finally, let me talk briefly about the impact of the New Jersey Supreme Court’s recent decision in *Gallenthin v. Paulsboro*.

As I said before the *Paulsboro* decision involved an undeveloped 60 acre parcel of land situated near the Delaware River. It was designated as “blighted under subsection (e) of the Local Redevelopment Law, which provides that an area can be designated as “in need of redevelopment,” which is equivalent to the constitutional term “blighted,” if it is found to have 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.”

Read literally, subsection (e) could be construed to be so malleable as to permit huge swathes of properties to be declared blighted-- my house, your house, the Governor’s house.

Faced with this situation, the Supreme Court, on Chief Justice Zazzali’s second to last day in office, made a number of significant holdings that I think will provide the legal framework for a long time in this area.

First, it noted that the Blighted Areas Clause “operates as both a grant and limit on the State's redevelopment authority. The contention that the clause cannot be the basis for invalidating municipal action is thus incorrect.”

Second, the Court found that “By adopting the Blighted Areas Clause, the People entrusted certain powers to the Legislature, and the courts are responsible for ensuring that the terms of that trust are honored and enforced. We find no merit to Paulsboro's assertion that the Blighted Areas Clause divests the Judiciary of that responsibility.”

Most importantly, the Court laid out a constitutional definition of blight, within which any legislative definition of the term must operate. “Although the meaning of ‘blight’ has evolved, the term retains its essential characteristic: deterioration or stagnation that negatively affects surrounding properties.”

The Court referred to other definitions of blight that had gained common acceptance: "'Constitutes an economic and social liability,' 'conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, and crime,' and 'detrimental (or a menace) to the public safety, welfare, or morals.'"

The Court therefore rejected the interpretation of subsection (e) that equated mere lack of full productivity with blight. “Under that approach, any property that is operated in a less than optimal manner is arguably "blighted."

If such an all-encompassing definition of "blight" were adopted, most property in the State would be eligible for redevelopment. . . . We therefore conclude that Paulsboro's interpretation of *N.J.S.A. 40A:12A-5(e)*, which would equate "blighted areas" to areas that are not operated in an optimal manner, cannot be reconciled with the New Jersey Constitution.”

The Court, in an exercise of the doctrine of constitutional avoidance, interpreted subsection (e) in a way to bring it within the constitutional limitations it had just described. “In sum, because

we must presume that the Legislature intended subsection (e) to function in a constitutional manner, and because subsection (e) is reasonably susceptible to an alternative interpretation, we conclude that the Legislature intended *N.J.S.A. 40A:12A-5(e)* to apply only to property that has become stagnant because of issues of title, diversity of ownership, or other similar conditions. By adopting that construction, we avoid rendering *N.J.S.A. 40A:12A-5(e)* unconstitutional and give effect to the Legislature's original purpose in adopting the language that would become subsection 5(e).”

Finally, the Court described the evidentiary burden that the municipality had to meet in order to establish the existence of blight. “The substantial evidence standard is not met if a municipality's decision is supported by only the net opinion of an expert.” “A municipality must establish a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met.”

The impacts of this decision are already being felt throughout the state, as trial and appellate court decisions have invoked the *Gallenthin* decision as they overturned blight designations several municipalities.

In the Lodi case I mentioned earlier, the court, citing *Gallenthin*, invalidated the blight designation as unsupported by substantial evidence.

In Belmar, a popular family-owned bakery was designated as part of a blighted area because of its “faulty and obsolete layout.” The Appellate Division overturned the lower court observing that the record contained “no proof whatsoever” that the area was “detrimental to the safety, health, morals or welfare of the community.”

With regard to the Mulberry Street redevelopment area in Newark, the Law Division ruled that, “regardless of whether the property is located in a small municipality, such as Paulsboro, or a large municipality, such as Newark, whether it is vacant or unimproved or a parking lot, gravel lot or storage yard, a municipality cannot take property for redevelopment...merely because it believes that the land is not fully productive and can be used for something more beneficial to the general welfare.”

And in Hackensack, two office buildings had been designated as part of a blighted area because they were “underutilized.” Again citing *Gallenthin*, the Law Division ruled that just because “properties may be in a state of mere underutilization is not justification, in and of itself, for designating an area in need of redevelopment.”

The *Gallenthin* decision does not preclude the Legislature from further amending the blight criteria, as I’m sure many interested parties would like the Legislature to do. But it does put a strict limit on how the Legislature can define blight – at its core blight must include deterioration or stagnation that has a decadent effect on surrounding property.”

In the next few weeks and months, I look forward to working with the Legislature in examining what further reforms are needed to achieve the overall goals about which there is little disagreement: providing for an affordable and pleasant living environment for the people of New Jersey, and at the same time giving the proper respect to fundamental constitutional values.

Thank you.