# The Revival of Due Process Rights in Redevelopment Takings: Recent Developments in Due Process in State Eminent Domain Case Law

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THE POWER TO ACQUIRE PRIVATE PROPERTY through eminent domain is one of the most awesome rights of the sovereign. The decision of the United States Supreme Court in *Kelo v. City of New London*[1] ignited a flame of public outcry over the question of what constitutes a "public use" to justify the exercise of eminent domain. As a result of *Kelo* there has been a renewed focus on the limitations of eminent domain set forth in the Constitution of the United States, state constitutions, and state and federal statutes. The primary and most familiar limitations on eminent domain are found in the Fifth Amendment, extended to the states under the Fourteenth Amendment, which provides that property may be taken only for a public use and with just compensation. A less prominent, but equally important limitation, especially after *Kelo*, is the property owner's due process rights to notice of and an opportunity to participate in certain aspects of the eminent domain process. Several recent state cases show that courts are now examining the boundaries of those due process rights.

## I. Notice Due to Property Owners: *Harrison Redevelopment Agency v. DeRose*[2]

The court in *DeRose* held that the New Jersey Local Redevelopment and Housing Law[3] ("LRHL") notice provisions alone did not provide

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

2. Harrison Redevelopment Agency v. DeRose, 942 A.2d 59, 70-71 (N.J. App. Div. 2008).

3. N.J. STAT. ANN. § 40A:12A-1 (West 2009).

the fundamental guarantees of due process because they were not "reasonably calculated" to apprise property owners of the true nature of the government's actions.[4] The court saved the statute by interpreting it in a manner that preserved a property owner's due process rights,[5] and held that in the absence of constitutionally adequate notice at the time of the designation, a property owner will maintain his right to contest a blight designation in defense of an ensuing condemnation action.[6] The appellate division agreed with DeRose by finding that, after nine years, it was not too late to bring a facial attack upon the statute's constitutionality.[7] More importantly, citing the New Jersey Supreme Court in *Asbury Park Press, Inc. v. Woolley*,[8] the court held that the passage of time cannot validate the deprivation of a constitutional right by a governmental entity.[9]

Discussing the LRHL's notice provisions, the appellate division found significant the cross-reference to the Eminent Domain Act of 1971 because it "indicates a legislative desire that the two statutes be applied . . . in a coordinated and harmonized fashion," whereas the LRHL notice requirements are "spotty and incomplete."[10]

The appellate division carved out an exception to the preservation of the right to challenge the blight designation at the time of a condemnation action which would subject the owner to the forty-five day time limitation to challenge the designation. Where a municipality goes beyond the LRHL's minimal notice requirements and provides the property owner with

> contemporaneous individual written notice that fairly alerts the owner that (1) his or her property has been designated by the governing body for redevelopment, (2) the designation operates as a finding of public purpose and authorizes the municipality to take the property against the owner's will, and (3) informs the owner of a presumptive time limit within which the owner may take legal action to challenge the designation.[11]

An issue not squarely before the court in *DeRose* was the notice required for the investigatory hearings. Does the failure to provide such comprehensive notice at that time deprive the property owner of a

4. *Harrison*, 942 A.2d at 84.
5. *See id*. at 87.
6. *See id*.
7. *Id*. at 93.
8. Asbury Park Press, Inc. v. Woolley, 161 A.2d 705 (N.J. Sup. Ct. 1960) (citing State v. Wrightson, 28 A. 56 (N.J. Sup. Ct. 1893)).
9. *See Harrison*, 942 A.2d at 85.
10. *Id*. at 81-82.
11. *Id.* at 90.

meaningful opportunity to develop an adequate record upon which the designation may be made and, equally important, to be placed before a court on judicial review? In *DeRose*, the appellate court found that on remand either party could supplement the record with additional evidence to support or contest the blight designation. This, of course, raises the question of what evidence should be admitted.

To the extent that any additional evidence is considered by a court hearing a challenge to a redevelopment designation, must such evidence be limited to that which was available to the municipality at the time of the designation? Should the municipality be permitted to "backfill" a record with information that only became available after the original blight designation? May a municipality be permitted to rely on a subsequently adopted redevelopment plan in order to justify the blight designation? In *DeRose* the court did not address the issue directly, although it did find that neither the goals of the redevelopment plan nor the expenditures in furtherance thereof could "justify the abnegation of a property owner's statutory rights."[12] To allow otherwise would not only offend basic notions of fairness, but the express requirements of the LRHL which clearly sets forth the criteria of blighted property and the process for designating the same, which must occur before and independent of the redevelopment plan.

## II. Notice Due to Commercial Tenants: *Iron Mountain Information Management, Inc. v. City of Newark*[13]

*Iron Mountain* provided an opportunity for the New Jersey Supreme Court to address an extension of the *DeRose* arguments and whether commercial tenants are entitled to notice under the LRHL's provisions. Specifically, the court sought to answer

> whether a long-term commercial tenancy, with a limited right of first refusal, amounts to a protected interest in the property that is equivalent to the building owner's interest in the property that is subject to a potential blight designation. The answer to that question, in turn, will determine whether plaintiff has an interest that entitles it to the same notice accorded to the building's owner under the LRHL when the building is

12. *Id*. at 94.

13. Iron Mountain Info. Mgmt., Inc. v. City of Newark, 966 A.2d 62 (N.J. App. Div. 2009), *cert. granted*, 973 A.2d 385 (N.J. May 21, 2009). The New Jersey Supreme Court released its opinion in this matter on May 19, 2010, after this paper had been presented at the American Bar Association's Section of State and Local Government's Spring Meeting. The court affirmed "the judgment of the Appellate Division for substantially the reasons expressed in Judge Baxter's published opinion." Iron Mountain Info. Mgmt., Inc. v. City of Newark, A-100-08, 2010 N.J. LEXIS 477, at *10 (N.J. May 19, 2010).

> within the proposed redevelopment area and, therefore, proposed to be designated as blighted, see N.J.S.A. 40A:12A-6(b)(3).[14]

The appellate division declared that long-term lessee Iron Mountain Document Systems, Inc. was not entitled to notice when the building it occupied was taken through eminent domain because the legislature had contemplated notice issues for lessees, and lessees were provided adequate due process under the statutory law.[15]

Petitioner Iron Mountain argued that it was entitled to notice because of its unique status as a tenant with an option to purchase.[16] This status, it claimed, gave it an ownership right which required notice under the Due Process Clause of the United States Constitution, and the LHRL's notice requirements should not be strictly construed when it would deny due process under New Jersey case law. The court focused on the potential burden to municipalities to provide actual notice to tenants when a single building may have one hundred tenants. The court additionally inquired whether Iron Mountain had filed a copy of their lease with the tax assessor or records office. Several justices also inquired into what Iron Mountain knew about the redevelopment plan, and when it knew it, since no formal certifications had been made to any court.

Respondent City of Newark pointed out that Iron Mountain had never filed a formal certification that they did not have notice of the redevelopment plan hearings or blight designation. Newark then argued that the appellate division correctly determined Iron Mountain was not entitled to notice under the LRHL as a tenant, and Iron Mountain was only entitled now to compensation for its interests and not an opportunity to reargue the blight designation. The court asked Newark whether it was aware that Iron Mountain was a tenant when the notices were originally sent to property owners in the redevelopment area, and questioned whether it would not have been easier for the city to have provided notice up front than to argue all the way to the New Jersey Supreme Court. Newark affirmed that the city knew about Iron Mountain, but argued that notice should be provided as required by statute and not on an ad hoc basis. The court's opinion is expected later this year.

14. *Iron Mountain Info. Mgmt., Inc*, 2010 N.J. LEXIS 477 at *10.

15. *See* Iron Mountain Info. Mgmt. Inc., v. City of Newark, 966 A.2d 62, 65 (N.J. App. Div. 2009).

16. The oral argument webcast is archived at http://njlegallib.rutgers.edu/supct/args/A_100_08.php. All references to arguments made by the parties are references to the arguments raised during oral arguments.

## III. Notice of Blight and Reasonable Opportunity to be Heard: *Matter of Kaur v. New York State Urban Dev. Corp.*[17]

*Kaur* presented the question of whether the proposed expansion of Columbia University constituted a valid public purpose for the use of eminent domain. The appellate division ultimately determined the property owners had been denied due process without a fair opportunity to respond to a blight designation.[18] But the New York Court of Appeals reversed the appellate court decision, holding that the record did support the determination of blight and that the petitioners were not denied due process.[19]

The appellate division was suspicious that the EDC and the ESDC were "compelled to engineer a public purpose for a quintessentially private development" because the appellate court determined that no proof of blight existed before Columbia began purchasing the land for development.[20] But the court of appeals disagreed, holding a 2003 blight study by Urbitran (performed when Columbia had only just begun to purchase property), and a study by Earth Tech stating that "since 1961, the neighborhood has suffered from a long-standing lack of investment interest" to be ample evidence to support a good-faith determination of blight.[21]

The court of appeals also disagreed with the appellate division's finding that petitioner's due process rights had been violated. The appellate division held that petitioner's were not afforded a reasonable opportunity to be heard because the record was arbitrarily closed and certain documents had been withheld in violation of the Freedom of Information Law (FOIL).[22] However, the court of appeals determined that there was in fact a reasonable opportunity to be heard. The court concluded that the "petitioners had an opportunity to comment on the proposed Project in a meaningful manner-both orally and through written submissions."[23] The court specifically noted that seventy-five pages

17. Kaur v. N.Y. State Urban Dev. Corp., 2010 WL 2517686 (N.Y. June 24, 2010).
18. *See* Kaur v. N.Y. State Urban Dev. Corp., 892 N.Y.S.2d 8, 26 (App. Div. 2009). More can be found on Kaur v. N.Y. State Urban Dev. Corp. in Robert H. Thomas, *Recent Developments in Challenging the Right to Take in Eminent Domain*, 42 URB. LAW. 693 (2010).
19. *Kaur*, 2010 WL 2517686 at Part VII.
20. Kaur v. N.Y. State Urban Dev. Corp., 892 N.Y.S.2d 8, 12, 14 (App. Div. 2009).
21. *Kaur*, 2010 WL 2517686 at Part VII.
22. Kaur v. N.Y. State Urban Dev. Corp., 892 N.Y.S.2d 8, 26 (App. Div. 2009).
23. *Kaur*, 2010 WL 2517686 at Part VII.

of detailed responses made by ESDC to the petitioner's comments was clear evidence that petitioners were in fact heard.[24] Although the court had previously held ESDC to be in violation of FOIL, in order for a FOIL violation to amount to a denial of due process the petitioners must have shown that the withholding of documents caused actual prejudice.[25] The court of appeals held that petitioners did not meet this burden.[26]

The reversal of the decision of the appellate division reconciled the *prima facie* inconsistencies between the *Kaur* case and the New York Court of Appeals decision in *Goldstein v. New York State Urban Development Corp*.[27]

## IV. *Albuquerque Commons Partnership v. City Council of Albuquerque*[28]

The court in *Albuquerque Commons* found that the city interfered with Albuquerque Commons Partnership's ("ACP") property when it downzoned the property and subsequently failed to present an impartial tribunal, denying an adequate state remedy, and ACP's right to due process.[29] The Albuquerque City Council requested an overview of the 1981 Uptown Sector Plan ("1981 USP") after the ACP withdrew and then resubmitted a site plan to develop its property. The city refused to consider the plan while the 1981 USP was being reviewed. In 1995 the city adopted another Uptown Sector Plan ("1995 USP").

ACP challenged the 1995 USP and claimed damages from a regulatory taking under 42 U.S.C. § 1983 for violations of due process and takings in violation of the Fifth Amendment. After the city rejected ACP's plan on remand the matter was appealed again. The New Mexico Court of Appeals reversed, holding that the city's adoption of the 1995 USP was a legislative action and, therefore, ACP was not entitled to quasi-judicial process; and that the city did not downzone ACP's property. The New Mexico Supreme Court then reversed, holding that ACP had been denied due process and was entitled to a quasi-judicial hearing because its property was downzoned, the 1995 USP had not been properly enacted, and the ACP site plan had been wrongfully denied. The matter was remanded to the court of appeals which then determined that ACP

24. *Id*.
25. *Id*.
26. *Id*.
27. 921 N.E.2d 164 (N.Y. 2009).
28. Albuquerque Commons P'ship v. City Council, 212 P.3d 1122 (N.M. Ct. App. 2009).
29. *Id.*

had a constitutionally protected property interest adequate for a section 1983 claim.

The court rejected the city's challenge to ACP's section1983 claim, announced that ACP had a state-created property right sufficient to trigger federal due process protections,[30] and noted that although a property owner has no vested right in a particular zoning classification, a property could only be downzoned under both case law and statutory law if the city demonstrated a mistake had been made in the original zoning, subsequent changed conditions in the neighborhood before the zoning could be changed, or that a different use category would be more advantageous to the community.[31] Additionally, the court highlighted the importance of the justification process when rezoning targets a single parcel[32] and that the rules created the limitations upon the city's discretion that are necessary to invoke due process guarantees. It was found inconsequential to ACP's due process rights whether the city succeeded in proving one of the three justifications; only that the city made the attempt.[33]

The city attempted to circumvent this process by arguing that the outcome must be predetermined to establish a property interest.[34] The court rejected this argument and the case law relied on by the city because Resolution 270-1980 was sufficiently mandatory to support a claim of entitlement, required the city to provide proof of the listed criteria, and ACP was entitled to the justification process because they owned their property before the 1995 USP was adopted.[35] Thus, Resolution 270-1980 is "a set of conditions under state and local law, the fulfillment of which would give rise to a legitimate expectation"[36] by ACP that the city must provide evidence of an error or change.[37] The court determined that a quasi-judicial hearing was required to protect ACP's constitutionally protected property right but "the failure to hold a particular type of hearing was not by itself a failure of due process actionable under [s]ection 1983."[38]

The court rejected the city's argument that ACP's section 1983 claim must fail because adequate state remedies existed in the courts and

30. *See id*. at 1127.
31. *See id*. at 1128.
32. *See id*. at 1127.
33. *Albuquerque Commons*, 212 P.3d at 1128.
34. *Id*. at 1129.
35. *Id*. at 1130-31.
36. *Id*. at 1130.
37. *Id*. at 1127.
38. *Albuquerque Commons*, 212 P.3d at 1131-32.

the decision to proceed legislatively was a mere procedural mistake. The court found the city's interference with ACP's property interests required a predeprivation hearing when the deprivation was not unpredictable and preventable. Thus, "under the unusual circumstances of this case . . . the city's failure to provide ACP with an impartial tribunal violated ACP's right to procedural due process."[39] The court affirmed the trial court and the jury verdict on the section 1983 claim following additional discussions on a variety of topics. The matter was then remanded to the trial court for entry of a judgment consistent with the court's opinion.

## V. Conclusion

The revival of basic due process rights in the redevelopment context is an important development for property owners. The recent cases stand for the proposition that the courts are no longer going to rubberstamp municipal decisions that deprive property owners of the opportunity to be fairly heard by an impartial tribunal. A continuation of this trend would ensure that, going forward, property owners will and perhaps tenants will have a meaningful opportunity to assert their constitutional rights to protect their property.

39. *Id*. at 1135.