



IC/L-A Washington Road, LLC v. Township of West Windsor and the Planning Board of the Township of West Windsor: DeRose by Any Other Name?

By: Todd D. Greene, Esq.

On January 15, 2010, the Honorable Linda R. Feinberg, A.J.S.C., Mercer County, decided the first half of a challenge¹ to the Township of West Windsor's (Township) proposed redevelopment of the area surrounding the Princeton Junction Train Station. The challenge was filed on behalf of IC/L-A Washington, LLC (Intercap), a property owner whose 350-acre parcel is included in the redevelopment plan. In resolving the dispute regarding Intercap's standing to challenge the Township's in need designation—a challenge brought nearly three and a half years after the designation was adopted—the Court found Intercap had standing based upon the Township's inadequate notice of the designation and the prima facie inadequacy of the Township's Redevelopment Study.

Judge Feinberg's January 15, 2010 decision in this regard is remarkable, as the Court seemingly extended the Appellate Division's decision in *Harrison Redevelopment Agency v. DeRose*, 398 N.J. Super. 361 (App. Div. 2008), thereby permitting Intercap's challenge to proceed despite the fact that: (1) no condemnation action by the Township of West Windsor was filed; (2) the Township asserted on numerous occasions that properties in the redevelopment area would not be acquired through eminent domain; and (3) Intercap, which purchased its parcel after the in need designation, was instrumental in the creation of the Township's Redevelopment Plan and spent substantial sums of money attempting to garner the public's support for the Plan.

West Windsor's efforts to redevelop the Princeton Junction area began six years ago. On April 12, 2004, the Township directed the Planning Board to investigate whether the Princeton Junction area was in need of redevelopment. Upon completion, the Redevelopment Study found that the Princeton Junction area, including Intercap's property, was in need of redevelopment. The Redevelopment Study was scheduled to be the subject of a hearing before the Planning Board on November 2, 2005. Notice of the hearing was published in *The Times* and was sent by way of certified mail to all property owners in the proposed Redevelopment Area. It is undisputed by the parties, however, that the Notice sent did not comply with the requirements set forth in *De Rose*, which require that notice to the affected property owners contain the condemnation implications of a blight designation and information regarding the time during which property owners may present a challenge to the designation.

Intercap filed its complaint on May 4, 2009, almost three and a half years after the Township approved the Planning Board's recommendation to adopt the redevelopment designation for the area, and well after the 45 day period for filing a prerogative writ action. Judge Feinberg noted, however, that although R. 4:69-6(a) establishes a 45 day time period for filing an action, the time period may be enlarged where the interests of justice manifestly require such an extension. *Ibid.* see also *Brunetti v. New Milford*, 68 N.J. 576, 585 (1975). Here, the Court found that "important and novel constitutional questions" and "important public rather than private interest which require adjudication or clarification" warranted the extension of time in accordance with the standards set forth in *Brunetti*, *supra.*, at 586.

¹ The challenge involves both Intercap's standing, as well as the substantive merits of Intercap's claims. As of the date of this article, Intercap's substantive claims are still pending before the Court.

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Although the Court could not make a substantive determination about the sufficiency of the in need designation because the record of the hearings had not been provided, Judge Feinberg concluded that the Redevelopment Study upon which the Township's designation was based, was "ripe with constitutional infirmities." Specifically, the Court noted that some of the summaries of the parcels designated in the Redevelopment Study were designated as in need of redevelopment based on Criterion E, which consisted of merely one word "underutilization," and which mirrored the characterization struck down by the New Jersey Supreme Court in *Gallenthin v. Paulsboro*, 191 N.J. 344 (2007).

Moreover, relying on the Appellate Division's decision in *DeRose*, which permits property owners in a condemnation hearing to raise a defense beyond the 45 day limitation provided for in N.J.S.A. 40A:12-6, the Court also noted that the Township's inadequate notice of the in need designation was another constitutional issue that supported granting an enlargement of time.

Judge Feinberg reasoned that although *DeRose* was decided over two years after West Windsor adopted the in need designation at issue, the holding applied retroactively to the extent that it concerned a potential defense to a condemnation proceeding yet to be initiated. The Court explained that "it is evident under *DeRose* that plaintiff's claims will be heard eventually, despite the untimeliness." Accordingly, the Court saw no reason to deny Intercap the opportunity to present its claims now, rather than being forced to wait for a condemnation action that may never be filed.

In permitting late challenge, the Court also agreed with Intercap that the constitutional implications raised are so great that a "very important public interest arises as a consequence." The Court acknowledged that Intercap purchased the property after the Township designated the area in need of redevelopment and that it was very involved in creating the Township's Redevelopment Plan and rallying the public to support it, but the issues at stake implicated a "very important public interest" beyond those interests expressed by the parties to the case. The Court could not ignore the notice issues and problems with the Redevelopment Study identified by Intercap because "doing so would be tantamount to condoning the unconstitutional use of redevelopment strategies and standards at the expense of the public and of property owners."

For further information on this important decision, please contact Frank J. Petrino, Esq. at 609.989.5029 or by e-mail at fpetrino@sternslaw.com or Todd D. Greene, Esq. at 609.989.5023 or by e-mail at tgreene@sternslaw.com.