

In The
Supreme Court of the United States

GEORGE A. GALLENTHIN, III, ESQ.,

Petitioner,

v.

BOROUGH OF PAULSBORO, PAULSBORO
PLANNING/LAND USE BOARD and PAULSBORO'S
COUNCIL AS FOLLOWS: GARY C. STEVENSON,
PAULSBORO MAYOR; JOHN A. GIOVANNITTI,
COUNCIL PRESIDENT; and COUNCILPERSONS: ERIC
DITONNO, ALFONSO G. GIAMPOLA, LARRY HAYNES,
SR., THEODORE D. HOLLOWAY, II, and JOE KIDD,
individually, jointly, severally and in the alternative,

Respondents.

**On Petition For A Writ Of Certiorari
To The Superior Court Of New Jersey,
Appellate Division**

OPPOSITION TO A WRIT OF CERTIORARI

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QUESTION PRESENTED

Has Petitioner's private real property been taken,
or threatened with a taking without just compensation
in violation of the Fifth Amendment?

PARTIES TO THE PROCEEDING

Pursuant to *Rule 14.1(b)*, the following list identifies all of the parties appearing before the New Jersey Supreme Court:

Petitioner, George A. Gallenthin, III, Esq., who was Plaintiff and Petitioner before the New Jersey Supreme Court.

Respondents, Borough of Paulsboro, Gary C. Stevenson, John A. Giovannitti, Eric Ditonno, Alfonso G. Giampola, Larry Haynes, Sr., Theodore D. Holloway, II, Joe Kidd, and the Paulsboro Planning/Land Use Board, who appeared as Defendants and Respondents before the New Jersey Supreme Court.

CORPORATE DISCLOSURE STATEMENT

Respondents, Borough of Paulsboro, Gary C. Stevenson, John A. Giovannitti, Eric Ditonno, Alfonso G. Giampola, Larry Haynes, Sr., Theodore D. Holloway, II, and Joe Kidd, are not non-governmental corporations.

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OPINIONS BELOW

Respondents rely upon the statement set forth in Plaintiff-Petitioner's Petition for Certiorari.

JURISDICTION

Respondents rely upon the statement set forth in Plaintiff-Petitioner's Petition for Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The only statutes involved in this case are the New Jersey Local Redevelopment and Housing Law, *N.J.S.A. 40A:12A-1 et seq.*, and more particularly, *N.J.S.A. 40A:12A-15* and *N.J.S.A. 40A:12A-7*. The Fifth Amendment to the United States Constitution is also involved.

N.J.S.A. 40A:12A-15 provides as follows:

N.J.S.A. 40A:12A-15. Implementation of redevelopment plan.

In accordance with the provisions of a redevelopment plan adopted pursuant to section 7 of P.L.1992, c.79 (C.40A:12A-7), a municipality or redevelopment entity may proceed with clearance, replanning, conservation, development and rehabilitation of an area in need of rehabilitation. With respect to a redevelopment project in an area in need of

rehabilitation, the municipality or redevelopment entity, upon the adoption of a redevelopment plan for the area, may perform any of the actions set forth in section 8 of P.L.1992, c.79 (C.40A:12A-8), except that with respect to such a project the municipality shall not have the power to take or acquire private property by condemnation in furtherance of a redevelopment plan, unless: a. the area is within (1) an area determined to be in need of redevelopment prior to the effective date of P.L.2013, c.159, or (2) a Condemnation Redevelopment Area and the municipality has complied with the notice requirements under subparagraph (e) of paragraph (5) of subsection b. of section 6 of P.L.1992, c.79 (C.40A:12A-6); or b. exercise of that power is authorized under any other law of this State.

Due to its length, *N.J.S.A. 40A:12A-7* is reproduced in the appendix.

STATEMENT OF THE CASE

This case involves Petitioner's misunderstanding of the effect of a redevelopment plan adopted for a municipal-wide rehabilitation area within the State of New Jersey.

By way of Resolution #157.16, adopted on September 6, 2016, the Borough designated the entire Borough of Paulsboro as an area in need of rehabilitation ("Rehabilitation Area"). (Pet. App. 4a & 18a). Even

though it was part of the record below, Petitioner has failed to reproduce in his appendix Resolution #157.16. At no time did Plaintiff challenge the adoption of this rehabilitation designation. (Pet. App. 4a, n.2). A redevelopment plan for the Rehabilitation Area, dated September 6, 2016 was prepared (“Redevelopment Plan”). (Pet. App. 4a). On October 3, 2016, the Planning Board held a public meeting and voted to recommend that the Redevelopment Plan be adopted for the Rehabilitation Area. (Pet. App. 4a & 18a). This Redevelopment Plan was adopted by the Borough on October 4, 2016, by way of Ordinance #11.16. (Pet. App. 19a & 42a-46a).

Although Petitioner’s Appendix contains what is labeled as “Redevelopment Plan for the Borough of Paulsboro, New Jersey” this reproduction omits relevant sections of the Redevelopment Plan. For example, it omits Section VI which provides:

The existing use, bulk, design and performance standards, and all other standards set forth in the Borough Zoning and Land Development Ordinances shall apply to the Project Area.

It is intended and expressly understood that with respect to any issue of relevant land use and building requirements not specifically addressed in this Redevelopment Plan, those issues are subject to the Zoning and Land Development Ordinances and all other ordinances and regulations of the Borough of Paulsboro not contravened in this Redevelopment Plan as permitted by *N.J.S.A. 40A:12A-7(a)(2)*.

Development of the Project Area shall be governed by the underlying zoning currently in effect through the Borough of Paulsboro, and subject to any and all existing Redevelopment Plans.

Moreover, Petitioner's Appendix omits Section VIII which provides as follows: "**VIII. Property Acquisition.** The Project Area is a rehabilitation area and therefore, pursuant to the LRHL, property acquisition by eminent domain *is not* authorized." (Emphasis original) (See also Pet. App. 9a).

Nothing in the Redevelopment Plan authorizes the Borough of Paulsboro to acquire Petitioner's property by condemnation, nor does it otherwise restrict Petitioner's use of its property in any manner that was otherwise permitted prior to the adoption of the Redevelopment Plan. (Pet. App. 47a-49a).

On or about November 14, 2016, Plaintiff filed a Verified Complaint in Lieu of Prerogative Writ, challenging the adoption of the Redevelopment Plan. (Pet. App. 5a). Respondents filed a Motion to Dismiss the Complaint for failure to state a claim and on March 10, 2017, the Trial Court granted this Motion. (Pet. App. 13a-14a). In doing so, the Trial Court explained, that there was a difference between a redevelopment designation and a rehabilitation designation, and carefully noted that a rehabilitation designation does not permit the use of eminent domain. (Pet. App. 21a-22a). The Trial Court concluded that "Plaintiff's complaint does not suggest any grounds that would give rise to a cause

of action against the Borough for violating the Local Redevelopment and Housing Law . . . ” (Pet. App. 17a).

Dissatisfied with the Trial Court’s decision, Petitioner appealed the decision to the New Jersey Appellate Division. (Pet. App. 2a). The Appellate Division affirmed the Trial Court’s decision stating, “[h]aving reviewed the record, we agree with the judge’s conclusion that the Plan is not arbitrary, capricious, or contrary to law for the reasons expressed in her written opinion dated March 10, 2017, supplementing her decision from the bench on March 3, 2017.” (Pet. App. 8a). The Appellate Division went on to explain:

Plaintiff’s property was designated as an area in need of rehabilitation, which precludes the municipality from exercising eminent domain as to his property. See *N.J.S.A. 40A:12A-15* (“With respect to a redevelopment project in an area in need of rehabilitation, . . . the municipality shall not have the power to take or acquire private property by condemnation in furtherance of a redevelopment plan. . . .”). The Plan expressly acknowledges that “[t]he Project Area is a rehabilitation area and therefore . . . property acquisition by eminent domain is not authorized.”

(Pet. App. 9a).

Undeterred, Petitioner then sought review from the New Jersey Supreme Court. (Pet. App. 41a). Finding the Petition insufficient to warrant review, the New Jersey Supreme Court denied Petitioner’s Petition for Certiorari. *Ibid.*

Petitioner now seeks Certiorari from this Court.

SUMMARY OF THE ARGUMENT

This Petition for Certiorari should be denied because Petitioner has not satisfied the grounds for granting the same. Despite claims that the Courts below decided an important federal question in a way that conflicts with decisions of this Court, Petitioner has cited to no cases in which there are any conflicts.

Petitioner cites to three U.S. Supreme Court cases, none of which conflict with the New Jersey Supreme Court's decision in this case. Ultimately, the Fifth Amendment and its right to just compensation is not implicated in this case because, as all of the Courts below have found, there has been no taking of any property rights, nor can there be, simply by designation of a rehabilitation area and adoption of a redevelopment plan for the same.

This case predominantly involves a question of state law, namely, the Local Redevelopment and Housing Law, *N.J.S.A. 40A:12A-1 et seq.* ("LRHL"), and the powers authorized thereunder which are granted to municipalities. All levels of the New Jersey Courts have said that no property rights have been taken from Plaintiff. Absent a taking, neither the Fifth Amendment nor the Due Process Clause have been implicated.

ARGUMENT

Supreme Court Rule 10 sets forth the general grounds for granting Certiorari. Petitioner appears to be relying upon subsection (b), as point heading I of his brief alleges a conflict between Supreme Court decisions and that of the New Jersey Supreme Court in this case. (Compare Rule 10(b) with Pet. 9). However, the Petition appears to be based on a fundamental misreading of the cited cases and also a fundamental misunderstanding of the applicable law.

I. Adoption of the Redevelopment Plan does not Result in a Taking.

Despite the fact that all of the Courts below have been quite clear in indicating that no taking has occurred (Pet. App. 8a-9a & 22a), Petitioner still persists in alleging that a taking has occurred. (Pet. 12). Specifically, Petitioner alleges that the Respondents have taken “tangible real estate powers” such as “1.) [the] power to contract on Petitioner’s land; 2.) [the power to] issue bonds on Petitioner’s land; 3.) [the power to] contract for planning on Petitioner’s land; 4.) [the power to] lease or convey land by fee Simple Absolute; 5.) [the power to] construct improvements on Petitioner’s land; 6.) and, all things necessary and convenient to carry out the above powers.” (Pet. 22).

Presumably, Petitioner’s arguments are based on the fact that once a redevelopment plan is adopted, under the LRHL, a municipality is authorized to execute certain powers, including undertaking a

redevelopment project, execution of an agreement with a redeveloper to undertake a redevelopment project, issuing bonds for purposes of undertaking a redevelopment project, leasing and selling land for purposes of implementing a redevelopment plan, and the generic power to “[d]o all things necessary and convenient to carry out its powers.” *N.J.S.A. 40A:12A-8(a), (e), (f), (g), and (n).*

Where Petitioner’s claim fails is that while the LRHL may empower Respondents to do these things upon adoption of a redevelopment plan, Respondents have not taken any action to exercise said powers. Petitioner does not allege that Respondents adopted resolutions or ordinances authorizing execution of any agreements, nor physically entered his property to undertake construction, nor issued any bonds. Even assuming that the exercise of such powers would constitute a taking, until Respondents have actually exercised these powers, no taking has occurred. Essentially, Petitioner simply misunderstands the LRHL.

Adoption of a redevelopment plan is merely adoption of an “outline for the planning, development, redevelopment or rehabilitation of the project area . . . ” *N.J.S.A. 40A:12A-7(a)* (Resp. App. 1a). It confers no authority to acquire private property. As the New Jersey Courts have explained:

While a “redevelopment plan” may address an AINred [area in need of redevelopment], or an AINreh [area in need of rehabilitation] or both, *N.J.S.A. 40A:12A-3*, that does not mean that a redevelopment plan may provide for

the taking or acquisition of property within an AINreh.

If there was any reasonable basis for concern about the threat of a municipality's obtaining authorization to effectuate an acquisition or taking as a consequence of a governing body's delineation of AINreh, since the adoption of Chapter 159 there no longer is. To the extent that [plaintiff] argues otherwise, it misunderstands the law.

R. Neumann & Co. v. City of Hoboken, 98 A.3d 1213, 1221 (N.J. Super. Ct., App. Div. 2014). All levels of the New Jersey Courts in this case agreed. (Pet. App. 8a-9a, 22a, 30a & 41a).

A similar argument to that which Petitioner advances was previously rejected by New Jersey Courts. See *Dock St. Seafood, Inc. v. City of Wildwood*, 47 A.3d 785, 794, 796 (N.J. Super. Ct., Law. Div. 2011), *aff'd*, 42 A.3d 247 (N.J. Super. Ct., App. Div. 2012) (stating no taking occurred where the plaintiff "did not give governmental agencies an opportunity to act on any proposed redevelopment plans for the property").

Nothing in the Redevelopment Plan prevents Petitioner from utilizing his land in the same manner as he could prior to adoption of the Redevelopment Plan. Petitioner conveniently ignores the power authorized under N.J.S.A. 40A:12A-8(j).

It bears mentioning that, under N.J.S.A. 40A:12A-8(j), plaintiffs are free to pursue an agreement with Hackensack that would

permit them to rehabilitate their property in a way consistent with the redevelopment plan. See *N.J.S.A. 40A:12A-8(j)*; *see also* William M. Cox & Stuart R. Koenig, *New Jersey Zoning & Land Use Administration*, § 38-7.2 at 953 (2014) (stating that ‘statute encourages property owners to voluntarily repair and rehabilitate buildings and associated improvements to bring them up to current standards usually accomplished through an agreement with the governing body or redevelopment entity’).

62-64 Main St., L.L.C. v. Mayor & Council of City of Hackensack, 110 A.3d 877, 896 (N.J. 2015).

In short, the mere adoption of the Redevelopment Plan has no effect on Petitioner’s bundle of rights. More importantly, under *N.J.S.A. 40A:12A-15*, the power of eminent domain is specifically prohibited. Because adoption of a redevelopment plan does not and cannot effectuate a taking, review by this Court is unnecessary.

II. None of the Cases Cited by Petitioner Conflict with the New Jersey Supreme Court’s Decision.

In justifying Certification in this case, Petitioner claims that the decision of the New Jersey Supreme Court conflicts with decisions of this Court. (Pet. 9). Petitioner cites to three cases in his Petition: (1) *Chisholm v. Georgia*, 2 U.S. 419 (1793); (2) *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); and (3) *Kelo v.*

City of New London, Conn., 545 U.S. 469 (2005). (Pet. 14, 18, 23). However, Petitioner provides absolutely no discussion as to how the New Jersey Supreme Court decision in this case conflicts with those cases.

In fact, none of the cases cited to by Petitioner conflict. *Chisholm* was not a takings case, but rather was a case that dealt with the issue of whether a state could be subject to the jurisdiction of the Courts. While *Kaiser Aetna* is a takings case, its holding was limited to whether the government could prevent a property owner from exercising its “right to exclude” the public without paying just compensation. *Kaiser Aetna*, 444 U.S. at 179-180. This Court concluded that the government’s prevention of the exercise of the right to exclude constitutes a physical invasion of private property for which just compensation was required. *Id.* at 180. Here, Petitioner has not asserted that his right to exclude has been impacted. Moreover, Respondents are not seeking to force Petitioner to allow members of the public to access his private property. Thus, there is no conflict with *Kaiser Aetna*.

Finally, as to *Kelo*, although it was a takings case, the question in *Kelo* was limited to whether or not a taking “for the purpose of economic development satisfies the ‘public use’ requirement of the Fifth Amendment.” *Kelo*, 545 U.S. at 477. Ultimately, the Court concluded that a “program of economic rejuvenation” was sufficient to constitute a public purpose to satisfy the public use requirement under the Fifth Amendment. *Id.* at 484. The decision of the New Jersey Supreme Court in this case does not conflict with *Kelo*.

because although Respondents in this case are proceeding under a program of economic rejuvenation (Pet. App. 4a), they are not seeking to acquire Petitioner's property. Unless and until a taking has occurred, or any taking is contemplated, or a process begun, the Fifth Amendment is not implicated.

Because the decision of the New Jersey Supreme Court in this case does not conflict with any decisions of this Court, review by this Court is unnecessary.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that Petitioner, George A. Gallenthin, III, Esq.'s Petition for Certiorari be denied.

Respectfully submitted,

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