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**COMMUNITY JUST COMPENSATION: THE NEED FOR SUFFICIENT PROPERTY OWNER PROTECTIONS AND FOCUSED ECONOMIC REDEVELOPMENT IN NEW JERSEY EMINENT DOMAIN CASES**

By Franklin Barbosa, Jr.\*

**I. Introduction**

*“Since the days of Greece and Rome when the word ‘citizen’ was a title of honour, we have often seen more emphasis put on the rights of citizenship than on its responsibilities. And today, as never before in the free world, responsibility is the greatest right of citizenship and service is the greatest of freedom’s privileges.”*<sup>1</sup>

- Robert F. Kennedy

In 2010, after a New Jersey appellate court rejected an attempt by the city of Long Branch to seize “blighted” properties under its eminent domain power, Long Branch Mayor Adam Schneider dejectedly stated “I think eminent domain is a dead issue in New Jersey” and claimed that he would no longer propose the use of eminent domain for any redevelopment in his city.<sup>2</sup> This was seen as a shocking statement because at the time of the decision, and until very recently, New Jersey was only one of nine states that had not legislatively responded to the U.S. Supreme Court’s decision in *Kelo v. City of New London*.<sup>3</sup>

Instead of an immediate legislative response, New Jersey judicially responded to *Kelo* in *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, wherein it placed limits on the ability of municipalities to designate an area as “in need of redevelopment” or “blighted.”<sup>4</sup> In

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\* Special thanks to Professor Angela Carmella and Anthony Della Pelle for providing guidance and unique insights into the world of eminent domain

<sup>1</sup> Clarke Stevens, *RFK: Quotes to Live By*, HUBPAGES, (Jan. 30, 2012), <http://clarke-stevens.hubpages.com/hub/RFK-Speeches-on-Democracy>

<sup>2</sup> Cottage Emporium, Inc. v. Broadway Arts Center, LLC, A-0048-07T2, 2010 WL 1526045 (N.J. Super. Ct. App. Div. 2010); A-0048-07T2 MaryAnn Spoto, *Appeals court rules against Long Branch in longtime eminent domain dispute*, NJ.COM, April 16, 2010, [http://www.nj.com/news/index.ssf/2010/04/appeals\\_court\\_rules\\_against\\_lo.html](http://www.nj.com/news/index.ssf/2010/04/appeals_court_rules_against_lo.html)

<sup>3</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005); Larry Morandi, *State Eminent Domain Legislation and Ballot Measures*, NATIONAL CONFERENCE OF STATE LEGISLATURES, (Jan, 1, 2012), <http://www.ncsl.org/issues-research/env-res/eminent-domain-legislation-and-ballot-measures.aspx>

<sup>4</sup> *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, 191 N.J. 344 (2007)

*Gallenthin*, the New Jersey Supreme Court interpreted the New Jersey Constitution to require limits on legislative redevelopment powers. Therefore, it interpreted the New Jersey Local Redevelopment and Housing Law as not allowing blight designations merely because a local planning board found that an area was “stagnant or not fully developed.”<sup>5</sup> Rather, the court asserted that an agency determination of blight is valid only if the designated area is fully unproductive and marked by “deterioration or stagnation that has a decadent effect on surrounding property.”<sup>6</sup> While this decision improved redevelopment law in New Jersey, it did not create a statutory scheme of property owner protections as had been accomplished in forty-three other states.<sup>7</sup>

After numerous failed attempts to pass eminent domain reform legislation, the New Jersey Legislature finally passed A-3615, in 2013, which codified the *Gallenthin* decision and attempted to create an alternative to using eminent domain for redevelopment: a direct negotiation process with homeowners.<sup>8</sup> Despite this advancement, it is merely a “scaled-down version” of a bill introduced in 2011, lacking many of the individual property owner protections found in the 2011 bill.<sup>9</sup> A-3615 also lacks requirements for “community just compensation,” -- direct benefits to the community that arise out of redevelopment projects, such as employment opportunities.

This Note describes A-3615, compares its provisions to past bills that failed to garner enough support, and posits a scheme to protect property owners in situations involving blight determinations and create concentrated economic development that will have a positive, lasting

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<sup>5</sup> Id. at 368

<sup>6</sup> Id. at 365

<sup>7</sup> Morandi, *supra* note 3

<sup>8</sup> Michael Booth, *Law Creates Alternative to Using Eminent Domain for Redevelopment*, NEW JERSEY LAW JOURNAL, Sep. 16, 2013

<sup>9</sup> Id.

impact on the redeveloped community. First, this Note lays out the history and development of the eminent domain doctrine in the United States starting with the interpretation difficulties faced by federal and state courts and ending with the infamous *Kelo* decision. Second, it describes, in detail, the most common post-*Kelo* improvements to state eminent domain laws. Third, it examines the fairly unique New Jersey reaction to *Kelo*, especially the early legislative attempts to improve the state eminent domain law, the standard-setting *Gallenthin* decision, and subsequent court decisions that overturned inadequate blight determinations. Fourth, this Note examines New Jersey's most recent legislative attempts to improve eminent domain laws, including Senate Bill 1451 (S-1451), which was rejected in 2011, and Assembly Bill 3615 (A-3615), which was recently passed by the legislature and signed into law by Governor Christie in September 2013. Finally, it suggests four legislative changes to A-3615 that would provide for community just compensation. Among these legislative suggestions are: requirements that developers construct mixed-use projects in commercial areas that will promote the hiring of local residents; requirements to replace affordable housing lost as a result of redevelopment; and incentives to allow municipalities to prevent blight by seizing underwater mortgages through use of eminent domain.

## **II. The Development of the Eminent Domain Doctrine**

Eminent domain is the power of the government, under the Fifth Amendment of the U.S. Constitution, “to take private property for public use in exchange for just compensation.”<sup>10</sup> During the 20<sup>th</sup> century, state courts had much difficulty defining what constitutes a “public use.” The U.S. Supreme Court stepped into the debate and began to shape the modern eminent domain doctrine with its decisions in *Berman v. Parker*<sup>11</sup> in 1954 and *Hawaii Housing Authority v.*

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<sup>10</sup> U.S. Const. amend. V.

<sup>11</sup> *Berman v. Parker*, 348 U.S. 26 (1954)

*Midkiff*<sup>12</sup> in 1984. In *Berman*, a Washington, D.C. department store owner challenged the constitutionality of the District’s eminent domain statute and the inclusion of his property in a redevelopment scheme, on the grounds that private property could not be taken for the purpose of merely developing “a better balanced, more attractive community.”<sup>13</sup> He also contended that his property was not blighted, and therefore, could not be included in the redevelopment plan.<sup>14</sup> The Court disagreed with both of these arguments and declared that a legislature may authorize redevelopment in an area without having to assess the status of each building within the redevelopment zone, and a taking would not be held invalid so long as the redevelopment plan intended to remedy an ailment affecting the public.<sup>15</sup>

The Court in *Midkiff* similarly echoed a deferential standard for legislatures. In *Midkiff*, a Hawaiian landowner challenged a local land redistribution law that was intended to break up a land oligopoly that had existed in Hawaii since the 1800s.<sup>16</sup> In its opinion, the majority reiterated the Court’s position in *Berman* and declared that where the use of eminent domain is “rationally related to a conceivable public purpose” the court would not prohibit the taking.<sup>17</sup> As such, the Court found that the redistribution plan served a public purpose because “regulating oligopoly and the evils associated with it is a classic exercise of a State’s police powers.”<sup>18</sup>

#### **A. *Kelo v. City of New London***

The *Kelo* decision was a product of decades of Supreme Court deference to legislatures, as evidenced by the *Berman* and *Midkiff* decisions. In *Kelo*, nine property owners were challenging a redevelopment plan for the Fort Trumbull area of New London, Connecticut. The

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<sup>12</sup> *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984)

<sup>13</sup> *Berman*, 348 U.S. at 28-31.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 32-36

<sup>16</sup> *Midkiff*, 467 U.S. at 232

<sup>17</sup> *Id.* at 241

<sup>18</sup> *Id.* at 242, *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978); *Block v. Hirsch*, 256 U.S. 135 (1921); *see also People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316, cert. denied, 329 U.S. 772 (1946)

redevelopment plan called for seizing tracts of land owned challengers to build new residences, hotels and other waterfront development with the purpose of economically revitalizing Fort Trumbull, an area declared economically distressed by a Connecticut state agency.<sup>19</sup> Included within the redevelopment plan, was a proposal by Pfizer to build a multi-million dollar research facility on property adjacent to Fort Trumbull.<sup>20</sup> Notably there was no dispute between the parties as to the fact that the property being seized was not blighted or harmful.<sup>21</sup>

Incensed by the proposed takings, the property owners requested that the court develop a bright-line rule that economic development does not qualify as a public use.<sup>22</sup> They argued that the development would only provide purely economic benefits to private parties, use of eminent domain for economic benefits would blur the line between public and private purpose, and the court should require that economic benefits be reasonably certain in these kinds of takings cases.<sup>23</sup>

The majority upheld the Court's tradition of judicial deference towards legislatures while also clarifying that "[p]romoting economic development is a traditional and long-accepted function of government."<sup>24</sup> In an attempt to further elucidate the standard for the public use doctrine, the Court rejected the challengers' contention that the development served a purely private purpose. The Court conceded that "the government's pursuit of a public purpose will often benefit individual private parties" and the city's goal was no less legitimate because private

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<sup>19</sup> Kelo, 545 U.S. at 473

<sup>20</sup> Id.

<sup>21</sup> Id. at 475

<sup>22</sup> Id. at 484

<sup>23</sup> Id. at 484-488

<sup>24</sup> Kelo, 545 U.S. at 484

parties stood to gain from the redevelopment scheme.<sup>25</sup> Thus, the *Kelo* decision gave much deference to legislative findings of public purpose.<sup>26</sup>

### III. State Responses to *Kelo*

In the aftermath of the *Kelo* decision, Judge Richard Posner, currently sitting on the Seventh Circuit Court of Appeals, predicted that the political response to *Kelo* would be so strong that it would “obviate the need for judicial protection of property rights.”<sup>27</sup> Posner was partially correct and partially incorrect in his predictions. Indeed, the general public overwhelmingly disagreed with the *Kelo* decision, with some public opinion polls showing that 80 to 95 percent of Americans disapproved of the decision.<sup>28</sup> However, as we will see later, the need for judicial protection of property rights would end up playing a large role in states like New Jersey.<sup>29</sup>

In the aftermath of *Kelo*, many states acted on the wave of emotion created by the decision. States like Texas, Alabama, and Delaware enacted reforms in the weeks after the decision, while Ohio immediately placed a nearly year-long moratorium on the use of eminent domain for development.<sup>30</sup> To date, forty-three states have enacted improvements to their eminent domain laws or constitutions.<sup>31</sup> Of those forty-three, ten were approved by voter

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<sup>25</sup> Id. at 485-486; Amanda W. Goodin, Note, *Rejecting the Return to Blight in Post-Kelo State Legislation*, 82 N.Y.U. L. Rev. 180, 182 (2007)

<sup>26</sup> *Kelo*, 545 U.S. at 485-486

<sup>27</sup> Somin, Ilya. “Post-*Kelo* America,” *Reason.com*, April 20, 2007. <http://reason.com/archives/2007/04/20/post-kelo-america>

<sup>28</sup> Id.; Stephen Ansolabehere & Nathaniel Persily, Field Report: Constitutional Attitudes Survey, Knowledge Networks, 61 (July, 14, 2010) [http://www.law.columbia.edu/null?&exclusive=filemgr.download&file\\_id=55737&rtcontentdisposition=filename%3DPersily](http://www.law.columbia.edu/null?&exclusive=filemgr.download&file_id=55737&rtcontentdisposition=filename%3DPersily) (83.5% of respondents believed that the government should not be able to use eminent domain in accordance with the *Kelo* decision); Monmouth University/Gannet News Poll, *The Power of Eminent Domain*, (Oct. 5, 2005) [http://www.monmouth.edu/polling/admin/polls/MUP01\\_4.pdf](http://www.monmouth.edu/polling/admin/polls/MUP01_4.pdf) (90% of respondents were against taking low value homes to build a shopping center); See, e.g., Judy Coleman, *The Powers of a Few, the Anger of the Many*, THE WASHINGTON POST, Oct. 9, 2005 (reporting that *Kelo* provoked a firestorm of resentment)

<sup>29</sup> *Gallethin Realty Development, Inc. v. Borough of Paulsboro*, 191 N.J. 344 (2007)

<sup>30</sup> Goodin, *supra* note 24, at 193

<sup>31</sup> Morandi, *supra* note 3

referendum.<sup>32</sup> Generally, the state legislative reforms fall into six broad categories, of which none are mutually exclusive.<sup>33</sup> For example, Georgia has enacted reforms that prohibit eminent domain use for economic development, limit redevelopment to situations where the property will be used and possessed by the public, restrict blight determinations to general safety and welfare concerns, and require greater public notice.<sup>34</sup> On the other hand, Wyoming’s reforms only involve limitations on public use.<sup>35</sup>

The reform efforts are not without their critics. Texas, a state whose post-*Kelo* reforms prohibit eminent domain usage for economic development, was harshly criticized for writing an exception into the law that allowed for use of eminent domain to construct the referendum-approved Dallas Cowboys stadium.<sup>36</sup> Other states like Pennsylvania and Minnesota received similar criticisms for creating five-year exemptions for their major metropolitan cities, sparking fears that those exemptions would be extended in the future and thus render the reforms moot.<sup>37</sup> Some states have been criticized for poorly crafted or ineffective legislation. For example, West Virginia has been criticized for permitting blight determinations when minor defects such as “faulty lot layout” or “obsolete platting” are present.<sup>38</sup> The California Health and Safety Code allows blight determinations even in situations involving inadequate parking or high crime rates, thus creating fears for potential abuses.<sup>39</sup>

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<sup>32</sup> Somin *supra* note 26

<sup>33</sup> Larry Morandi, *Eminent Domain Legislation: Post-Kelo Update*, NATIONAL CONFERENCE OF STATE LEGISLATURES, (Jan, 1, 2012), <http://www.ncsl.org/documents/natres/EminentDomainPost-Kelo.pdf> (Six general categories: prohibition of the use of eminent domain for economic development; strict interpretation of the “public use” principle, which requires that property be used or possessed by the public or public agencies; restricting the use of eminent domain to blighted properties and redefining blight to only include situations involving public health, safety, or welfare; requiring greater public notice and negotiation; or requiring compensation at a rate greater than fair market value.)

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Goodin, *supra* note 24, at 194

<sup>37</sup> Somin, *supra* note 26

<sup>38</sup> Goodin, *supra* note 24, at 196; W. VA. Code Ann. § 16-8-3

<sup>39</sup> Cal. Health & Safety Code § 33031(b)(5), 33030(c), 33031(b)(7)



Despite these criticisms, property rights advocates have lauded a number of state reform efforts.<sup>40</sup> For instance, the Institute for Justice has praised Florida for its outright prohibition of eminent domain use for economic development.<sup>41</sup> Georgia, which has also received praise, defines blight so narrowly that it must meet at least two conditions from a set list, and those conditions must influence health or safety problems.<sup>42</sup> Indiana's eminent domain statute is even stricter than the Georgia statute because it requires that property meet all of the factors listed within the statute.<sup>43</sup>

#### **IV. The New Jersey Reaction to *Kelo***

New Jersey's reaction to *Kelo* cannot be fully understood without an examination of New Jersey eminent domain law. Article I of the New Jersey Constitution proclaims, "private property shall not be taken for public use without just compensation."<sup>44</sup> Since the days prior to the 1947 New Jersey Constitutional Convention, the state of New Jersey has used eminent domain to combat dilapidation and stagnation, although without much success.<sup>45</sup> To deal with this issue and spur redevelopment in New Jersey, the framers of the New Jersey Constitution placed the blighted areas clause in the constitution.<sup>46</sup>

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<sup>40</sup> Institute for Justice. "Five Years After *Kelo*: The Sweeping Backlash Against One of the Supreme Court's Most-Despised Decision," last modified 2013. <http://www.ij.org/five-years-after-kelo-the-sweeping-backlash-against-one-of-the-supreme-courts-most-despised-decisions>

<sup>41</sup> Id.; Fla. Stat. § 73.014

<sup>42</sup> Goodin, *supra* note 24, at 195; Ga. Code Ann. § 22-1-1

<sup>43</sup> Ind. Code § 32-24-4.5-7; Goodin *supra* note 24 at 196

<sup>44</sup> N.J. Const. art. I, para. 20.

<sup>45</sup> Chester R. Ostrowski, A "Blighted Area" of the Law: Why Eminent Domain Legislation Is Still Necessary in New Jersey after *Gallenthin*, 39 SETON HALL L. REV. 225, 230-232 (2009) (The provision promulgates 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.)

<sup>46</sup> Id. at 231-232; N.J. Const. art. VIII, § 3 ("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. Municipal, public or private corporations may be authorized by law to undertake such clearance, replanning, development or redevelopment; and improvements made for these purposes and uses, or for any of them, may be exempted from taxation, in whole or in part, for a limited period of time during which the profits of and dividends payable by any private corporation enjoying such tax exemption shall be limited by law. The conditions of use, ownership, management and control of such improvements shall be regulated by law.").

In an attempt to define the term “blighted” the Legislature passed the Blighted Areas Act (BAA).<sup>47</sup> When the constitutionality of this provision was challenged, the New Jersey Supreme Court upheld the BAA and clarified that the act allowed agencies to initiate “urban, suburban and rural redevelopment, to acquire land for that purpose and to make it available for redevelopment by private enterprise or by public agencies in accordance with approved redevelopment plans.”<sup>48</sup> In 1992, the New Jersey State Legislature repealed the Blighted Areas Act and replaced it with the Local Redevelopment and Housing Law (LRHL).<sup>49</sup> The LRHL provides that any municipal governing body, after a thorough hearing and determination process, may by resolution, declare an area in need of redevelopment or “blighted.”<sup>50</sup> The law also lists eight factors or conditions and only one of them needs to be met in order for an area to be considered “blighted.”<sup>51</sup> Most

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<sup>47</sup> N.J. Stat. Ann. § 40:55-21.1(e) (repealed 1992) (The clause provided that blight constituted “[a] growing or total lack of proper utilization of areas caused by the condition of title, diverse ownership of real property therein and other conditions, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.)

<sup>48</sup> *Wilson v. City of Long Branch*, 142 A.2d 837 (N.J. 1958), cert. denied, 358 U.S. 873 (1958); *Levin v. Township Comm. of Bridgewater*, 274 A.2d 1, 4 (N.J. 1971).

<sup>49</sup> Ronald K. Chen, *Gallenthin v. Kaur: A Comparative Analysis of How the New Jersey and New York Courts Approach Judicial Review of the Exercise of Eminent Domain for Redevelopment*, 38 FORDHAM URB. L.J. 987, 995 (2010).

<sup>50</sup> Ostrowski, *supra* note 63, at 233.

<sup>51</sup> *Id.* at 233-234; N.J. Stat. Ann. § 40A:12A-5 ((**a.**) The generality of buildings are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living or working conditions. (**b.**) The discontinuance of the use of buildings previously used for commercial, manufacturing, or industrial purposes; the abandonment of such buildings; or the same being allowed to fall into so great a state of disrepair as to be untenable. (**c.**) Land that is owned by the municipality, the county, a local housing authority, redevelopment agency or redevelopment entity, or unimproved vacant land that has remained so for a period of ten years prior to adoption of the resolution, and that by reason of its location, remoteness, lack of means of access to developed sections or portions of the municipality, or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital. (**d.**) Areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community. (**e.**) A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real properties therein or other similar conditions which impede land assemblage or discourage the undertaking of improvements, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare, which condition is presumed to be having a negative social or economic impact or otherwise being detrimental to the safety, health, morals, or welfare of the surrounding area or the community in general. (**f.**) Areas, in excess of five contiguous acres, whereon buildings or improvements have been destroyed, consumed by fire, demolished or altered by the action of storm, fire, cyclone, tornado, earthquake or other casualty in such a way that the aggregate assessed value of the area has been materially depreciated. (**g.**) In any municipality in which an enterprise zone has been designated pursuant to the “New Jersey

notably, the language of the Blighted Areas Act at issue in *Wilson* was expanded from “stagnant and unproductive condition of land” to “stagnant and not fully productive condition of land”<sup>52</sup>

The LRHL’s definition of blight also embodied the changing economic and developmental realities that were affecting and still affect New Jersey today. The whole premise of the LRHL was based on a report issued by the New Jersey County and Municipal Government Study Commission in 1987.<sup>53</sup> In the report the Commission stated its belief that the term “blighted” had become an outmoded concept.<sup>54</sup> Specifically the Commission asserted that the focus of redevelopment had “shifted from the elimination of ‘unsanitary,’ congested and unsafe slums, to the rehabilitation and conservation of declining neighborhoods” as well as the “enhancement and improvement of underutilized commercial and industrial areas.”<sup>55</sup> Under this philosophy many parcels of property in the state could be seized under eminent domain.

#### **A. Early Legislative Responses to Kelo**

In 2006, a series of New Jersey State Assembly bills attempting to respond to *Kelo* made their way through the legislative process only to end in failure. In February of 2006, two separate Assembly bills were introduced.<sup>56</sup> Both bills called for moratoriums to be placed on the use of

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Urban Enterprise Zones Act," P.L.1983, c.303 (C.52:27H-60 et seq.) the execution of the actions prescribed in that act for the adoption by the municipality and approval by the New Jersey Urban Enterprise Zone Authority of the zone development plan for the area of the enterprise zone shall be considered sufficient for the determination that the area is in need of redevelopment pursuant to sections 5 and 6 of P.L.1992, c.79 (C.40A:12A-5 and 40A:12A-6) for the purpose of granting tax exemptions within the enterprise zone district pursuant to the provisions of P.L.1991, c.431 (C.40A:20-1 et seq.) or the adoption of a tax abatement and exemption ordinance pursuant to the provisions of P.L.1991, c.441 (C.40A:21-1 et seq.). The municipality shall not utilize any other redevelopment powers within the urban enterprise zone unless the municipal governing body and planning board have also taken the actions and fulfilled the requirements prescribed in P.L.1992, c.79 (C.40A:12A-1 et al.) for determining that the area is in need of redevelopment or an area in need of rehabilitation and the municipal governing body has adopted a redevelopment plan ordinance including the area of the enterprise zone. (h.) The designation of the delineated area is consistent with smart growth planning principles adopted pursuant to law or regulation.).

<sup>52</sup> Chen, *supra* note 70, at 996; N.J. Stat. Ann. § 40A:12A-5; N.J. Stat. Ann. § 40:55-21.1(e) (repealed 1992)

<sup>53</sup> Chen, *supra* note 70, at 995.

<sup>54</sup> *Id.* at 995; State of N.J. Cnty. & Mun. Gov’t Study Comm’n, LOCAL REDEVELOPMENT IN NEW JERSEY: STRUCTURING A NEW PARTNERSHIP 58 (1987).

<sup>55</sup> *Id.*

<sup>56</sup> Ostrowski, *supra* note 43, at 254-255.

eminent domain.<sup>57</sup> Even though the moratoriums were supported by prominent organizations such as the National Coalition to End Eminent Domain Abuse, the bills failed to muster the support necessary to pass the Assembly.<sup>58</sup>

In May of 2006, another Assembly bill was introduced, but this bill did not aim to impose a moratorium. Instead, Assembly Bill 3143 (A-3143) retained the Eminent Domain Study Commission proposed in A-2423, while adding new features concerning just compensation payments and declaratory judgments.<sup>59</sup> Namely, the bill required a declaratory judgment from the superior court whenever a redevelopment determination was made.<sup>60</sup> In terms of just compensation, A-3143 sought to compensate property owners for the intangible value they attached to their home rather than just the fair market value of their home.<sup>61</sup> This bill also failed to gain enough support in the Legislature.

Finally, in June of 2006, the most comprehensive of the early legislative reform efforts came in the form of Assembly Bill 3257 (A-3257). The dual purpose of A-3257 was to define important terms within N.J.S.A. § 40A:12A-3 (Local Redevelopment and Housing Law) that were relevant to eminent domain use and redevelopment, and also create more procedural hurdles for municipalities trying to make redevelopment determinations.<sup>62</sup> First, the bill defined the phrase “detrimental to the safety, health, or welfare of the community” as requiring “objective evidence” of “substantial” code violations or dilapidated exterior appearance.<sup>63</sup> In order to retain flexibility in redevelopment of commercial property, the bill retained the

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<sup>57</sup> N.J. Assem. 2423, 212th Leg., 2006-2007 Sess. (N.J. 2006); N.J. Assem. 3178, 212th Leg., 2006-2007 Sess. (N.J. 2006).

<sup>58</sup> National Coalition to End Eminent Domain Abuse, <http://www.gwengoodwin.com/eda/> (Petition Gov. Corzine to pass an eminent domain moratorium in light of the *Kelo* decision.).

<sup>59</sup> N.J. Assem. 3143, 212th Leg., 2006-2007 Sess. (N.J. 2006).

<sup>60</sup> *Id.* at 9.

<sup>61</sup> Assem. 3143, at 11.

<sup>62</sup> N.J. Assem. 3257, 212th Leg., 2006-2007 Sess. (N.J. 2006).

<sup>63</sup> N.J. STAT. ANN. § 40A:12A-3; N.J. Assem. 3257 at 4.

underutilization standard when commercial property was involved.<sup>64</sup> A-3257 passed the Assembly on June 22, 2006 by a vote of 51-18.<sup>65</sup> The chief sponsor of an identical Senate bill, State Senator Ronald Rice (D-Essex), was unable to marshal enough votes in the Senate Community and Urban Affairs Committee to send the bill to the Senate floor.<sup>66</sup> Thus, the bill died and New Jersey was left without a *Kelo* response or any improvement to its eminent domain laws.

### **B. Gallenthin and Its Legacy**

In 2007, New Jersey became one of nine states whose high courts would issue a post-*Kelo* decision restricting the use of eminent domain in terms of private development, thus responding judicially rather than legislatively.<sup>67</sup> Observers were unsure of what to expect in light of the New Jersey Supreme Court's strict deference to legislative redevelopment determinations.<sup>68</sup>

In 2003, the Planning Board of the Borough of Paulsboro adopted a redevelopment plan which included property owned by the Gallenthin family.<sup>69</sup> The property had been operated by the Gallenthin family since 1902 and had been owned by them since 1951.<sup>70</sup> The New Jersey Department of Environmental Protection's Geographic Information Survey designated the land as protected wetlands, and it primarily consisted of undeveloped space.<sup>71</sup> As such, the property

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<sup>64</sup> Id.

<sup>65</sup> See Dana E. Sullivan, *Eminent Domain Not So Imminent*, N.J.L.J., June 4, 2007, at 7; William J. Ward, *Defining Blight: Step One in New Jersey's Redevelopment Process*, N.J. L.J., June 25, 2007, at S-4.

<sup>66</sup> Michael Booth, *Eminent Domain Compromise Bill, Pleasing No One, Stalls in Senate*, N.J. L.J., Dec. 3, 2007, at 23.

<sup>67</sup> Institute for Justice, *supra* note 57.

<sup>68</sup> *City of Atlantic City v. Cynwyd*, 148 N.J. 55, 73; *Casino Reinvestment Dev. Authority v. Banin*, 320 N.J. Super. 342, 346

<sup>69</sup> *Gallenthin*, 191 N.J. at 354 (2005)

<sup>70</sup> Id. at 348.

<sup>71</sup> Id. at 349.

had been used periodically as a deposit site for dredging materials.<sup>72</sup> As late as 1998, upon Gallenthin's request, the town had recognized the business activities being carried out at the site by rezoning the area from manufacturing to marine industrial business park.<sup>73</sup>

At the time of the rezoning, the borough had just adopted a master plan to redevelop certain areas of Paulsboro in order to stimulate "economic rehabilitation."<sup>74</sup> The master plan did not include the Gallenthin property, though it mentioned that the borough should consider the acquiring that property for marina construction.<sup>75</sup> The following year the Paulsboro Planning Board was authorized to conduct a report exploring whether the parcels owned by BP and Dow Chemicals could be designated as in need of redevelopment.<sup>76</sup> The report concluded that the areas were, indeed, in need of redevelopment.<sup>77</sup> Both of those corporations initiated a joint study as to how their properties could be redeveloped, and that report mentioned the use of the Gallenthin property for redevelopment purposes.<sup>78</sup> After a follow-up study commissioned by the Planning Board concluded that the property was unimproved and in need of redevelopment, and after a Planning Board hearing concerning redevelopment of the Gallenthin property, the Planning Board concluded that the Gallenthin property should be included in the BP/Dow redevelopment plan.<sup>79</sup> Gallenthin's pleas that he was using his property to harvest phragmites and pursuing the idea of using the property as a dredging depot were drowned out by the desire for economic revitalization.<sup>80</sup>

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<sup>72</sup> Id.

<sup>73</sup> Id.

<sup>74</sup> Gallenthin, 191 N.J. at 350.

<sup>75</sup> Id.

<sup>76</sup> Id.

<sup>77</sup> Id.

<sup>78</sup> Id.

<sup>79</sup> Gallenthin, 191 N.J. at 351-354.

<sup>80</sup> Id. at 354

The Gallenthins filed suit to enjoin the redevelopment designation.<sup>81</sup> The trial court dismissed the complaint finding that the Paulsboro Planning Board had adhered to the statutory requirements of the Local Redevelopment and Housing Law and that their decision was supported by substantial evidence.<sup>82</sup> The Appellate Division affirmed the trial court’s ruling, also finding that the Planning Board presented substantial evidence of the need for redevelopment and attaching minimal importance to Gallenthin’s phragmite harvesting and future property plans.<sup>83</sup>

When the case reached the New Jersey Supreme Court, the court focused on defining the term “blight” in order to determine whether the Paulsboro Planning Board had correctly interpreted language in the LRHL claiming that land could be designated as in need of redevelopment if it was “stagnant or not fully productive.”<sup>84</sup> The Court perused various definitions of blight penned by redevelopment and planning experts, all of which equated the term blight with slum conditions.<sup>85</sup> The Court even looked to the legislative history of the Blighted Areas Clause and found that the framer of the clause viewed it as a means to rehabilitate cities that had fallen into depressed conditions.<sup>86</sup>

Under the guise of this definition, the majority subsequently analyzed whether Paulsboro’s interpretation of 40A:12A-5(e) was in harmony with the Blighted Areas Clause of the New Jersey Constitution.<sup>87</sup> The Court believed that Paulsboro’s all-encompassing interpretation of blight would make most property in the State vulnerable to redevelopment, thus

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<sup>81</sup> Id.

<sup>82</sup> Id.

<sup>83</sup> Id.

<sup>84</sup> Gallenthin, 191 N.J. 357.

<sup>85</sup> Id. at 360.

<sup>86</sup> Id. at 360; *Proceedings of the New Jersey Constitutional Convention of 1947*, vol. I at 744 (1947)

<sup>87</sup> Id. at 342.

making it unconstitutional.<sup>88</sup> Instead, the Court asserted that blight encompasses “deterioration or stagnation that has a decadent effect on surrounding property.”<sup>89</sup>

Since Paulsboro had designated the Gallenthin property as “in need of redevelopment” based on the fact that the plaintiffs were not utilizing the property in a fully productive manner, the court invalidated the blight designation.<sup>90</sup> In essence, the court held that the New Jersey Constitution does not allow for government redevelopment of “underutilized” property, and that 40A:12A-5(e) applies “only to property that has become stagnant and unproductive because of issues of title, diversity of ownership, or other conditions of the same kind.”<sup>91</sup>

When analyzing the case, former New Jersey Public Advocate and current Dean of Rutgers Law School Ronald Chen postulated that the decision may have been a product of the recent national public furor over *Kelo*, because the case did not seem to be a “likely candidate for discretionary review.”<sup>92</sup> Nonetheless, the decision became the standard for eminent domain use in New Jersey. It was quickly followed by a string of cases testing the application of the recent decision to different fact patterns, and largely upholding and expanding upon the protective standard expounded by *Gallenthin*.<sup>93</sup>

## **V. S-1451 and A-3615: Compromising on Eminent Domain**

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<sup>88</sup> Id. at 368.

<sup>89</sup> *Gallenthin*, 191 N.J. at 365.

<sup>90</sup> Id.

<sup>91</sup> Id. at 373.

<sup>92</sup> Chen, *supra* note 47, at 995.

<sup>93</sup> *HJB Associates, Inc. v. Council of Belmar*, No. A-6510-05T5, 2007 WL 2005173, 1-3 (N.J. Super. Ct. App. Div. July 11, 2007) (holding that the New Jersey Constitution doesn’t allow redevelopment of private property just because the property is underutilized or not used in an “optimal manner.”); *Mulberry Street Area Property Owner’s Group v. City of Newark*, unreported, ESX-L-9916-04, decided July 19, 2007 (Bloomberg Law)(holding that an area can’t be designated in need of redevelopment simply for demonstrating “a growing lack of proper utilization resulting in a stagnant and not fully productive condition of land”); *LBK Associates, LLC v. Borough of Lodi*, No. A-1829-05T2, 2007 WL 2089275 (N.J. Super. Ct. App. Div. July 24, 2007) (Bloomberg Law)(finding that a redevelopment designation concerning two trailer parks and several small businesses was unsupported by substantial evidence); *Harrison Redevelopment Agency v. DeRose*, 942 A.2d 59 (N.J. Super. Ct. App. Div. 2008)(holding that a property owner always has a right to contest a redevelopment designation, but if a municipality provides adequate notice a person may not raise their claims after the 45-day period unless a judge decides otherwise).



*Gallenthin* and subsequent decisions overturning blight determinations were heralded as good news.<sup>94</sup> Nonetheless, the decisions were not seen as guarantees that major developers would not someday find judges that would accept their “loose” definitions of blight.<sup>95</sup> This fear stems from the fact that *Gallenthin* and subsequent cases only dealt with 40A:12A-5(e), thus leaving room for interpretation on other sections of the LRHL.<sup>96</sup> *Gallenthin* also left open the opportunity for municipalities to designate an unblighted parcel of property as in need of redevelopment if it fit into a larger redevelopment area.<sup>97</sup> Even though the *Gallenthin* decision left many questions unanswered, the state legislature was not in any hurry to enact protective legislation. The only major attempt at crafting legislation came in October of 2010 when State Senator Ronald Rice (D-Essex) introduced the most property owner-friendly reform bill to date, S-1451.<sup>98</sup>

The purpose of the bill was to codify the decisions in *Gallenthin* and *Harrison Redevelopment Agency v. DeRose*<sup>99</sup> while adding property owner protections to fill the gaps left behind by the decisions.<sup>100</sup> Namely, the bill sought to “preserve the ability of municipalities to redevelop blighted areas; enhance the notice and hearing requirements afforded property owners and tenants under current law; and ensure just compensation and appropriate relocation benefits

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<sup>94</sup> Staci Berger, *Courts’ clarity on eminent domain*, NJ.COM, July 31, 2007, [http://blog.nj.com/njv\\_diane\\_sterner/2007/07/courts\\_act\\_will\\_legislature\\_fo.html](http://blog.nj.com/njv_diane_sterner/2007/07/courts_act_will_legislature_fo.html).

<sup>95</sup> *Id.*

<sup>96</sup> Ostrowski, *supra* note 43, at 245 (citing Robert G. Seidenstein, *Eminent Domain: “Blight” Loses its Bite*, N.J.L.J., June 18, 2007, at 43, (The court’s holding “does not significantly hamper redevelopment as long as municipalities base their designations on appropriate sections of the Local Redevelopment and Housing Law.”).

<sup>97</sup> *Gallenthin*, 191 N.J. at 372 (“Paulsboro does not present a situation where the subject property is in any way connected to a larger redevelopment plan. If that were the case, the result may have been different.”).

<sup>98</sup> Michael Booth, *Senate Defeats Measure to Strengthen Owners’ Defense Against Condemnation*, 203 N.J.L.J. 4, (2011) [http://www.law.com/jsp/nj/PubArticleNJ.jsp?id=1202477628910&Senate\\_Defeats\\_Measure\\_To\\_Strengthen\\_Owner\\_s\\_Defense\\_Against\\_Condemnation&slreturn=20130816152541](http://www.law.com/jsp/nj/PubArticleNJ.jsp?id=1202477628910&Senate_Defeats_Measure_To_Strengthen_Owner_s_Defense_Against_Condemnation&slreturn=20130816152541).

<sup>99</sup> *Harrison Redevelopment Agency v. DeRose*, 398 N.J. Super. 361 (App. Div. 2008) (holding that, under the LRHL, municipalities must provide property owners with written notice of redevelopment designations, notice of the time limits for the property owner to initiate a legal challenge to such designations, and that an owner’s initial acquiescence to application of the LRHL did not bar him from challenging the constitutionality of the statute.).

<sup>100</sup> *Id.*;

for property owners and tenants impacted by eminent domain and redevelopment projects.”<sup>101</sup> As such the bill was meant to amend the Local Redevelopment and Housing law, the Eminent Domain Act of 1971 and the Relocation Assistance Act.<sup>102</sup>

Sections 1 and 2 of the bill were meant to amend the Eminent Domain Act of 1971 by enhancing communication between the condemnors and condemnees, thus giving condemnees some leverage in just compensation negotiations. Specifically, the provisions required condemnors to give condemnees a copy of the appraisal upon which the compensation offer is made.<sup>103</sup> In addition, the bill allowed condemnees to provide the taking agency’s appraiser with any relevant information that may affect the valuation of the property, such as outstanding mortgages, etc., and the appraiser must provide this information to the condemnor.<sup>104</sup> In an attempt to codify *DeRose* and expand upon its protections, the also bill required that a condemnee be granted a 45-day review period that is extendable up to 70 days unless the condemnor could show good cause as to why the time period should not be expanded.<sup>105</sup> Within the time period, the condemnor was to provide timely responses and explanations when requested as well as an opportunity for the condemnee to meet with a representative of the condemnor to discuss the offer.<sup>106</sup> Despite these protections, disagreements over the valuation of the property would not require the continuation of negotiations or prevent the condemnor from ultimately acquiring the property after proper condemnation proceedings.<sup>107</sup> Thus, these sections of the bill adequately balanced the interests of the property owner and those of the redeveloper

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<sup>101</sup> N.J. Sen. 1451, 214th Leg., 2010-2011 Sess. (N.J. 2011).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at § 2(a).

<sup>104</sup> *Id.* at § 2 (b), 2(c)(1) and 2(c)(2).

<sup>105</sup> *Id.* at § 2(f)(1) and (2).

<sup>106</sup> *Id.* at § 2(f)(3).

<sup>107</sup> *Id.* at § 2(f)(6).

because the property owner was given a chance to determine their fate while a redeveloper wouldn't be held up by a stubborn or unreasonable property owner.

Sections three through nine explicitly dealt with amending the Relocation Assistance Act by clarifying that condemnees were entitled to relocation assistance and increased rental assistance for the first time since 1971.<sup>108</sup> Under the Relocation Assistance Act, a taking agency should make “fair and reasonable relocation payments” to residents and business displaced by a taking.<sup>109</sup> Any person who was displaced and eligible for compensation payments in section (a) and elected to recover relocation expenses in lieu of the other compensation payments would be entitled to a reasonable moving expense allowance and a dislocation allowance, both of which were increased in amount under S-1451.<sup>110</sup> Business owners were entitled to the same kind of increased payments provided that they could not be relocated without a “substantial loss to its existing patronage,” and it was not part of a “commercial enterprise” that had at least one other establishment not taken for redevelopment purposes.<sup>111</sup>

In addition to the relocation compensation, the act allowed for increased rental assistance payments to be made to residents who were not eligible to be compensated otherwise due to the fact that they do not own the taken property.<sup>112</sup> While these protections were available before S-1451 was written, this bill increased the amount of compensation a person could receive as rental assistance, and it allowed for compensation over a longer period of five years.<sup>113</sup> In order to ensure the relevance of the compensation increases, section 8 provided that all payment amounts set forth in sections four through six would be adjusted annually based on the Consumer Price

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<sup>108</sup> Id. at §§ 3-9.

<sup>109</sup> Id. at § 4(a).

<sup>110</sup> Id. at § 4(b).

<sup>111</sup> Id. at § 4(c).

<sup>112</sup> Id. at § 6.

<sup>113</sup> Id. at § 6(a)-(b).

Index.<sup>114</sup> These amendments provided a great amount of protection for those residents who had no say in the sale of the property, and who often had trouble finding a replacement home. It provided renters with a sense of relief and comfort knowing that they would not be thrown out onto the streets. The annual adjustments to the payments were extremely helpful because they reflect true consumer prices rather than arbitrary numbers created by politicians.

Section 11 amended the definitional section of N.J.S.A. 40A:12A-3, also known as the Local Redevelopment and Housing Law.<sup>115</sup> The amendments made a number of changes to some technical and procedural definitions that are not as pivotal as the changes made to the definition of “redevelopment area”. Within the definition of redevelopment area the bill specified that nonblighted areas could be included within a redevelopment plan as long as those parcels did not comprise of more than 20% of the redevelopment area to become available for private ownership.<sup>116</sup> This section also stipulated that the unblighted areas must have be an integral part of the redevelopment area.<sup>117</sup> These definitional changes gave greater protection against overzealous municipal governments that could’ve try to “sneak” unblighted areas into a redevelopment plan in order to make it more palatable for developers and investors. The limitation on unblighted areas within a redevelopment area was very similar to some statutes passed by other states in response to the *Kelo* decision. Perhaps State Senator Rice and other crafters of S-1451 looked to other states to gain ideas for their bill.

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<sup>114</sup> Id. at § 8.

<sup>115</sup> Id. at § 11.

<sup>116</sup> Id. at §10.

<sup>117</sup> Id.

Section 13 of the bill was largely cosmetic because its purpose was to amend the criteria used to determine blight by codifying the *Gallenthin* decision.<sup>118</sup> The amendments stated that a municipal governing body could only make a redevelopment determination if:

“(1) the deterioration or stagnation of the delineated area negatively affects surrounding properties because of any of the conditions described below, (2) the condition or conditions of blight described below are the prevailing characteristics of the delineated area, (3) each non-blighted parcel included within the delineated area is necessary for the effective redevelopment of the area and is an integral part of the area, and (4) within the delineated area, objective evidence of any of the following conditions is found”<sup>119</sup>

Included within conditions that could lead to a blight determination, was the phrase “detrimental to the safety, health, or welfare of the community,” one of the main developments in the *Gallenthin* decision.<sup>120</sup> In addition to that, the bill edited section of the LRHL which dealt with underutilized property, by removing the phrase “stagnant or not fully productive” and replacing it with the phrase “stagnant or unproductive.”<sup>121</sup> The only non-cosmetic change to this section of the LRHL came in the form of a new blight designation which asserted that a parcel may be designated as in need of redevelopment if, due to contamination, it had remained “vacant or substantially underutilized for at least 24 consecutive months.”<sup>122</sup>

While the majority of this section of S-1451 was largely cosmetic, it gave the *Gallenthin* decision the kind of force and legitimacy that only comes with written legislation. Further, the newly created blight decision would make it easier for municipalities to seize Superfund sites and other contaminated sites that have plagued redevelopment efforts in places like Newark.

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<sup>118</sup> Id. at § 13

<sup>119</sup> Id.

<sup>120</sup> Id. at §13(a)-(c)

<sup>121</sup> Id. at §13(e)

<sup>122</sup> Id. at §13(i)

Section 15 of S-1451 dealt with the constitutionally necessary notice requirements addressed in the *DeRose* decision. Instead of simply codifying the decision, Section 15 of S-1451 expanded on the protections afforded by *DeRose* by stipulating that there must be a “public informational meeting” before any adoption of a resolution to undertake a “preliminary investigation.”<sup>123</sup> Before the public meeting is even held, the planning board must prepare a map showing the boundaries of the proposed redevelopment area with specific details as to which buildings and lots will be included.<sup>124</sup> In addition to the map, the planning board was required to specify a date for the informational meeting and give notice written in simple and clear language that was easily understandable, and the map and report had to be made available for inspection at a specified location during normal business hours.<sup>125</sup> Notice of the hearing also had to be published in a newspaper of “general circulation” within the municipality once a week for two consecutive weeks, included on the municipal website, and posted within a close distance to each parcel within the proposed redevelopment zone.<sup>126</sup> The municipal clerk then had to contact the owner of each building to gather the names of all the legal tenants and lessees in the buildings.<sup>127</sup> All documents relevant to the condemnations had to be made publicly available, and all concerns levied against the project had to be recorded in the meeting minutes and made public.<sup>128</sup> After a planning board had made a proposal to the municipal governing body, no parcel that was not included in the planning board proposal could be added to the redevelopment zone.<sup>129</sup> The

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<sup>123</sup> Id. at §15(b)

<sup>124</sup> Id. at §15(b)(1)

<sup>125</sup> Id. at §15(b)(3)

<sup>126</sup> Id. at §15(b)(3)(b)(i)-(iii)

<sup>127</sup> Id. at §15(b)(3)(b)(iv)

<sup>128</sup> Id. at §15(b)(3)(c) and 15(b)(4)

<sup>129</sup> Id. at §15(b)(5)(b)

proposed ordinance had to be presented to the Commissioner of Community Affairs and the Public Advocate.<sup>130</sup>

Once the Commissioner approved the plan, presumptively backed by substantial evidence, the redevelopment designation was binding upon everyone.<sup>131</sup> Notice of the adoption of the redevelopment plan then had to be sent to all individuals entitled to notice.<sup>132</sup> The notice had to be published in the official newspaper of the municipality and clearly state that the redevelopment determination was binding and served a public purpose.<sup>133</sup> Any person, within 60 days following notice of the ordinance, could apply to the Superior Court, which could grant review of the determination.<sup>134</sup>

The aforementioned section showed the painstaking efforts of the framers to protect property owners. Under Section 15 property owners had a series of protections from the beginning of the redevelopment designation process to its end. The requirements that public documents and a map of the proposed area be on public display were hugely informative. Providing notice of the preliminary hearings was also extremely important because it gave property owners, as well as renters and lessees, a chance to voice their concerns and save their homes if they believed that the redevelopment designation was unfair. The publication requirements didn't go far enough because they didn't require that the notices be published in multiple languages, and this would have hurt the growing Latin-American immigrant population. Finally, the ability to appeal to the courts as a last ditch effort would have been extremely helpful, especially if the office of the Public Advocate puts their support behind the effort.

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<sup>130</sup> Id. at §15(b)(5)(c)

<sup>131</sup> Id. at §15(b)(5)(d)

<sup>132</sup> Id. at §15(b)(5)(e)(i)

<sup>133</sup> Id. at §15(b)(5)(e)(iii)

<sup>134</sup> Id. at §15(b)(7)

Ultimately, this very property owner friendly bill died in the Senate.<sup>135</sup> Opposition to the bill came in the form of local governments “who believed that the bill would interfere with the redevelopment projects.”<sup>136</sup> State Senator Rice was unable to muster up the twenty-one votes needed for passage and ultimately pulled the bill from consideration.<sup>137</sup> When Senator Rice was asked about the bill’s failure he said “I think my colleagues misunderstood the legislation,” and “taxpayers and residents are once again put in harm’s way because we failed to protect them from the government arbitrarily and capriciously taking people’s property.”<sup>138</sup>

Another attempt at crafting legislation would not come until December of 2012, when former Assemblymen Albert Coutinho (D-39), Assemblyman Anthony M. Bucco (R-25), and Assemblywoman Nancy F. Munoz (R-21) introduced Assembly Bill 3615 (A-3615).<sup>139</sup> A-3615 is a significantly more condensed bill, eleven pages as compared to the seventy page S-1451 bill. Much like S-1451, A-3615 attempts to codify the *Gallenthin* decision by amending 40A:12A-5. The only major change that A-3615 makes is the substitution of the phrase “stagnant or not fully productive” with “stagnant and unproductive” in section (e) of 40A:12A-5, and the insertion of the phrase “which condition is presumed to be having a negative social or economic impact or otherwise being detrimental to the safety, health, morals, or welfare of the surrounding area in general.”<sup>140</sup> A-3615 shares some minor similarities with S-1451 in terms of constitutional notice requirements. However, unlike S-1451, A-3615 only gives property owners 45 days, which is not

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<sup>135</sup> Michael Booth, *Senate Defeats Measure to Strengthen Owners’ Defense Against Condemnation*, 203 N.J.L.J. 4, (2011).

[http://www.law.com/jsp/nj/PubArticleNJ.jsp?id=1202477628910&Senate\\_Defeats\\_Measure\\_To\\_Strengthen\\_Owner\\_s\\_Defense\\_Against\\_Condemnation&slreturn=20130816152541](http://www.law.com/jsp/nj/PubArticleNJ.jsp?id=1202477628910&Senate_Defeats_Measure_To_Strengthen_Owner_s_Defense_Against_Condemnation&slreturn=20130816152541) (Only 13 senators voted for the bill)

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> N.J. Assem. 3615, 215th Leg., 2012-2013 Sess. (N.J. 2012)

<sup>140</sup> *Id.*



extendable, to challenge a determination or they will be precluded from later raising a challenge.<sup>141</sup> Other than those features, the bills really share no other similarities.

The reason for including both bills in this analysis is to show the differences between the two and the need for further eminent domain reform. S-1451 was a valiant attempt at protecting property owners from overzealous municipalities that were willing to abuse their eminent domain powers while, on the other hand, A-3615 was crafted in order to help kick-start redevelopment in New Jersey as well as the general New Jersey economy in light of the Great Recession and Superstorm Sandy.<sup>142</sup> As such, the bill does not contain as many property owner protections as S-1451, and the goals of the legislation must be seen through this unique lens.

In its attempt to codify the *Gallenthin* decision A-3615 does so incompletely. For example, while it does substitute the phrase “stagnant or not fully productive” with “stagnant and unproductive,” it does not require, as the *Gallenthin* decision had suggested, that all conditions indicating a need for redevelopment be “detrimental to the safety, health, or welfare of the community.”<sup>143</sup> As for adding protections to the *Gallenthin* decision, unlike S-1451, A-3615 fails to place a cap on how much unblighted territory can be included in a redevelopment area. These seeming deficiencies make it easier for redevelopment to occur.

A-3615’s most glaring deficiencies are in its lack of property owner involvement in the appraisal and negotiation process. The bill is silent on this issue whereas S-1451 provided a whole host of ways that property owners could determine their own fate. Unlike S-1451, A-3615 does not require condemnors to provide condemnees with a copy of the appraisal used to calculate compensation, and it does not allow property owners to challenge appraisals with their

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<sup>141</sup> Id.

<sup>142</sup> Interview with Anthony Della Pelle, Attorney, McKirdy & Riskin, PA, in Morristown, N.J, helped draft A-3615 (Nov. 28, 2013).

<sup>143</sup> N.J. Sen. 1451, 214th Leg., 2010-2011 Sess. (N.J. 2012).

own evidence of property valuation. It also doesn't give condemnees a forty-five day period that is extendable, in order to review the condemnor's offer, request more information, or meet with a representative of the condemnor.

A-3615 also fails to adjust relocation or rental assistance to mirror the realities of New Jersey's current real estate market. The current market is characterized by rising home prices, and as a consequence, a decrease in affordability.<sup>144</sup> Most property owners, especially those living in areas where most blight determinations are made, would struggle to find an affordable home in New Jersey's current real estate market. Thus, relocation and rental assistance that is adjusted to match the Consumer Price Index is essential to the health and well-being of people leaving their homes due to condemnation. Unfortunately, A-3615 leaves these vulnerable individuals out in the cold.

Despite these seeming inadequacies, the bill was successful in light of its original purpose. The bill made it easier for redevelopment to occur by not being burdened by the litany of protections that arguably led to the failure of S-1451. A-3615 even fashioned an alternative redevelopment path that does not require the use of eminent domain but, instead, focuses on negotiating with individual property owners.<sup>145</sup> Nevertheless, as we move out of the Recession we must reform eminent domain and create stronger property owner protections.

## **V. Legislative Suggestions**

A-3615 is a law lacking in property owner protections. As such, the New Jersey Legislature should pass another bill adopting the entirety of the property owner protections found in S-1451. However, even with those protections in place redevelopment in New Jersey will still fall short of what is truly needed in eminent domain/redevelopment cases: focused economic

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<sup>144</sup> Tom DePoto, *Eminent domain may find new use to salvage urban homes*, STAR LEDGER, July 31, 2007, [http://www.nj.com/business/index.ssf/2013/07/eminent\\_domain\\_may\\_find\\_new\\_us.html](http://www.nj.com/business/index.ssf/2013/07/eminent_domain_may_find_new_us.html).

<sup>145</sup> N.J. Assem. 3615, 215<sup>th</sup> Leg., 2012-2013 Sess. § 5(g) (N.J. 2013).

development. As of August 2013, the unemployment rate in New Jersey was hovering at 8.5%, just above the national rate of 7.2%.<sup>146</sup> The employment figures in big cities are even bleaker. For example, as of July 2013 the unemployment rate in Newark was 14.2%, a full 5.6 percentage points above the New Jersey rate and seven percentage points above the national average.<sup>147</sup> As a result, crime rates also rise. In terms of crime and desperation, there were ninety-six murders in Newark last year, down from 107 in 2006 but up from sixty-eight in 2009.<sup>148</sup> Cities like Newark and Trenton are plagued by crime and unemployment, and citizens often welcome redevelopment efforts to remove legitimately blighted areas.<sup>149</sup> Community activists in the Wilbur section of Trenton, a neighborhood plagued by crime and drugs, have welcomed demolitions of blighted buildings that served as a “convenient refuge for drug dealers and vagrants, as well as a handy hiding place for weapons.”<sup>150</sup> This is proof that we need to retain blight designations in regards to eminent domain use despite the objections of some commentators.<sup>151</sup>

However, New Jersey needs more than just blight designations and individual just compensation. New Jersey needs “community just compensation.” Community just compensation would require that a community receive more than just tax revenues, removal of blighted buildings, and incidental benefits stemming from redevelopment. It would require that communities receive direct benefits from redevelopment projects that will replace blighted

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<sup>146</sup> UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, LOCAL AREA UNEMPLOYMENT STATISTICS, <http://data.bls.gov/timeseries/LASST34000003>; Paul Davidson, *U.S. gains 148,000 jobs, jobless rate, 7.2%*, USA TODAY, Oct. 22, 2013, <http://www.usatoday.com/story/money/business/2013/10/22/september-jobs-report/3146693/>.

<sup>147</sup> City-data.com, Newark, N.J., <http://www.city-data.com/city/Newark-New-Jersey.html>.

<sup>148</sup> Kate Zezima, *Cory Booker Faces Newark Crime Wave Amid Campaign*, Huffington Post, Sept. 4, 2013, [http://www.huffingtonpost.com/2013/09/04/cory-booker-newark-crime\\_n\\_3870508.html](http://www.huffingtonpost.com/2013/09/04/cory-booker-newark-crime_n_3870508.html).

<sup>149</sup> Times of Trenton Editorial Board, *Editorial: Trenton's demolition of vacant buildings needs to be first chapter in redevelopment*, NJ.COM, Mar. 15, 2013, [http://www.nj.com/times-opinion/index.ssf/2013/03/editorial\\_trentons\\_demolition.html](http://www.nj.com/times-opinion/index.ssf/2013/03/editorial_trentons_demolition.html).

<sup>150</sup> Id.

<sup>151</sup> See generally, Goodin, *supra* note 24, at 196.

conditions with some form of community capital. The best way to achieve community just compensation is through the following methods: require that developers contract mixed-use projects that spur the hiring of local residents; require that developers build new affordable housing units or replace units that were lost in the condemnation process in order to help New Jersey comply with its *Mount Laurel* obligations; and empower municipalities to seize underwater mortgages in order to prevent future blight.

### **A. Hire Locals**

The concept of hiring local construction companies and local employees is not a new idea, but it has never been statutorily prescribed by the state in eminent domain cases. Former Newark mayor, and now United States Senator, Cory Booker has championed the idea of having local private parties hire Newark residents as employees. In a March 2008 interview with BigThink, Cory Booker discussed this idea at length. When Cory Booker became mayor of Newark, he approached Continental Airlines, the biggest employer in the city at the time, to ask why they were only hiring 7% of their employees from the city of Newark.<sup>152</sup> Upon meeting with the CEO of Continental Airlines they reached an agreement about Continental's hiring of local Newarkers.<sup>153</sup> As a result of that agreement, Continental's hiring of locals went from 7% to 25-30%.<sup>154</sup> Part of Cory Booker's negotiation strategy was to point to the fact that corporations spend billions of dollars each year to train employees.<sup>155</sup> Booker offered to have the city train employees so that they would be job ready once they reported to work, which would greatly reduce corporate training costs.<sup>156</sup> Booker was so impressed with the success of his negotiations

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<sup>152</sup> *Keeping jobs in Newark*, BIG THINK (Mar. 11, 2008), <http://bigthink.com/videos/keeping-jobs-in-newark>.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*; John Hollon, *New Study: Spending on Training Jumped by 12% Last Year*, TLNT, Jan. 23, 2013, <http://www.tlnt.com/2013/01/23/new-study-says-spending-on-training-jumped-by-12-last-year> (In 2012, employer spending for employee training rose by 12%).

<sup>156</sup> Big Think, *supra* note 149.

with Continental that he began to offer tax abatements to corporations if they demonstrate their intent to hire local residents and ex-offenders.<sup>157</sup> Booker referred to this type of program as putting forth your values.<sup>158</sup>

Similarly, the State of New Jersey needs to foster a value system that looks to find gainful employment for the unemployed population. The best way to foster this value system is to institutionalize it through legislation. The New Jersey legislature should pass a bill that amends the Local Redevelopment and Housing Law to require that municipalities construct multi-use projects in commercial areas. Building multi-use projects would allow for more grocery stores, restaurants, and other similar businesses to be built in an area designated for redevelopment. These types of businesses would look to the local population as potential employees. This is a feasible alternative to legislation mandating that local employers and developers hire a specific percentage of their workforce from the local population; a proposal that would face exaction challenges and logistical issues. With these kinds of requirements in place, the money made and spent on the redevelopment project will remain in the community, thus justly compensating the community. The hope is that this investment in human capital will prevent future blight conditions, help residents earn a living, and create even greater tax revenues.

### **B. Build Affordable Housing Units and Punish Lazy Developers**

George Santayana once said, those who do not remember the past are condemned to repeat it.<sup>159</sup> In its future effort to issue community just compensation, New Jersey can learn a lot from the mistakes of its neighbors, namely New York. New York's Atlantic Yards project was an attempt to redevelop a questionably blighted section of Brooklyn by building an arena to be

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<sup>157</sup> Id.

<sup>158</sup> Id.

<sup>159</sup> GEORGE SANTANAYA, *Reason in Common Sense*, in *THE LIFE OF REASON* 284 (1905).

used by the Brooklyn Nets NBA team, as well as some smaller shops. Within the plan was a condition that the developer build affordable housing units. The developer was given a twenty-five year window to complete the project. Ten years after the commencement of the project, the arena has been completed but no affordable housing units have been built.<sup>160</sup> New York city mayor Bill de Blasio, who served as public advocate at the time the redevelopment project began, came under fire for the lack of affordable housing units built. City Comptroller and Democratic primary opponent, John Liu chastised de Blasio for the lack of affordable housing 10 years after redevelopment began. He said that the project was supposed to be about “jobs and affordable housing”, and that 10 years later all they had was a “stadium and some popcorn vendors.”<sup>161</sup>

New Jersey should statutorily require that all development projects create new affordable housing units, which would help it adhere to its *Mount Laurel* obligations. Much like eminent domain and redevelopment, requirements for affordable housing units attempt to cure crime, unemployment, etc. Thus, it would make sense to try to accomplish both tasks at once. In addition, the New Jersey Legislature should place common-sense limits on how long a construction project may take before affordable housing units are built and opened to the public. A maximum limit of 10 years should be placed on all affordable housing projects and there should also be strict inspection procedures in place to make sure that developers don't cut corners in order to get the project done on time. If any developer exceeds the time limit without good cause they should be handed a steep fine. This would allow New Jersey to avoid the same kinds of issues that arose from the Atlantic Yards project and set an example for sister states.

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<sup>160</sup> Azi Paybarah, *De Blasio: I am going to make sure' affordable housing is built at Atlantic Yards*, CAPITAL NEW YORK (2013). <http://www.capitalnewyork.com/article/politics/2013/08/8532671/de-blasio-i-am-going-make-sure-affordable-housing-built-atlantic-ya>.

<sup>161</sup> Id.

### C. Prevent Blight By Seizing Underwater Mortgages

One of the best ways to deal with blight would be to prevent it before it starts. Much like other great questions presented to economists and social scientists, there is no easy solution. Nonetheless, Robert Hockett, a law professor at Cornell University thought of using eminent domain to seize underwater mortgages as a way of preventing blight.<sup>162</sup> The Great Recession and mortgage bubble led to many foreclosures and abandonments of property. As a result of these foreclosures and abandonments, the properties sit idle for years and ultimately begin to decay. These same issues have presented themselves at the Jersey Shore as a result of the Hurricane Sandy destruction and individuals being shut out from federal assistance because their homes are seasonal.<sup>163</sup> These abandoned homes create blight, both urban and suburban, and potential health hazards.<sup>164</sup> Cities and towns are struggling to figure out what to do.

These municipalities should seize the underwater mortgages to help prevent homeowners from losing their homes. Under Hockett's plan the city would seize the mortgage but they would not be the landlord.<sup>165</sup> Instead, they would sell the mortgage to a third party that would pay the lender fair market value and then issue a new mortgage based on the property's true worth.<sup>166</sup> This would, theoretically, force the original lender to accept the offer from the third party because if they reject the offer they are left with nothing.

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<sup>162</sup> DePoto, *supra* note 141.

<sup>163</sup> Star Ledger Staff, *Nearly a year after storm, N.J. uninsured, seasonal Sandy victims struggle to regain footing*, STAR LEDGER, Sept. 8, 2013, [http://www.nj.com/news/index.ssf/2013/09/nearly\\_a\\_year\\_after\\_storm\\_nj\\_uninsured\\_seasonal\\_sandy\\_victims\\_struggle\\_to\\_regain\\_footing.html](http://www.nj.com/news/index.ssf/2013/09/nearly_a_year_after_storm_nj_uninsured_seasonal_sandy_victims_struggle_to_regain_footing.html).

<sup>164</sup> *Id.*

<sup>165</sup> DePoto, *supra* note 141.

<sup>166</sup> *Id.*

As of October 2013, the city council of Richmond, Calif., became the first municipality in the country to pass legislation allowing for the seizure of underwater mortgages.<sup>167</sup> As a result of this action, investors could be deprived of tens of millions of dollars in order to save borrowers from foreclosure.<sup>168</sup> A number of investors sued to prevent the plan from going into effect. Recently, a district court judge dismissed the investors' complaint as premature because no mortgages had been seized yet.<sup>169</sup>

Major organizations such as the Mortgage Bankers Association and The Securities Industry and Financial Markets Association, the biggest lobbying group on Wall Street, opposed the use of eminent domain to seize underwater mortgages.<sup>170</sup> Investors fear that the seizure of mortgages will discourage banks and other lending institutions from giving out loans in municipalities where the practice is adopted. In a recent Star Ledger opinion piece, prominent New Jersey real estate attorney, Anthony Della Pelle, expressed that the seizure of underwater mortgages is doomed to fail because of the unequal valuation of the mortgage owed as compared to the value of the property as well as the transactional and legal fees piled on top of the already large mortgage debt.<sup>171</sup> In other words, he claims that a city using eminent domain would be stuck with an even larger debt than it had originally planned.<sup>172</sup>

Nevertheless, New Jersey should be the first “test” state to pass legislation explicitly empowering municipalities to seize underwater mortgages using their eminent domain power. The idea of using eminent domain to seize mortgages is largely untested and fears of

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<sup>167</sup> Lydia DePillis, *Richmond's rules: Why one California town is keeping Wall Street up at night*, WASHINGTON POST, Oct. 5, 2013, <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/10/05/richmonds-rules-why-one-california-town-is-keeping-wall-street-up-at-night/>.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> DePoto, *supra* note 141.

<sup>171</sup> Anthony Della Pelle, Opinion, *Irvington's foreclosure plan condemned to failure*, STAR LEDGER, Nov. 26, 2013, [http://blog.nj.com/njv\\_guest\\_blog/2013/11/irvingtons\\_foreclosure\\_plan\\_co.html](http://blog.nj.com/njv_guest_blog/2013/11/irvingtons_foreclosure_plan_co.html).

<sup>172</sup> *Id.*



implementation are merely speculative. In their calculations, cities must consider the yearly costs to maintain vacant and abandoned homes, their contributions to criminal activity, and future costs related to blight. Powerful Wall Street lobbying interests would likely challenge the measure. This challenge would likely rise to the New Jersey Supreme Court. It is very difficult to predict what the Supreme Court would decide, however, at least by passing the legislation we could find out whether these types of seizures are constitutional and economically feasible.

## **V. Conclusion: Do It For the Community**

There is no doubt that the *Kelo* decision caused a major political upheaval across the country. The vast majority of states enacted legislation in response to the decision, thus indicating its widespread effects. Some states have enacted legislation that has been heralded as extremely property owner friendly. Other states, for a multitude of reasons, have been criticized for enacting legislation that is insufficient in its property protections. Unfortunately, New Jersey falls into the latter category.

New Jersey has had a unique response to the *Kelo* decision. Some early, more property friendly pieces of legislation were rejected, then the New Jersey Supreme Court issued a very property owner protective decision, and finally a piece of legislation has been enacted a full eight years after the *Kelo* decision. A-3615 is inadequate for the purpose of preventing eminent domain abuses. The law lacks provisions that will allow property owners to participate and negotiate in the pre-development process. A-3615 also fails to protect property owners by failing to increase rental and relocation assistance that reflects the Consumer Price Index.

More importantly, A-3615 lacks provisions that provide for community just compensation. While individual just compensation is a constitutional requirement and absolutely necessary to protect people from total property loss, states and municipalities must learn how to

truly “redevelop” blighted areas by promoting employment and providing affordable housing to local residents. Many blighted areas in cities like Newark and Trenton have high unemployment rates and high crime rates as well. Removal of blighted buildings often results in less safe havens for drug dealers and weapons storage. Thus, the removal of the blighted buildings could contribute to the general health and safety of the community. This is a start but it should not be the end of the process.

Often municipalities try to get major corporations to open offices in their communities. Cities gain great tax revenue benefits if a large private company makes the redeveloped area its home. Arguably, the community will receive indirect benefits because the increased tax revenues could lead to more social services. However, this calculation is speculative at best and it doesn’t mean much to the community unless they can receive some direct benefits. This is why New Jersey should statutorily require that local construction companies are hired for the redevelopment projects, local residents are hired to work for private parties settling in the redeveloped area, and redevelopers build affordable housing units. These would provide direct benefits to local residents who really need some sort of capital to provide for themselves and their families.

Finally, one of the best ways to remove blight is to prevent it in the first place. There is no easy way to do this and municipalities may need to experiment with various methods. However, the seizure of underwater mortgages is an idea growing in popularity but is still untested. Richmond, California has passed legislation allowing for the seizure of mortgages but they have not attempted to use this power yet. As such, the feasibility and legality of the plan has not been assessed in any part of the country. Thus, New Jersey should be the first state to legislatively empower municipalities to seize underwater mortgages in their communities. The

plan will likely be challenged in court. The New Jersey Legislature and government should facilitate the quick appeal of the power to the New Jersey Supreme Court so that the constitutionality may ultimately be determined.

Only with these provisions can New Jersey become a state that truly understands redevelopment.