

DIMENSIONS

LOCAL REDEVELOPMENT: IT'S BAAACK, WITH A TWIST: MOUNT LAUREL?

By: Richard P. DeAngelis, Jr. and Anthony F. DellaPelle

There has been a recent uptick in municipally sponsored redevelopment efforts under New Jersey's Local Redevelopment and Housing Law, after nearly a decade of inactivity due to the economy and a spate of litigation in the 1990s and the early 2000s that focused upon whether properties qualified as blighted and, as such, were subject to acquisition by eminent domain.

So, what's changed in the last ten years? Well, for one, amendments to the Redevelopment Law in 2013 that now permit the designation of "non-condemnation redevelopment areas." This amendment was intended to make the controversial condemnation power optional, while continuing to provide favorable zoning and long-term tax abatements in hopes of incentivizing redevelopment. More recently, it appears there is another consideration that may be driving some of the renewed redevelopment efforts – the possible intersection between local redevelopment projects and the obligation of municipalities to provide a realistic opportunity for affordable housing under *Mount Laurel*.

Redevelopment under attack by the courts and the economy

The last proliferation of local redevelopment projects in New Jersey was dampened by the deep recession about ten years ago, as well as several court decisions. In the summer of 2007, the New Jersey Supreme Court issued its decision in *Gallenthin Realty Development v. Borough of Paulsboro*, concerning the constitutional definition of blight. This was followed by a string of decisions overturning municipal blight designations.

In February 2008, the Appellate Division

decided *Harrison Redevelopment Agency v. DeRose*, holding that the minimal amount of notice required under the Redevelopment Law fell short of the constitutional requirements of due process. This decision set a higher procedural bar for future projects, and also raised a hurdle for projects already in the pipeline because it held that property owners who receive inadequate notice retain the right to contest the property's blight designation as a defense in a later condemnation action.

These court decisions were codified in the 2013 amendments to the Redevelopment Law and, prior to becoming legislation, their precedent hampered municipal redevelopment projects which, combined with the precipitous fall of the real estate market, caused municipal redevelopment activities in New Jersey came to a screeching halt by 2009. In some instances, developers backed out of redevelopment agreements. In others, redevelopment plans languished as there was no incentive for developers to proceed with their projects.

Multiple redevelopment projects have regained life and new projects have been conceived over the last two years. The driving force behind this resurgence is a revived economy and once again, the courts are playing a role. The courts will have to sift through the impact of its earlier decisions regarding the Redevelopment Law, particularly in regard to those "pipeline" projects that were halted. Also, the judiciary may have unknowingly given rise to a new issue to be considered in redevelopment matters – the issue of affordable housing.

The Mount Laurel conundrum

Under the Supreme Court's 1973 *Mount Laurel* decision, every municipality has

an obligation to use its zoning power to provide for a reasonable opportunity for the development of low and moderate cost housing. In its 1983 *Mount Laurel II* decision, the Supreme Court established the consequences of not complying with the *Mount Laurel* doctrine and that is the "builder's remedy."

Thereafter, the Fair Housing Act was enacted and created the Council on Affordable Housing ("COAH") to implement the *Mount Laurel* doctrine. COAH was charged with evaluating municipal compliance and it was through this process by which a municipality could attain "substantive certification" and protections from a builder's remedy action. Since then, many municipalities have struggled to control growth, while at the same time, complying with *Mount Laurel*. COAH's Round Two regulations expired in 1999, and the agency failed to establish legally valid rules. Years of litigation ensued over how the new rules should be formulated and the methodology to establish municipal fair share obligations.

In its March 2015 *Mount Laurel IV* decision, the Supreme Court reaffirmed the *Mount Laurel* doctrine. The Court also declared COAH defunct and eliminated the exhaustion-of-administrative-remedies requirement. In its stead, the Court provided for a judicial forum to adjudicate affordable housing disputes, creating a substitute for COAH's substantive certification process. It was under this new regime that municipalities then participating in the COAH substantive certification process could file an action to request from the court a declaration of compliance with its obligations under *Mount Laurel* and the Fair Housing Act. Shortly thereafter,

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About the Author:

The authors are attorneys at the Morristown law firm of McKirdy, Riskin, Olson & DellaPelle, P.C., where they limit their practice to eminent domain, redevelopment and real estate tax appeal matters. In addition, Mr. DellaPelle was a member of the NJBA's Redevelopment Committee which originated the proposed amendments to the Local Redevelopment and Housing Law that were enacted in late 2013 and which are referenced in this article.

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forth at N.J.S.A. 40:55D-53.h. While inspection fees are still calculated at five (5%) percent of the cost of both the dedicated site improvements that are the subject of the performance guarantee and private site improvements for which no performance guarantee is required, the amendments alter the process for replenishing the inspection escrow. Historically, when the five (5%) percent escrow was depleted, a municipality would simply demand additional funds to replenish the escrow without explanation or justification and work on a project could be stopped until additional funds were deposited. Under the amendments, a municipality will have to send a request to the developer seeking additional funds, signed by the municipal engineer, setting forth the basis for the request including the items or undertakings that require inspection, estimates of the time required and the estimated cost of those inspections. The amendments also eliminate the provision that allowed inspections to cease where sufficient funds were not on deposit.

While the new law, by its terms, took effect immediately, there are many questions regarding what this means in practice. The new law requires municipalities to adopt an ordinance prior to requiring any of the guarantees. It appears clear that as of the effective date of the amendments, municipalities can only require new performance guarantees calculated upon the cost those improvements specified in the amended act. Since performance guarantees are not among the "general terms and conditions" protected under vesting provisions of the MLUL, the applicability of the new law to any particular project is not affected by the date of Board approval. While replacing existing guarantees may raise practical difficulties, it appears clear that the amount of any existing performance guarantees should be adjusted at the time of any renewal and guarantees

for future phases of a development of a multi-phased project must be calculated under the new law notwithstanding that a different law applied to earlier phases. Particular circumstances may require negotiation with the municipality to reach a workable accommodation that balances the cost differential between guarantees required under the prior law and that under the amendments against the cost of fighting over the proper application of the new law. Further, a municipality arguing against applicability of the amendments to a project approved prior to the effective date of the amendments may be hard pressed to claim a right to require either the SSG or TCOG. Therefore, a cooperative effort by all parties will be required to work through the period of adjustment to the amendments.

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several such matters were filed and remain pending, including in municipalities with pre-2007 blight designations and/or redevelopment plans.

Mount Laurel to the rescue?

Some of the proposed settlements in these *Mount Laurel* compliance proceedings rely, in part, on redevelopment projects with affordable housing set-asides. The Redevelopment Law has always provided that a redevelopment plan adopted thereunder "may include the provision of affordable housing in accordance with the 'Fair Housing Act.'" What has changed is the renewed pressure on municipalities to meet their *Mount Laurel* obligations, which has resulted in an increasing number of redevelopment plans that provide for affordable housing.

In at least one pending *Mount Laurel* compliance proceeding, there is a proposal to seize properties by eminent domain citing to both the Redevelopment Law and the Fair Housing Act to facilitate a proposed for-profit transit oriented

development. Property owners have challenged the blight designation, to which the municipality has responded by claiming that the power of eminent domain is appropriate under the Fair Housing Act because the proposed development includes an affordable housing set aside. In doing so, the municipality is attempting to shift the court's focus from (a) whether the area in question satisfies the blight criteria in the Redevelopment Law, to (b) whether the project should proceed due to the affordable housing set-aside. But the Fair Housing Act does not provide the power of eminent domain for an inclusionary development and prohibits the transfer of condemned lands to a for-profit developer.

Should a municipality be permitted to shield a local redevelopment project subject to a challenge under the Redevelopment Law with a cloak of "*Mount Laurel* compliance" in order to be able to take property by eminent domain under the Fair Housing Act? How the courts will respond to such efforts remains to be seen, yet judicial scrutiny concerning municipal determinations that areas are "in need of redevelopment" should properly be focused on whether those areas satisfy the statutory criteria of the Redevelopment Law, not whether those municipalities can or should provide otherwise needed affordable housing in such areas. Regardless of the judicial reaction, the next unknown will likely be if and how the Legislature and Governor will respond.