

LAWYER OF THE YEAR: RONALD CHEN

Pundit for Eminent Domain Reform

New Jersey's public advocate is the draftsman of the state's new hard line against arbitrary takings for redevelopment

By Mary Pat Gallagher

As soon as the U.S. Supreme Court ruled in 2005 that the U.S. Constitution does not bar public takings for private redevelopment, the question arose: would states follow suit or enact their own prohibitions?

Perhaps nowhere was the issue more pronounced than in small, densely populated New Jersey, where buildable land is scarce and large swathes of it are off-limits to developers.

Last June 13, the New Jersey Supreme Court answered resoundingly — construing the state constitution to curtail drastically the power to condemn property for redevelopment.

The architect of the doctrine of *Gallenthin Realty Development v. Borough of Paulsboro*, 191 N.J. 344, was Public Advocate Ronald Chen, who appeared as amicus curiae and whose prior research and advocacy on the subject of eminent domain laid the groundwork for the decision.

For his instrumental role in bringing about the *Gallenthin* decision, and for his continuing efforts to achieve reform of eminent domain in New Jersey, Chen is the *Law Journal's* Lawyer of the Year.

In 2006, Chen, who had been an assistant dean and professor at Rutgers Law School-Newark, teaching civil rights and constitutional law among other courses, became the first lawyer to hold the public advocate post since Gov. Christine Whitman abolished it in 1994.

Eminent domain was the first major issue he chose to take on, and to some extent the decision was a no-brainer. The bombshell the U.S. Supreme Court dropped in *Kelo v. City of New London*, 545 U.S. 469 (2005), was still reverberating.

Bills were introduced in the New Jersey Legislature, some calling for constitutional amendments to limit or to ban takings of land for redevelopment.

Chen says the issue touched a raw nerve, since the idea of using eminent domain “to take people’s homes and give them to private developers raised a very understandable public concern.” He says he found a “disconnect” between what the constitution permits and the reality.

Last May, Chen wrote a scathing report to Gov. Jon Corzine calling for comprehensive reform of the use of eminent domain for redevelopment.

In the report, titled “In Need of Redevelopment: Repairing New Jersey’s Eminent Domain Laws,” Chen laid out a litany of misfeasance by which local governments, often with the backing of developers, leave property owners with little or no recourse once a decision has been made to move ahead with a development project.

Chen wrote that New Jersey’s Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq., falls short of protecting the rights of owners and tenants. He said two of the law’s criteria for “blighted” — the state constitutional standard for such takings — expand the definition to the point where property that isn’t blighted can be seized.

Chen said that over the years since adoption of the

1947 constitution, the term “blighted” has been broadened to the point “where it now ceases to impose a real limitation.”

“The current law’s vague and broad definition of ‘area in need of redevelopment’ could apply to virtually any property in New Jersey that the government feels it could better utilize or make more productive: any building could have another floor added; any house could be razed to make way for luxury condominiums; and any business could be replaced with a bigger business that generates more tax revenue,” he said.

To fix the problem, Chen advocated passage of pending legislation that would narrow the definition of “blighted” and infuse more due process into the system by which blight designations are made.

Chen actively pushed for legislative change, meeting with lawmakers and testifying before committees. But due to an inability to achieve a consensus among competing interest groups, no measure passed, leaving



Public Advocate
Ronald Chen

PHOTO BY CARMEN NATALE

New Jersey’s Legislature one of only a handful that has not acted in response to the *Kelo* ruling.

Fortunately for Chen, a judicial remedy was in sight. The *Gallenthin* case provided a perfect forum for him to advance to the state’s highest court the same arguments about misuse of the Local Redevelopment and Housing Law.

Paulsboro had designated as blighted 63 undeveloped acres, mostly wetlands, along Mantua Creek for use as a deepwater port in an industrial redevelopment area. The town declared the property to be “not fully productive” and “in need of redevelopment” — both grounds for a taking under N.J.S.A. 40A:12A-5(e). The condemnation was upheld by two lower courts.

Chen argued that applying the statute to property merely because it is not as productive as it could be exceeds the authority vested by the state constitution, Art. 8, sec. 3, par. 1, to condemn blighted land. He contended the statute should apply only to real property that is decayed or deteriorated in a way that is detrimental to the public health, safety or welfare.

Chief Justice James Zazzali, writing for the unanimous Court, agreed with Chen that the designation was incompatible with the constitution’s blighted areas clause and thus invalid. “We need not examine every shade of gray coloring a concept as elusive as ‘blight’ to

conclude that the term’s meaning cannot extend as far as Paulsboro contends,” Zazzali wrote.

“At its core, ‘blight’ includes deterioration or stagnation that has a decedent effect on surrounding property ... Paulsboro’s interpretation ... which would equate ‘blighted areas’ to areas that are not operated in an optimal manner, cannot be reconciled with the New Jersey Constitution,” Zazzali said.

Presuming that the Legislature did not intend to pass an unconstitutional law, Zazzali interpreted the statute as applying to land that is stagnant because of title, ownership and similar issues that might impede development.

The opinion concluded with guidance for planning boards and lower courts — requested by Chen — on the standard of review. Redevelopment designations are entitled to deference if supported by substantial evidence, which requires more than the net opinion of an expert or “bland recitation of applicable statutory criteria and a declaration that those criteria are met,” wrote Zazzali.

Gallenthin’s impact was felt at once. Within a week, Bergen County Superior Court Judge Joseph Conte used it to vacate a redevelopment designation in *Land Plus LLC v. Hackensack*, L-8029-06. And by the end of July, at least three appellate courts and two more trial courts had applied *Gallenthin*: *LBK Associates LLC v. Lodi*, A-1829-05; *Cramer Hill Residents Association v. Primas*, A-5486-05; *HJB Associates v. Belmar*, A-6510-05; *Evans v. Maplewood*, ESX-L-6910-06; and *Mulberry St. Property Owners Association v. Newark*, ESX-L-9916-04.

Chen served as amicus curiae in *LBK Associates*, which led to a July 24 decision that Lodi improperly designated property containing trailer parks as needing redevelopment.

He also appeared in consolidated appeals involving Long Branch and Harrison, which raise procedural due process issues of timing and notice. Property owners can challenge a redevelopment designation by an action in lieu of prerogative writ, which must be filed within 45 days of the determination. But it is often years before a town starts condemnation proceedings. By that time, when a property owner realizes what is at stake and turns to the courts for protection, it can be too late, Chen says.

Compounding the problem is the inadequacy of the notice that tells people their property might be designated in need of development but does not mention that that could lead to condemnation, he adds.

Chen was recently granted amicus status in *Harrison Redevelopment v. DeRose*, A-0958-06, and the Appellate Division has asked for briefing, due Jan. 8, on “the apparently unsettled question of whether a property owner who fails to challenge a redevelopment designation within forty-five days of its adoption by the governing body may still challenge ... the public purpose of the redevelopment and the consequent taking of the owner’s property, by way of defense in an ensuing condemnation action.” Courts have gone both ways on the issue, and there is no published opinion. The attorney general is also an amicus in the case, scheduled for oral argument in February.

Chen filed an amicus brief in *City of Long Branch v. Brower*, A-191-06, on Jan. 11, and then fended off the city’s effort to strike it on the basis it raised new issues, such as notice. No argument date has been set.

Chen emphasizes he is not opposed to using eminent domain for redevelopment, which is very important in a highly developed state like New Jersey with a great need for affordable housing. “If we complicate it too much, the cities will suffer,” he adds.

And he points out that he hasn’t initiated any cases but merely joined those that were going to have to be defended anyway, and thus minimized the cost to local governments. “All we’re adding is our legal advocacy,” and to the extent it is effective, he makes no apology. ■