

NEW JERSEY SUPREME COURT CHIPS AWAY AT THE POWER OF EMINENT DOMAIN

By Kevin M. Hahn, Esq.

On June 13, 2007, the New Jersey Supreme Court decided *Gallenthin Realty Development Inc. v. Borough of Paulsboro*, and significantly altered the scope of eminent domain in the State of New Jersey. The court analyzed the intended meaning of "blighted" as used in the Local Redevelopment and Housing Law (LRHL). The outcome of that analysis has essentially redefined the local government's power to take private property. The Court's holding in *Gallenthin* expressly prohibits the controversial practice whereby municipalities seize private property for other uses where the owner has allegedly failed to utilize the land to its fullest potential.

In any eminent domain case, the State of New Jersey must satisfy three Constitutional prerequisites before seizing private property: (1) prior to taking the property, the State must afford the property owner due process of law; (2) the State must pay the affected party "just compensation" for property taken; and (3) the property may only be subject to a taking if it serves a "public use."

With respect to the "public use" requirement, the New Jersey Constitution contains a Blighted Areas Clause which provides that "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..." In addition, the Legislature enacted the LRHL, which empowers municipalities to designate property as "in need of redevelopment" and thus, subject to the State's power of eminent domain. In essence, the Blighted Areas Clause operates as both a

grant and a limit on the State's redevelopment authority with respect to "blighted areas." It allows government entities to exercise eminent domain with respect to "blighted areas," but only to the extent allowed by the New Jersey Constitution. In addition, these laws also permit non-blighted parcels to be included in a redevelopment plan, but only where the parcel is clearly necessary for the rehabilitation of a larger blighted area.

In the context of urban redevelopment, "blight" is described as "an area, usually in a city, that is in transition from a state of relative civic health to the state of being a slum, a breeding ground for crime, disease, and unhealthful living conditions." "Blight" was incorporated into the New Jersey Constitution when the Blighted Areas Clause was adopted. Even though the term "blight" has since evolved, it still retains its essential characteristic of deterioration or stagnation that negatively affects surrounding properties.

In specifying the *Gallenthin* property as "in need of redevelopment," the Borough of Paulsboro relied on the use of the term "blighted" in the LRHL. Paulsboro interpreted the relevant subsection to allow redevelopment of any property that is "stagnant or not fully productive" but still potentially valuable for "contributing to and serving" the general welfare. Although the New Jersey Constitution expressly authorizes municipalities to engage in redevelopment of "blighted areas," Paulsboro's interpretation of the LRHL would have allowed any property that is not operated in the most advantageous manner to be defined as

"blighted," eligible for redevelopment, and thus, subject to the municipality's power of eminent domain.

Paulsboro's sole argument in support of designating the *Gallenthin* property as "in need of redevelopment" was the owners alleged failure to utilize their property in a "fully productive manner." The record, however, established that the owners held their property with clear title and that the land has been periodically used for, among other things, a deposit site for dredging materials, employee parking and storage. Moreover, Paulsboro failed to demonstrate that the *Gallenthin* property was connected to a larger redevelopment plan. Therefore, since Paulsboro's sole basis for classifying the *Gallenthin* property as "in need of redevelopment" was based upon the municipality's claim that the owners were not being "fully productive," the Supreme Court found such a designation invalid. The Court flatly rejected Paulsboro's broad and sweeping interpretation of the LRHL, finding that their analysis could not be reconciled with the State's Constitution.

A redevelopment designation obviously carries serious implications for property owners. Although the Court acknowledged that community redevelopment is an important municipal power, it also recognized that this authority should not go unregulated. With the *Gallenthin* decision, it is now evident that the New Jersey Constitution does not permit the use of eminent domain against private property merely because the property is not being used in the best possible manner. ♦

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COURTER KOBERT SAVES REGIONAL SCHOOL DISTRICT

By Jason P. Gratt, Esq.

Michael Selvaggi (mselfaggi@ckclaw.com) and Jason Gratt (jgratt@ckclaw.com) recently prevented the dissolution of the Great Meadows Regional School District in Warren County, New Jersey.

On February 2, 2007 Liberty Township, one of the constituent municipalities to Great Meadows, filed a Petition with the New Jersey Commissioner of Education seeking the dissolution of this regional school district. According to its Petition, Liberty claimed that it would save \$1.6 million annually in tax dollars if the District were dissolved. The Petition also contended that Liberty would be able to educate its own pupils in a manner that was at least equal to the education that they were currently receiving at Great Meadows.

Under New Jersey Statutes, once the Commissioner of Education receives such a Petition, she is to forward the same to a Board of Review. The Board of Review is an *ad hoc* committee that is comprised of the Commissioner of Education, a member of the State Board of Education, the State Treasurer and the Director of the Division of Local

Government Services in the Department of Community Affairs.

This Board is to consider the effect of the proposed dissolution upon both the educational and financial condition of not only the withdrawing district, but also upon the remaining district. In considering these effects, the Board may deny an application seeking the dissolution of a regional school district if:

1. An excessive debt burden will be imposed upon the remaining districts, or the withdrawing district, or upon any of the constituent districts in the event of a dissolution;
2. An efficient school system cannot be maintained in the remaining districts or the withdrawing district, or in any of the constituent districts in the event of a dissolution, without excessive costs;
3. Insufficient pupils will be left in the remaining districts, or in any of the constituent districts in the event of a dissolution, to maintain a properly graded school system; or

4. Any other reason, which it may deem to be sufficient.

On behalf of the Board, Mr. Selvaggi and Mr. Gratt argued that not only was Great Meadows providing an above average education to its students, at a cost that was below both the county and State averages, but also that the dissolution of the district would cause Liberty to incur an "excessive debt burden."

According to both Liberty as well as the Board's experts, if Liberty's proposed dissolution were to occur, Liberty would be left with only \$1.6 to \$2.8 million in available borrowing capacity. It was argued that such a minimal amount was simply not adequate in the event of cost overruns or other unexpected budget contingencies.

In rendering its decision in this matter, the Board of Review sided with the arguments presented by Great Meadows, and held that Liberty's Petition Seeking the Dissolution of the Great Meadows Regional School District was to be denied. This decision was based, primarily, upon the fact that Liberty would have to incur an "excessive debt burden" if its proposed dissolution was granted. ♦

SCHOOLS MUST EXERCISE REASONABLE CARE

By Marysol Rosado Thomas, Esq.

Your child will be safer at the end of the school day as schools must now exercise reasonable care for supervising students' safety at dismissal. Recently, the Supreme Court of New Jersey determined that a school's duty to exercise reasonable care for children in its custody does not arbitrarily cease upon the ringing of the school's dismissal bell. Rather, the duty continues beyond the dismissal bell.

In imposing this duty upon schools, the Court reasoned that fairness and public policy supports the creation of this duty. First, parents entrust their children to the care of schools, essentially relinquishing their supervisory role and transfer-

ring it to school officials. Also, children face many dangers at dismissal, many of which cannot be appreciated because of their youth. Moreover, school officials are already required to exercise care in supervising students during the day and have the opportunity and ability to continue that supervision at dismissal. Finally, the State has a strong interest in protecting our children, which is not served if the duty arbitrarily ceases when the school bell rings.

In order to satisfy its duty of reasonable care at dismissal, school districts must: (1) adopt a reasonable age-appropriate dismissal supervision policy; (2) provide adequate

notice to parents and guardians of that policy; and (3) effectively implement that policy and adhere to reasonable requests from parents or guardians regarding dismissal. By satisfying the foregoing requirements, a school district will discharge its duty to exercise reasonable care.

One caution to parents and guardian's, however, a school's obligation to act reasonably at dismissal does not completely diminish your responsibilities to read school notices, communicate with the school and independently act reasonably and responsibly. ♦

CONSEQUENCES OF AN IMPROPERLY FILED RESIDENTIAL CONSTRUCTION LIEN

By James F. Moscagiuri, Esq.

While the Construction Lien Law (the "CLL") was adopted more than thirteen years ago, many contractors, subcontractors and suppliers remain unaware of the CLL's impact upon residential construction projects. In order to protect both the homeowner and the potential lien claimant, the CLL demands strict compliance with pre-lien and post-lien requirements, and failure to adhere to said requirements can bestow serious consequences upon a wayward claimant.

First and foremost, a purported lien that has not been filed in substantial compliance with the CLL's form, manner and time requirements will often result in the forfeiture of all claimed lien rights as well as the right to file any corrected lien claim. Furthermore, the claimant can also be held liable for all court costs, reasonable legal expenses, including attorneys' fees, as well as any damages incurred by another party forced to defend against or discharge a defective lien claim. The CLL expressly grants the Courts authority to reduce such an award to an enforceable monetary judgment against the claimant who improperly maintained the defective lien.

Accordingly, in order to protect against the disturbing results set forth above, a potential

lien claimant must fully comply with all the steps set forth in the CLL when dealing with residential construction. The process is commenced with the filing of a Notice of Unpaid Balance and Right to File Lien ("NUB") with the county clerk in the county where the residence is located. The potential lien claimant must then serve the NUB on the owner of the residence and other appropriate parties. A simultaneous Demand for Arbitration with the American Arbitration Association ("AAA") must also be served on the owner of the residence and other interested parties.

Subsequent to the potential lien claimant's service of the NUB and arbitration demand, the AAA arbitrator will contact the involved parties and request any submission in opposition to the claim. Within thirty (30) days from the date of the initial filing, the arbitrator will determine whether the potential lien claimant has complied with the requirements of the CLL and, if so, will investigate the validity and amount of the lien claim through a review of the respective party's submissions. If the arbitrator finds substantial compliance with the CLL and sufficient evidence of the claim, a decision will be rendered to the lien claimant and the claimant

can thereafter file and serve the lien claim against the owner of the residence. All of the foregoing must be accomplished within ninety (90) days from the date the claimant provided its last work at the residence. The ninety (90) day period includes the thirty (30) day period in which the AAA arbitrator is required to render a decision. Therefore, the potential lien claimant would be wise to proceed with the filing of its NUB and arbitration demand immediately and, certainly, no later than sixty (60) days from the date the claimant provided its last work at the residence.

As you can see, the CLL established very stringent requirements that, if neglected, can even result in a potential lien claimant's own liability. Clearly, the loss of the right to file a lien can have serious consequences in and of itself. The entry of an enforceable judgment for another's attorneys' fees and costs compounds the seriousness of a claimant's failure to adhere to the CLL's requirements. Accordingly, an inexperienced lien claimant would be well served to seek legal advice immediately upon its provision of last work at a residential construction site in order to learn how to properly navigate the CLL's procedures and avoid its potential pitfalls. ❖

EMPLOYER ALERT

NEW MANDATORY PAID FAMILY LEAVE LIKELY TO BECOME LAW

By Howard A. Vex, Esq.

To the dismay of many large and small New Jersey businesses, Governor Corzine and many members of the State Legislature continue to search for ways to increase an employee's ability to take extended temporary leave from work. One such bill (S 2249), which may be adopted imminently, would require virtually all New Jersey employers to grant employees up to 10 weeks per year of temporary paid leave to care for a new baby or an immediate family member with a serious health condition. Unpaid leaves for such purposes are already

available under existing family leave laws at companies with 50 or more workers, but larger businesses can often absorb lengthy absences with less disruption, and the unpaid nature of such leaves encourages employees to accelerate their return to work. In sharp contrast, this new law would dramatically alter the family leave landscape because it will apply to virtually all employers, irrespective of size, and because the new paid component will open a floodgate for potential abuse.

The new paid leave benefit would be funded through an additional payroll tax on covered employees and would be paid through the existing Temporary Disability Insurance (TDI) system at the same rate as would be paid to the employee for disability leave. However, establishing eligibility for the new paid family leave would be far easier than qualifying for temporary disability. The phrase "immediate family member" has been defined quite broadly, encompassing the employee's father, mother,

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Michael W. Rosati
Marisela S. Ross

1001 Route 517

Hackettstown, NJ 07840

Tel. (908) 852-2600 • Fax (908) 852-8225

172 West State Street

Trenton, NJ 08608

Tel. (609) 656-1330 • Fax (609) 393-1990

23 Cattano Ave.

at Chancery Square
Morristown, NJ 07960

Tel. (973) 285-1281

48 Trinity Street

Newton, NJ 07860

Tel. (973) 875-0046

200 Madison Avenue

New York, NY 10016

Tel. (212) 576-1172

PEOPLE IN THE NEWS

Courter, Kobert & Cohen, P.C., is pleased to announce that:

JOEL A. KOBERT has recently been appointed by the New Jersey Supreme Court to serve on the Ad Hoc Committee on the Code of Judicial Conduct. This committee will be chaired by Former Chief Justice Debra T. Poritz and is comprised of eighteen members of the judiciary and seven attorneys practicing in the State of New Jersey. This committee will review the Code of Judicial Conduct, hold hearings, and make recommendations to the New Jersey Supreme Court.

JOHN J. ABROMITIS was appointed to the Board of Directors of Family Promise of Warren County, Inc., which is a member of the Interfaith Hospitality Network. Family Promise provides housing and related services to homeless families in Warren County.

ANTHONY J. ZARILLO, JR. attended the Insurance Council of New Jersey's 9th Annual Symposium in Woodbridge, New Jersey on June 15, 2007. Among the continuing legal education courses offered were seminars on New York/New Jersey conflicts of laws for automobile accidents and updates on bad faith law and pending legislation to expand the New Jersey Wrongful Death Act.

EMPLOYER ALERT

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brothers, sisters, children, grandparents, in-laws and any other relative residing in the employee's home. Since the employee will receive pay for each week on leave to care for any one or more of these persons, and since this benefit will renew every 12 months, the potential impact upon New Jersey employers is enormous. While there is an obvious strong social value in allowing employees to take nec-

essary leave to care for seriously ill family members, the pending legislation is poorly crafted and will almost certainly lead to rampant abuse and increased litigation. Business owners and others who would be impacted by this pending law should not hesitate to contact their Assemblymen, State Senator and the Governor to express their concerns. ❖

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

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Hackettstown, New Jersey 07840
1001 Route 517
Courter, Kobert & Cohen, P.C.

