

Reprinted from May 23, 2005

TRACKING THE DEAL

Amboy Aggregates of South Amboy is battling to avoid being acquired under the town's powers of eminent domain.



A Question of Power

Eminent domain, the right of a municipality to take private property for public use, is one of the most far-reaching powers of government. It has become extremely controversial in New Jersey and elsewhere in the country as towns have started exercising that power to facilitate projects by private developers. In a landmark case, *Kelo v. City of New London*, the U.S. Supreme Court will decide this June whether Susette Kelo and six other homeowners in a Connecticut neighborhood are forced to sell their homes.

For a look at local aspects of the issue, **NJBIZ** assembled five people representing different pieces of the eminent domain puzzle. Present were Richard Rosamilia, president of Amboy Aggregates, a sand-mining company in South Amboy that faces the threat of its property being taken; Arthur Burgess, a Woodbridge lawyer representing Amboy Aggregates; John Inglesino, mayor of Rockaway Township from 1996 to 2002 who is now a partner at the Roseland law firm of Stern & Kilcullen and represents developers; William Ward, partner at the law firm of Carlin & Ward in Florham Park who represents property owners; and Meryl Frank, mayor of Highland Park, who is about to launch a redevelopment plan in her city. **NJBIZ** senior writer William Quinn moderated.

NJBIZ: Mr. Rosamilia, maybe you could start by telling us how your company is dealing with redevelopment and related concerns.

Rosamilia: Not very well. I'm president and owner of Amboy Aggregates, a company that mines sand in Ambrose Channel, the main shipping channel to New York harbor. We've been operating for 20 years, and prior to that, another 20 years under

another owner.

We have unique equipment and under federal and state permits we mine sand, bring it back to our port facility in South Amboy and unload that sand—which is then processed and made into the fine aggregate that goes into concrete, asphalt products and building products in general for northern New Jersey, the five boroughs of New York and the eastern shore of Con-

necticut. We are probably, if not the largest, the second-largest supplier of fine aggregate in the Northeast.

The uniqueness of our operation is that we are probably the only ones in the U.S. that mines sand in the ocean and takes that sand for processing to make fine aggregates. What's also unique about our operation is we load about 50% of our product by barge, so most of the product is delivered by water,

TRACKING THE DEAL

and the remaining 50% is delivered by trucks.

We're an ongoing business; we employ 65 people at our site; we're good neighbors; and we provide an important product. But the town has decided it doesn't like a sand operation in its community, therefore it wants to take over our property. The city of South Amboy just recently has blighted our property, and we're appealing that.

NJBIZ: What is the town's proposal? What do they want to do?

Rosamilia: We're not sure. We've heard a lot of things. We believe it's going to be some residential, some flex space, office and warehousing.

NJBIZ: This is partly an outgrowth of the Lighthouse Bay development next door?

Rosamilia: Again, it's very difficult to get answers, but that's what we understand.

NJBIZ: Reports are that New Jersey has 40 towns right now that are in some form of eminent-domain proceedings for redevelopment. That's one of the biggest numbers of any state. Why has it become such a popular tool for development or redevelopment?

Inglesino: I'm a lawyer and I represent a lot of redevelopers. I also served as a mayor and now serve as a freeholder in Morris County. I have the perspective of the mayor or of a municipality and that of a redeveloper's lawyer.

The answer is pretty obvious. New Jersey is the most densely populated state in the nation. We don't have much developable land left. In my county, for example, the Highlands law was passed last year which took some 800,000 acres of property—without paying just compensation. Where are people going to live? How is our state economy going to grow? How are we going to provide the money for municipalities to provide services to Trenton? Where is all this going to occur? It's going to occur in urban and mature suburban areas. That's why redevelopment is happening so much in New Jersey.

In fact, the state Constitution provides

the tools for redevelopment to occur—Article 8, Section 3, paragraph 1. It provides very clearly that the taking of blighted property is a public purpose and public use.

NJBIZ: The fight seems to be about what is blighted, right? What is blighted and what is not?

Burgess: In response to John's [Inglesino] comment, the line which supersedes the federal Constitution leaves a lot to be desired. It's not so clear as we've identified in this Supreme Court case of Kelo vs. City of New London. The Supreme Court is going to have a hard time wrestling with this decision.

It appeared from the comments made in the courtroom [in February] that the landowners may not necessarily have an upside on this issue. But if you go back historically to the concepts of the United States Constitution, that particular clause with regard to the taking of property for public purposes didn't come out of the woodwork by accident.

So if you start delving into history—and history is a pretty good teacher—not only have people fought their entire lives for the possession and ownership of property, back in the earliest times, but they are fighting for it today. I mean, look at the Gaza Strip and all the rest of it that's going on. It's a concept that's ingrained in the idea of freedom and liberty. And when government comes along to take property, it's one of the most invasive acts that can possibly occur.

I have worked as a law director in the township of Woodbridge for 15 years, so I come from that side of the fence as well. I've represented builders and developers in my practice, I've been at it about 40 years, and I've seen both sides of this picture.

I don't want to discuss the South Am-



"We're an ongoing business; we employ 65 people at our site; we're good neighbors; and we provide an important product. But the town has decided it doesn't like a sand operation in its community, therefore it wants to take over our property."

Richard Rosamilia

President, Amboy Aggregates

boy case in detail—we are in litigation—but I can tell you that one of the sad parts of it is it started back in 1992. And part of this process of eminent domain has so affected property owners in this state because municipalities and other governmental agencies throw this black cloud over a piece of property and take years and years to do something about it. I don't see taking property for a supermarket is a public purpose.

Frank: There are different cases here. In the case of Highland Park, most of the redevelopment we're doing is new curb cuts and interconnected parking. If you drive down Raritan Avenue in Highland Park, you'll see there are individual driveways and individual parking lots. Most of the redevelopment we're doing

is cutting off those individual driveways and connecting the parking.

We are talking about several blocks, and most of the people [impacted] are very enthusiastic. We are being very clear and very careful and we are saying that we'd like the owners to do the redevelopment themselves, to come up with creative ideas.

Of course, politics gets involved in it. The political opposition jumps in and says that they're going to get the assessed value from 10 years ago and we're going to raise five blocks. Very often, it's in your interest as someone who is in a redevelopment area to create chaos. There is a philosophy issue here about taking property. We have the law on our side in this case.

NJBIZ: What's your objective; what are you trying to do in Highland Park?

Frank: The areas in Highland Park have been identified as far back as 1945 and then in 1981. A 1984 study also has pictures of these properties, and they remain exactly the same. In one case, they use a car lot in the middle of our downtown to service them.

TRACKING THE DEAL

They have never been improved; they are contaminated. They are in the process of cleaning and they have a loan from the DEP [state Department of Environmental Protection].

If they sell [the property], they have to pay back the loan. If they keep the property for 15 years, they're forgiven [the loan]. So we're working on a piece of legislation to forgive the loan if you are in redevelopment.

We don't want anyone to be hurt by this. We want them to come out saying, "I made out like a bandit from redevelopment." It doesn't help me if these people who are residents are complaining three years down the line. My measure of success is not just this thriving downtown, and it's not just a stable ratable base. If people say they were treated fairly at the end of the process, that is part of the measure of success. It is very clear that in Highland Park we need redevelopment.

NJBIZ: These properties have been there for a long time but are not what you want in downtown?

Frank: They've never been improved. We can't develop. Who's moving in next to a contaminated service station? It's not happening. So even the neighbors can't develop. The other businesses are saying, "We can't thrive."

We are a walking town. You'll walk if you're commuting to the train station, but you are not if you're strolling down in front of one after another after another of unimproved property and then to the next bit.

The owners are very cooperative and understand what redevelopment means and understand it is to their advantage, and in some cases want to do the redevelopment themselves, which is terrific. If they can come up with an idea, I'd say, "Mazel tov, wonderful, do it." And they come up with very creative ideas that were not our own, and you know what—they work.

NJBIZ: In the Amboy Aggregates case, it's a business. It's functioning, and it's not dilapidated. Is it really blighted?

Ward: At my firm of Carlin and Ward, we represent property owners in eminent-do-

main cases. I've been doing eminent-domain cases for 35 years. I've done them on both sides of the fence. I started out at the Attorney General's office, and then the Department of Transportation (DoT). I also did all the acquisitions for the sports complex in East Rutherford. Since 1982 I've been exclusively representing property owners against condemning authorities. Most of my cases were against the Department of Transportation. Now, the New Jersey Schools Construction Corp. is doing a lot of acquisitions.

The most recent and controversial area is redevelopment projects. This is where you are getting a lot of property-owner outrage, at their properties—which they perceive to be viable—being taken and given to a developer for another use. This is where the Kelo case is very important. The Supreme Court took this case—it didn't have to—and is going to address "public purpose" and how they address it remains to be seen. We probably will have a decision on that in June.

But the discussion at the oral arguments leads you to believe they're not going to do anything. And I'm wondering why they took this case. There is going to be some refinement of what constitutes "public purpose." But, in the colloquy between the lawyers, they might try to throw the property owner a bone saying, "Well, you can take into consideration what up to this point is *verboden*, which is project enhancement." Project enhancement is the value created by the project of the condemning authority.

So, for instance, if Amboy Aggregates is taken and the highest and best use of that site is residential, they could claim a residential value in the litigation. But that is not the issue for a lot of property owners.

I'm litigating against the township of Bloomfield; I have cases in Long Branch.



"If you start delving into history—and history is a pretty good teacher—not only have people fought their entire lives for the possession and ownership of property, back in the earliest times, but they are fighting for it today. And when government comes along to take property, it's one of the most invasive acts that can possibly occur."

Arthur Burgess

Lawyer

Those people just don't want their properties taken. In Long Branch, for instance, the next section of that big project along the beach is taking very viable residential properties that have been owned 30-40 years; they're not blighted by any stretch of imagination. They are going to be taken, given to Hovnanian and he's going to put up condos.

Those people don't want their properties taken. Those properties were blighted in 1996. The people never fought the ordinance at the time it was passed. But they've been living with the cloud of condemnation over their properties for almost 10 years.

NJBIZ: It makes it effectively almost impossible to sell?

Ward: If you sell, you're going to have to sell at a

discount because any owner who does the least bit of due diligence will know that it could be condemned, and that will discount the price there. You're also a captive because if you wanted to sell and move to Florida, you're strapped.

A lot of these people in Long Branch are senior citizens. They grew up in Newark, bought houses at the beach and then retired and lived at the beach and improved those houses. They're never going to be able to buy into the new developments, because they don't have that kind of money, they can't afford those taxes, and they didn't fight the original blight declaration. But nevertheless they're going to try to fight the acquisition of the properties.

NJBIZ: It's a matter of principle?

Ward: It is a matter of principle and people are very outraged. And that's where you have the controversy coming in. In a DoT case where they are widening the highway or putting in a new roadway, nobody argues that that's not a public purpose. They're taking property for a school—that's clearly a public purpose. But then people say, "I'm be-

TRACKING THE DEAL

ing taken and you flip the property over to a developer to build other residential or a Target or a Home Depot, how is that a public purpose?”

New Jersey has in its Constitution “public use,” even though “use” includes blight. But there has been an amendment to the statute where it’s no longer called blight—it’s called “area in need of redevelopment,” which sounds a lot nicer.

NJBIZ: How do you respond to it, if they are taking over property for another residential use or taking commercial property for another commercial use?

Inglesino: The property has to be blighted or declared in need of redevelopment before you can do anything. That’s a law not just in New Jersey but on the federal level as well. The U.S. Supreme Court, back in 1954 [in *Parker v. Berman*] held that the taking of blighted property is also a public use.

The law, both federal and state, is well settled in this regard. We have a statute that enumerates the criteria to determine whether an area is in need of redevelopment or not. There is a process that is public, that safeguards the rights of property owners. There are public hearings required, and determinations need to be made as to whether or not a particular area satisfies the statutory criteria. Courts have said they are not going to impose their judgment or the judgment of the municipality but the courts have also said in New Jersey that that judgment made by the municipality is made on the basis of substantial evidence.

NJBIZ: Is there still a lot of discretion on the part of the local authority?

Inglesino: Yes, there is, as there should be, and the courts have recognized that. Courts are not planning boards or municipal governing bodies; courts are there to ensure that the statutes and the Constitution are adhered to, and they have repeatedly said with respect to cases emanating in Princeton and South Orange that so long as there is substantial evidence, they are going to defer to the judgment made by the municipality.

Kelo, by the way, has really limited relevance to New Jersey in some of the threshold issues raised by counsels with

regard to property owners. Kelo is not a case about whether you can take blighted property. That argument is not being made by the plaintiff. In fact the plaintiff’s attorney recognized that there is a right for the government to take blighted property. The issue in Kelo is whether or not you can take property that is not blighted, just for the purposes of economic development, and higher and better use. The question is whether or not that is a logical extension of the police powers.

So what is Kelo really about? I think Bill Ward is right. It may be more about what is just compensation.

NJBIZ: Suppose that happened—the change on the right to compensation—how would that affect redevelopment projects? Would the developers be somewhat less interested?

Inglesino: Developers like certainty. From my experience, that’s something they would generally be supportive of, within reason. The concept of revisiting the issue of just compensation is one that warrants review. Good profitable businesses in blighted areas, for example, arguably get hurt. That’s an issue that should be looked into. The other issue is clarity of title, where after being identified for redevelopment, nothing happens for decades.

Burgess: One of the examples I would like John [Inglesino] to hear is we have been cooperating with the city of South Amboy since around 1990, suggesting to them, “You find us a place to go, and we’re gone.” Now in spite of that offer, they’ve done absolutely nothing to fill that bill.

I too represent developers, and their bottom line is: “We want the cheapest deal we can get.” The Amboy Aggregates property is zoned for heavy industrial use, or light industrial use, or both. That’s not a



“If you sell, you’re going to have to sell at a discount because any owner who does the least bit of due diligence will know that it could be condemned, and that will discount the price there. You’re also a captive because if you wanted to sell and move to Florida, you’re strapped.”

William Ward
Partner, Carlin & Ward

very attractive piece of property anywhere. Industrial uses are no-nos in New Jersey.

What I see happening with this business of redevelopment is a quick fix to the sins of the past. Municipalities did not adopt zoning changes. Somebody will come in and negotiate with us to buy our property because now they can put up those warehouses or those single-family homes. You can’t just do this by coming in with a redevelopment plan or suggesting that blight doesn’t really underline and undermine the right of ownership—it just simply does.

If you say blight is the only criterion, I get into the background on cases and ask, “How did that declaration come about?” Or looking at what happened during all these years to

put up property in that position? You probably—given the criterion under blight—are the most productive piece of ground in the entire city. We give \$10 million to the state of New Jersey and the federal government because we pay a royalty and we also take from the Army Corps of Engineers the obligation that they were making or paying to keep the channel open.

Ward: Good, productive unblighted properties in otherwise blighted areas are subjected to redevelopment declarations as well.

Burgess: If you look at South Amboy 10 years ago, you’ll see that the one piece where they develop these homes—looking out over the bay, that are selling supposedly for a million dollars—was nothing more than a dump site.

The town made a deal with the developer. The zoning for the area was industrial but they ignored it because now they had a redevelopment plan and a rehab agency which can do anything they want to do.

Frank: In our case, I think in the end, we are not going to need to use eminent domain.

TRACKING THE DEAL

Some of them are businesses that are simply willing to sell or want to get involved in redevelopment. Most of the businesses will be able to be placed right in Highland Park.

Ward: The mayor [Meryl Frank] has a very good approach. But if you have a company like Amboy Aggregates where they are going to be taken, and the property is going to be converted to another use, there is no hope that they can remain in possession and stay there. They cannot relocate.

Even though the other part of eminent domain is providing relocation assistance, they're never going to find another site on the waterfront that will accommodate the facilities they have. If they go out of business, the maximum business-discontinuance allowance is \$10,000, which is nothing, for any business, much less a business like they have. If they can't resist the taking, then they're going to be arguing about value.

NJBIZ: You think it might be time for change in the New Jersey laws on eminent domain?

Ward: Up to this point New Jersey has been very clear that you cannot claim project enhancement in the eminent-domain case.

NJBIZ: What about the business-discontinuation allowance?

Ward: Certainly the business-discontinuance allowance should be increased dramatically, and it should be tied into what the business is. Right now if they put General Motors out of business, General Motors gets \$10,000. And Amboy Aggregates would get \$10,000. Relocation assistance is not part of the Supreme Court eminent-domain case; it's administrative, and it's all according to rules and regulations. Those regulations badly need updating in a lot of areas.

NJBIZ: Should there be some different standards for traditional public uses such as highways and schools versus some recent types of redevelopment for commercial or residential purposes?

Ward: I don't have a lot of hope the Supreme Court is going to dig into that. They might tweak it, but not to the point where they are going to K.O. all these redevelopment projects in New Jersey and many other states.

Inglesino: Because they are not taking up the



"Of course, politics gets involved in it. The political opposition jumps in and says that they're going to get the assessed value from 10 years ago and we're going to raze five blocks. Very often, it's in your interest as someone who is in a redevelopment area to create chaos."

Meryl Frank
Mayor, Highland Park

issue of blight. Once you are not talking about blight, you are not talking about redevelopment in New Jersey. That's where people fall short when they say that Kelo is going to somehow save all the property owners in New Jersey.

Redevelopment is a planning tool. You hear the argument all the time from lawyers who represent property owners, however inconsistent it is with the master plan. That's okay. In fact, the law provides that the redevelopment plan can be inconsistent with the master plan. The redevelopment plan governs because you recognize in New Jersey that in urban and mature suburban areas which have become blighted and in many cases very underutilized, there hasn't been the incentive for municipalities to plan over the past

several decades.

That's why the law provides for even properties that in and amongst themselves may not meet any of the statutory criteria for blight if the generality of the area meets the statutory criterion.

NJBIZ: So you could conceivably have a viable business inside a blighted area?

Inglesino: Correct.

Burgess: We've had the redevelopment statute on the books since 1948 and the best that has happened recently is that they took the word blight out and replaced with "area in need of redevelopment." And they've got a lot of tax incentives that are connected with redevelopment and rehabilitation, to induce developers to come into the picture.

NJBIZ: One of the things people in eminent-domain cases say they find most threatening is the idea that you could look at any property and find some technical violation that could be the basis for a blight designation. People say they feel threatened because if



TRACKING THE DEAL

your property can always be taken for a higher-valued use, well, where's the limit?

Ward: Here's what happens; I'm dealing with this. Lawyers who generally represent property owners will get together in a coalition and they scare [the owners] that their properties [may] be taken. And all of a sudden, these people [are] thinking their properties would be taken, at much, much less than the fair market value. So there's tremendous misinformation out there at the general public level.

People need to understand that government needs to compensate you at fair market value for your property—you can't just take it. They also need to understand that developers want to work with folks. They are willing, generally, to pay fair market value. In many cases they are willing to pay more than fair market value because that saves them time and dollars fighting the process that makes the lawyers rich. So what we need in New Jersey is better communication with ordinary folks, so they understand nobody is going to come and take their property.

NJBIZ: What's your feeling about this, Mr. Rosamilia?

Rosamilia: I'm a bitter property owner. First, it's great, John [Inglesino]. I wish we could meet some of the developers you work with. The guy that we have to deal with basically gave us an offer that was even below the assessed value of the property, and said, "Take it leave it." He said, "I'm going to take your property." He pretty much said that. So the mayor, since the

1990s, was going to relocate us. As a matter of fact, last week was the first property he brought me to. And I said it looks fine, if the acreage they're telling me it is works out. Maybe that will work out.

We need to be on the water, because we have a ship. We are a designated port, we provide services for the construction industry in New Jersey, which is important to the residents of New Jersey also. You take us out of the equation, put us out of business, okay, 65 people lose jobs. But the price of sand which goes into concrete and asphalt will double. Because there's sand in South Jersey; there's no sand in North Jersey—it's all stone. We provided sand that normally would go out to the mud dump off of Sandy Hook.

We took that sand and made use of it in concrete and asphalt, and it keeps the costs down on these construction projects. When we're out of that equation, those costs are going to go up. That's where we are at today. We haven't seen cooperation from the developer or the city council. Wish I was in Highland Park.

NJBIZ: How do you feel about the principles involved? Do you think the town should have a right to take a business to re-



"The state Constitution provides the tools for redevelopment to occur—Article 8, Section 3, paragraph 1. It provides very clearly that the taking of blighted property is a public purpose and public use."

John Inglesino

Partner, Stern & Kilcullen

develop its waterfront?

Rosamilia: The mayor here was talking about contaminated sites. We don't have a contaminated site. I could see her point of view. Ours happens to be in a community where they built million-dollar homes along the waterfront. There's a developer who sees that property and knows he can make a lot of money on this piece of property, and he wants to do the same up in that area.

Ward: Understandably so, there is always the possibility that the process is abused, and that's why the law requires a series of public actions.

Inglesino: Municipalities would be well advised to make it a very open process that would encourage and accommodate that kind of a public hearing. That does

straighten the process. And frankly it straightens the determination made by the municipality because it would be very hard for a lawyer to argue that there is not substantial evidence upon which to base the blight declaration if that lawyer has been given the opportunity to cross-examine witnesses, present his own experts, etc., etc. So maybe those kind of procedural safeguards are what you are looking to change in the law.

NJBIZ: Maybe that's a good place to stop. Thank you all for your participation. ♦