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### Providing Meaningful Judicial Review of Municipal Redevelopment Designations: Redevelopment in New Jersey Before and After *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*

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PROVIDING MEANINGFUL JUDICIAL REVIEW OF  
MUNICIPAL REDEVELOPMENT DESIGNATIONS:  
REDEVELOPMENT IN NEW JERSEY BEFORE AND AFTER  
*GALLENTHIN REALTY DEVELOPMENT, INC. v. BOROUGH  
OF PAULSBORO*

*Hon. James R. Zazzali\* & Jonathan L. Marshfield\*\**

ABSTRACT

This Article examines the significance of the New Jersey Supreme Court's recent decision in *Gallenthin Realty Development, Inc. v. Paulsboro* for redevelopment and property rights in New Jersey. It suggests that

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\* Chief Justice Zazzali currently serves as of counsel to Gibbons P.C. and Zazzali, Fagella, Nowak, Kleinbaum & Friedman, both of Newark, New Jersey. He previously served as Chief Justice of the Supreme Court of New Jersey and Attorney General of the State of New Jersey. See generally Gregory L. Acquaviva, Jonathan L. Marshfield, & David M. Stauss, *A Tribute to Chief Justice James R. Zazzali: More Than a "Caretaker,"* 59 RUTGERS L. REV. 667 (2007) (detailing the career and accomplishments of Chief Justice Zazzali). Before retiring from the Supreme Court of New Jersey in 2007, Chief Justice Zazzali authored the court's opinion in *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, 924 A.2d 447 (N.J. 2007).

No portion of this Article is intended to interpret or reinterpret *Gallenthin*. The court's opinion in *Gallenthin* speaks for itself. The intended and limited scope of this Article is to set forth the law as it existed before *Gallenthin*, recount the court's self-explanatory holding in *Gallenthin*, discuss post-*Gallenthin* opinions that have applied *Gallenthin*, and suggest some open questions regarding redevelopment in New Jersey. Because the court's opinion speaks for itself, the Authors leave the interpretation of *Gallenthin* to future courts. This Article should in no way be viewed—by litigants or courts—as a gloss on the court's opinion in *Gallenthin*.

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*Gallenthin* has resulted in the revival of meaningful judicial review of municipal redevelopment designations. Specifically, the Authors contend that *Gallenthin* confronted two pervasive problems concerning judicial review of redevelopment designations. First, since 1947, when New Jersey adopted a constitutional provision that specifically authorized the legislature to pass laws permitting the taking of property for redevelopment of “blighted areas,” courts have unduly acquiesced to legislative and municipal interpretations of “blight.” *Gallenthin* addressed this trend by reaffirming that the judiciary is responsible for ensuring that only “blighted areas” are subject to redevelopment. Second, although municipal fact-finding is entitled to deference if supported by substantial evidence, courts often deferred to municipal redevelopment designations based on an expert’s conclusory testimony that the property satisfied the statutory requirements for redevelopment. *Gallenthin* clarified that judicial deference is proper only if a municipality presents meaningful, quantitative evidence that directly correlates to the relevant statutory criteria. Indeed, post-*Gallenthin* judicial review provides property owners with great protections without frustrating legitimate redevelopment initiatives.

#### TABLE OF CONTENTS

ABSTRACT.....	451
INTRODUCTION.....	453
I. A HISTORY OF REDEVELOPMENT IN NEW JERSEY.....	458
A. <i>Redevelopment and Early American Public Housing Initiatives</i> .....	460
B. <i>New Jersey’s Extensive Early Experience with Redevelopment</i> .....	462
C. <i>The 1944 Redevelopment Companies Law and the 1946 Urban Redevelopment Law</i> .....	466
II. THE 1947 CONSTITUTIONAL CONVENTION AND THE GENESIS OF THE “BLIGHTED AREAS CLAUSE” .....	468
A. <i>The Committee on the Legislative Rejects a Constitutional Provision Addressing Redevelopment</i> .....	469
B. <i>The Convention Adopts a Redevelopment Provision</i> .....	471
III. THE PERCEPTION OF PLENARY LEGISLATIVE REDEVELOPMENT AUTHORITY AFTER 1947 .....	474
A. <i>The Blighted Areas Clause as a Grant of Plenary Redevelopment Authority</i> .....	474
B. <i>The Legislature’s Assumed Authority to Define “Blight” and Progressive Expansion of the Scope of Redevelopment</i> .....	476
C. <i>Judicial Review of Redevelopment Legislation Under the Blighted Areas</i>	

2009]	<i>GALLENTHIN REALTY DEVELOPMENT</i>	453
	<i>Clause</i> .....	479
IV.	THE (IN)SUBSTANTIAL EVIDENCE STANDARD AFTER 1947.....	483
V.	<i>GALLENTHIN</i> AND ITS PROGENY: MOVING TOWARDS A BALANCED APPROACH TO REDEVELOPMENT AND PROPERTY RIGHT PROTECTIONS.....	486
	A. <i>Gallenthin v. Borough of Paulsboro</i> .....	487
	1. Paulsboro’s Interpretation and Application of the LRHL .....	487
	2. The Court’s Opinion.....	489
	B. <i>Reclaiming Judicial Review of Redevelopment Designations: The Legislature’s Circumscribed Redevelopment Authority After Gallenthin</i> .....	490
	C. <i>Reclaiming Judicial Review of Redevelopment Designations: The Substantial Evidence Standard After Gallenthin</i> .....	494
VI.	UNANSWERED QUESTIONS OF JUDICIAL REVIEW AFTER <i>GALLENTHIN</i> .....	497
	A. <i>When Does the Constitution Permit Redevelopment of Non-Blighted Property Because it is Part of a Larger Blighted Area?</i> .....	497
	B. <i>How Often Does the Constitution Require Municipalities to Reevaluate Their Redevelopment Designations?</i> .....	499
CONCLUSION	.....	500

## INTRODUCTION

New Jersey is the most densely populated and heavily developed state in the country.<sup>1</sup> In addition to its large population and limited size, New Jersey’s aggressive land preservation and smart growth policies further limit the amount of developable land.<sup>2</sup> New Jersey’s existing housing stock is also

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1. New Jersey consists of 7,471 square miles and has at least 8.7 million residents. See Brian Uzdavinis, Note, *To Save or Not to Save: Historic Preservation in New Jersey—Justifications, Hindrances, Future*, 4 RUTGERS J.L. & PUB. POL’Y 649, 651 (2007) (citing U.S. Census Bureau, *Census 2000 Summary: Population, Housing Units, Area, and Density*, available at <http://quickfacts.census.gov/qfd/states/34000.html>). Thus, on average, New Jersey is home to more than 1,100 people per square mile. This means that New Jersey’s population is denser than both India and Japan. Jon Gertner, *Chasing Ground*, N.Y. TIMES MAG., Oct. 16, 2005, at 46.

2. New Jersey has “some of the most aggressive land preservation and smart growth policies in the nation . . .” Reforming the Use of Eminent Domain for Private Redevelopment in New Jersey 4 (N.J. Dep’t of the Pub. Advocate May 18, 2006) [hereinafter Reforming Eminent Domain in New Jersey]. For example, New Jersey’s Local Redevelopment and Housing Law, “encourages growth through redevelopment within existing towns and municipalities based on the premise that a community grows smarter by not growing outward.” Uzdavinis, *supra* note 1, at 690 (citing N.J. STAT. ANN. § 40A:12A-1 (West 2007)). New Jersey also has aggressive environmental land preservation legislation, see, e.g.,

among the oldest in the country.<sup>3</sup> Developers estimate, therefore, that New Jersey will be fully built-out within the next ten to fifteen years.<sup>4</sup>

These demands on New Jersey's developable land have created a precarious tension. On the one hand, as the New Jersey Public Advocate has observed, "the prosperity of New Jersey's communities is more reliant on redevelopment than perhaps any state in the nation."<sup>5</sup> Indeed, New Jersey is littered with antiquated plats, buildings, and street plans that inhibit modern development.<sup>6</sup> Unlike other less-developed States, some measure of government intervention is necessary to remove these impediments to development and protect communities from harmful blight.<sup>7</sup>

On the other hand, there is significant opportunity for abuse of property rights in New Jersey. Unlike the Federal Constitution and many state constitutions,<sup>8</sup> New Jersey's Constitution expressly authorizes the use of

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Freshwater Wetlands Protection Act, N.J. STAT. ANN. §§ 13:9B-1 to -30 (West 2008); agricultural land preservation legislation, *see, e.g.*, Agriculture Retention and Development Act, N.J. STAT. ANN. §§ 4:1C-11 to -48 (West 2008); and New Jersey's Municipal Land Use Law authorizes municipalities to preserve historic structures through zoning, *see* N.J. STAT. ANN. § 40:55:D-2 (West 2008).

3. *See* N.J. STAT. ANN. §§ 52:27D-437.2(d) (West 2008) (estimating that there are two million homes in New Jersey built before 1978); *In re Lead Paint Litig.*, 924 A.2d 484, 507 (N.J. 2007) (Zazzali, C.J., dissenting) (noting that New Jersey's housing stock is among the oldest in the country with one million homes built before 1950).

4. Gertner, *supra* note 1, at 46, 52 (citing interview by Jon Gertner with Professor Robert Lang, Co-Director, Metropolitan Institute at Virginia Tech (Oct. 16, 2005)).

5. Reforming Eminent Domain in New Jersey, *supra* note 2, at 4.

6. New Jersey was settled in the 1630's and is one of the oldest states in the country. Rebecca Hersh, *Historic Preservation, Smart Growth Recommendations From New Jersey Future*, N.J. FUTURE, Mar. 2005, at 1. More than two-thirds of its urban structures were constructed before 1959. *Id.* As a result, the configuration of roads and other public services are outdated in many of New Jersey's urban areas. *See* N.J. STAT. ANN. § 40A:12A-2(a) (West 2008) (declaring that "commercial and industrial installations, public services and facilities and other physical components and supports of community life" exist in New Jersey in conditions of "improper, or lack of proper, development . . .").

7. Reforming Eminent Domain in New Jersey, *supra* note 2, at 4; Hon. Peter G. Sheridan, *Kelo v. City of New London: New Jersey's Take on Takings*, 37 SETON HALL L. REV. 307, 324 (2007).

8. The Federal Constitution does not expressly authorize Congress to take private property for public use, but the United States Supreme Court has long held that "[t]he right of eminent domain inheres in the federal government by virtue of its sovereignty . . ." *James v. Dravo Contracting Co.*, 302 U.S. 134, 147 (1937). The power of eminent domain is, of course, restricted by the Fifth Amendment. *See* *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 n.7 (1984). Many state constitutions expressly grant the legislature the power of eminent domain, *see, e.g.*, MICH. CONST. art. X, § 2, but few state constitutions identify private redevelopment as a valid "public purpose" for which private property can be taken; *see e.g.*, ARIZ. CONST. art. II, § 17 (not identifying private redevelopment as valid public purpose).

eminent domain for redevelopment by private entities.<sup>9</sup> The Garden State's large population and limited size mean that land is at a premium, and, consequently, there is significant private capital willing to finance this redevelopment.<sup>10</sup> Municipalities are easily tempted by "redevelopment" proposals that promise to replace less profitable land uses such as low-income housing with more lucrative uses.<sup>11</sup> It is imperative, particularly in New Jersey, that municipalities are held in check by meaningful legal protections for property owners.<sup>12</sup>

Since the United States Supreme Court's decision in *Kelo v. City of New London*,<sup>13</sup> New Jersey has been sharply criticized for failing to provide property owners with adequate legal protections against "eminent domain abuse."<sup>14</sup> This criticism is not unfounded. Over the past several decades, the

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9. N.J. CONST. art. VIII, § 3, para. 1, provides:

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.

*Id.*

10. For example, the much publicized redevelopment of the beachfront in the City of Long Branch attracted almost \$1 billion in private investment. *See* Bill Bowman, *Poll: Don't Seize Homes for Private Development But Eminent Domain OK For Schools, Open Space*, ASBURY PARK PRESS, Oct. 5, 2005, at A1. Other billion-dollar redevelopment plans in New Jersey include redevelopment in Fort Monmouth, *see* Keith Brown, *Towns' Input Yields Changes in Fort Plan*, ASBURY PARK PRESS, Aug. 21, 2008, at Monmouth Section, and a plan to redevelop landfills at the Meadowlands; *see* Harry S. Pozzycki, Op-Ed., *Corzine Should Close Loopholes in Pay-to-Play Law*, ASBURY PARK PRESS, May 21, 2008, at Opinion Section.

11. *See* Antoinette Martin, *Taking On the Role of Tempter*, N.Y. TIMES, April 13, 2008, at RE 10 (discussing the replacement of small businesses with more lucrative uses, such as condominiums, as part of a redevelopment plan in Harrison, New Jersey).

12. *See generally* Repairing New Jersey's Eminent Domain Laws—Abuses and Remedies (N.J. Dep't of the Pub. Advocate May 29, (2007) (follow-up report) (documenting examples of alleged "eminent domain abuse").

13. 545 U.S. 469 (2005).

14. In August 2007, the Castle Coalition released its report, *50 State Report Card—Tracking Eminent Domain Reform Legislation Since Kelo*, (Castle Coalition Aug. 7, 2007) [hereinafter *50 State Report Card*]. The report concludes that "New Jersey is one of the nation's worst eminent domain abusers and is one of the states with the most work to do in the

New Jersey legislature has steadily expanded the statutory grounds on which a municipality can take property for redevelopment.<sup>15</sup> Indeed, the current statutory criteria are susceptible to almost unlimited application<sup>16</sup> and New Jersey is one of only a few states that have not yet enacted any post-*Kelo* eminent domain reform legislation.<sup>17</sup>

However, an even greater threat to property rights has been the absence of meaningful judicial review for property owners.<sup>18</sup> A survey of New Jersey's eight-decade long experience with redevelopment reveals that the 1947 Constitutional Convention was a turning point for judicial review of redevelopment legislation and municipal redevelopment designations.<sup>19</sup> In 1947, the Constitutional Convention adopted a provision that specifically authorized the legislature to pass laws permitting municipalities to take private property for redevelopment of "blighted areas."<sup>20</sup> The purpose of the provision was to attract private investment to finance redevelopment by eliminating any question as to the constitutionality of taking property for redevelopment by private developers.<sup>21</sup> After 1947, courts consistently acquiesced to legislative and municipal interpretations of "blight."<sup>22</sup> Courts

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legislature." *Id.* at 34. Fueling this criticism is the fact that, unlike the majority of states, New Jersey's legislature has not yet enacted any post-*Kelo* eminent domain reform legislation. *Id.*

15. See Reforming Eminent Domain in New Jersey, *supra* note 2, at 10-13 (discussing the legislative history of New Jersey's current redevelopment statute).

16. *Id.* at 7-9; see also Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447, 456-57 (N.J. 2007) (describing Paulsboro's interpretation of subsection (e)).

17. See generally 50 State Report Card, *supra* note 14 (summarizing legislative reforms after *Kelo*); Elaine B. Sharp & Donald Haider-Markel, *At the Invitation of the Court: Eminent Domain Reform in State Legislatures in the Wake of the Kelo Decision*, 38 PUBLIUS 556 (2008) (summarizing legislative reforms after *Kelo*). On the heels of *Kelo*, the New Jersey Legislature proposed eminent domain reform legislation that has not yet been passed. See *Lawmakers Seek End of Eminent Domain in N.J.*, COURIER POST, Aug. 8, 2008, at South Jersey News (discussing the proposal of Assembly Bill No. 1492, a response to the *Kelo* decision). That legislation has been significantly revised and has still not been passed. See Michael Booth, *Senate and Assembly Sponsors Forge Assent on New Eminent Domain Law*, N.J. L.J., June 22, 2009, at A1; Mary Fuchs, *N.J. Lawmakers Say Updated Eminent Domain Law Possible by Year's End*, NJ.COM, June 15, 2009, [http://www.nj.com/news/index.ssf/2009/06/after\\_years\\_of\\_negotiation\\_bet.html](http://www.nj.com/news/index.ssf/2009/06/after_years_of_negotiation_bet.html).

18. See discussion *infra* Part III.

19. See discussion *infra* Parts II and III.

20. N.J. CONST. art. VIII, § 3, para. 1; see generally discussion *infra* Part II.

21. See discussion *infra* Part II.

22. The case that set the tone for this deferential review of redevelopment legislation was *Wilson v. City of Long Branch*, 142 A.2d 837 (N.J. 1958); see generally discussion *infra* Part III (discussing the effect of the *Wilson* decision on judicial review of redevelopment in New Jersey after 1947).

deferred to the legislature's ever expanding definition of "blight" without adequately addressing whether those definitions exceeded the constitution's circumscribed redevelopment mandate.<sup>23</sup> Courts also frequently deferred to a municipality's interpretation of the scope of its redevelopment authority without addressing whether the municipality's claimed redevelopment authority was overbroad.<sup>24</sup>

The Supreme Court of New Jersey's decision in *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*<sup>25</sup> addressed this undue deference and, as demonstrated by subsequent lower court decisions, has revived meaningful judicial review of municipal redevelopment designations in at least two ways. First, *Gallenthin* clarified that although New Jersey's Constitution expressly authorizes the taking of private property for redevelopment,<sup>26</sup> the constitution limits redevelopment to only "blighted" areas.<sup>27</sup> More important, the court rejected the municipality's argument that redevelopment legislation is insulated from judicial review because New Jersey's Constitution "authorizes the Legislature, not the Judiciary, to define 'blight' . . . ."<sup>28</sup> Rather, the court held that although "redevelopment is a valuable tool for municipalities faced with economic deterioration in their communities,"<sup>29</sup> the Judiciary retains the authority to review legislation and ensure that only "blighted" areas are subject to redevelopment.<sup>30</sup>

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23. See, e.g., *Wilson*, 142 A.2d at 842-49 (not addressing whether blighted areas clause places any restrictions on legislature's redevelopment authority but holding that "no reasonable argument can be made that the connotation ascribed to [the term "blight"] overreaches the public purpose sought to be promoted by the Constitution"); *Levin v. Twp. Comm. of Bridgewater*, 274 A.2d 1, 22 (N.J. 1971) (discussing the constitutionality of the Local Housing Authorities Law without mentioning whether the blighted areas clause places any restrictions on the legislature's redevelopment authority); *Forbes v. Bd. of Trustees of South Orange*, 712 A.2d 255, 260-61 (N.J. Super. Ct. App. Div. 1998) (recognizing that blighted areas clause may impose restrictions on the legislature but declining to define or enforce any restrictions); see generally discussion *infra* Part III (addressing the courts' acquiescence to legislative definitions of "blight").

24. See generally discussion *infra* Part IV (discussing the substantial evidence standard of review as applied before *Gallenthin*).

25. 924 A.2d 447 (N.J. 2007).

26. N.J. CONST. art. VIII, § 3, para. 1.

27. *Gallenthin Realty Dev., Inc.*, 924 A.2d at 460.

28. *Id.* at 456.

29. *Id.* at 460.

30. *Id.* at 456. Property owners can challenge the taking of their property in court by proving that their property is not "blighted" within the meaning of New Jersey's Constitution. As a corollary, municipalities must first demonstrate that an area is "blighted" before they can engage in redevelopment. Several post-*Gallenthin* cases have properly undertaken this analysis. See *Harrison Redev. Agency v. DeRose*, 942 A.2d 59, 92 (N.J. Super. Ct. App. Div.



Second, *Gallenthin* affirmed that a municipality's finding of "blight" is not entitled to deference by a reviewing court unless that determination is supported by substantial evidence on the record.<sup>31</sup> The court further stated that the substantial evidence standard requires quantitative evidence that directly correlates to the relevant statutory criteria.<sup>32</sup> The court emphasized that conclusory statements by an expert that the subject property satisfies the statutory criteria are not, on their own, sufficient.<sup>33</sup> This procedural safeguard forces municipalities to engage in meaningful research and investigation before they declare property blighted and subject to redevelopment.<sup>34</sup>

These basic principles are reshaping New Jersey's eminent domain practices by providing property owners with much-needed protections while not preventing redevelopment of genuinely "blighted areas." This Article will explore *Gallenthin*'s impact on redevelopment in New Jersey. Section I will place *Gallenthin* in context by uncovering New Jersey's notable history with redevelopment before the adoption of the 1947 constitution. Section II will provide a comprehensive look at the genesis of New Jersey's unusual constitutional provision that expressly authorizes the use of eminent domain for private redevelopment. Part III will discuss the deference that characterized judicial review of redevelopment legislation after 1947, and Part IV will discuss the substantial evidence standard as applied by courts during that time. Part V will discuss *Gallenthin*'s impact on redevelopment in New Jersey and the post-*Gallenthin* cases that have applied *Gallenthin*'s precepts. Finally, Part VI will raise some unanswered questions facing courts, municipalities, and the legislature after *Gallenthin*.

## I. A HISTORY OF REDEVELOPMENT IN NEW JERSEY

The United States Supreme Court's decision in *Kelo v. City of New London*,<sup>35</sup> which held that the taking of property to sell for private

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2008) (applying *Gallenthin*'s constitutional requirement that property be "blighted"); *Cramer Hill Residents Ass'n, Inc. v. Primas*, 928 A.2d 61, 70-71 (N.J. Super. Ct. App. Div. 2007) (applying *Gallenthin*'s constitutional requirement that property be "blighted"). The court recognized an exception to this requirement where non-blighted property is "integral" to redevelopment of the larger blighted area. *Gallenthin Realty Dev., Inc.*, 924 A.2d at 464.

31. *Id.*

32. *Id.*

33. *Id.*

34. See *City of Long Branch v. Anzalone*, No. A-0192-06T2, 2008 WL 3090052, at \*24 (N.J. Super. Ct. App. Div. Aug. 7, 2008) (per curiam) (applying the substantial evidence standard as articulated in *Gallenthin*).

35. 545 U.S. 469, 477 (2005).

development qualified as a “public use” within the meaning of the Fifth Amendment to the United States Constitution, set off a furious national debate regarding the appropriate use of the states’ eminent domain power for redevelopment.<sup>36</sup> Property owners lamented the ruling as an unprecedented assault on individual property rights.<sup>37</sup> Municipalities and local governments celebrated the decision as endorsing a much-needed tool in their efforts to protect the public from unsanitary and harmful blight.<sup>38</sup>

Notwithstanding the pubescent passion that the *Kelo* decision incited throughout the country,<sup>39</sup> New Jersey has a long history of balancing and accommodating these competing concerns. A proper understanding of the court’s decision in *Gallenthin* requires that it be viewed in the context of New Jersey’s eight-decade-long experience with redevelopment.<sup>40</sup> Indeed, New Jersey’s history shows that its current redevelopment legislation is not a recent assault on property rights but rather the culmination of incremental legislative action originally directed towards genuine public harms.<sup>41</sup> Similarly, the courts’ review of redevelopment legislation over the past eighty years demonstrates a healthy and constructive although sometimes imbalanced, institutional dialogue between the judiciary and the legislature regarding the scope of property rights and the appropriate use of eminent domain for redevelopment.<sup>42</sup> It is within this context that the court’s ruling in *Gallenthin* must be understood.

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36. See Michele Alexandre, “Love Don’t Live Here Anymore”: *Economic Incentives for a More Equitable Model Of Urban Redevelopment*, 35 B.C. ENVTL. AFF. L. REV. 1, 7-13 (2008) (discussing controversy stemming from Court’s decision *Kelo*); Avi Salzman, *Homeowners Shown the Door*, N.Y. TIMES, July 3, 2005, at 14CN; Bill Slocum, *Diner’s Owner Frets About Ruling*, N.Y. TIMES, July 3, 2005, at 14CN.

37. See Salzman, *supra* note 36, at 14CN.

38. See Ronald Smothers, *In Long Branch, No Olive Branches*, N.Y. TIMES, Oct. 16, 2005, at 14NJ (discussing municipalities’ reactions to *Kelo* decision).

39. See, e.g., The American Conservative Union, *Judicial Activism Strikes Again: Supreme Court Rules Government Can Seize Your Home*, June 23, 2005, available at [http://www.conservative.org/pressroom/06232005\\_un.asp](http://www.conservative.org/pressroom/06232005_un.asp) (stating that *Kelo* stands for the proposition that “the government can take away your home any time it wants to build a shopping mall” and the *Kelo* “ruling is a slap in the face to property owners everywhere.”).

40. New Jersey enacted its first redevelopment statute in 1938, the New Jersey Local Housing Authorities Law of 1938, ch 19, 1938 N.J. Laws 65, which was immediately challenged in court. See *infra* Part I.B. (discussing the Local Housing Authorities law as the beginning of New Jersey’s experience with redevelopment legislation and its attendant imposition on property rights).

41. See discussion *infra* Part I.A-B.

42. See discussion *infra* Part I.A-B.

*A. Redevelopment and Early American Public Housing Initiatives*

As early as the mid- to late-1800s, many Americans were concerned about growth of urban “slums.”<sup>43</sup> Advocates for the poor focused particularly on the role of landlords in creating and perpetuating unsanitary living conditions and called for legal reform.<sup>44</sup> New York City, for example, adopted various ordinances and regulations during the mid-1800s that were designed to counteract the city’s growing slums.<sup>45</sup>

Most notably, in 1895, New York passed the Tenement House Act of 1895,<sup>46</sup> which authorized the City Board of Health to condemn and demolish buildings that were unfit for human habitation.<sup>47</sup> This legislation is believed to have been the first of its kind in the United States.<sup>48</sup> Although the legislation was relatively unsuccessful in clearing slums because of sporadic enforcement, its express purpose was to authorize the condemnation and taking of privately held tenements that were declared unfit for human habitation.<sup>49</sup>

It was not until the 1920s and 30s, however, that the taking of private property for redevelopment, rather than the condemnation of tenements,

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43. See JACOB A. RIIS, *HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK* (Sam Bass Warner, Jr. ed., The Belknap Press of Harvard Univ. Press 1970) (1890); *THE TENEMENT HOUSE PROBLEM* (Robert W. DeForest & Lawrence Veiller eds., 1903); Lawrence Veiller, *Housing Reform Through Legislation*, 51 *ANNALS AM. ACAD. POL. & SOC. SCI.* 68 (1914); see also Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *YALE L. & POL’Y REV.* 1, 7-8 (2003) (discussing the public’s concern regarding public housing problems in the late 1800s).

44. See ROY LUBOVE, *THE PROGRESSIVES AND THE SLUMS: TENEMENT HOUSE REFORMS IN NEW YORK CITY 4-8* (Univ. of Pittsburgh Press 1890-1917) (1962).

45. See *id.*; Mark Peters, Note, *Homelessness: A Historical Perspective on Modern Legislation*, 88 *MICH. L. REV.* 1209, 1216-17 (1990) (discussing the immigrant situation and housing problems attendant to it in New York City and the resulting legislative efforts to address these problems).

46. 1895 N.Y. Laws § 8, ch. 567. See Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-modernism, Urban Planning, and Gentrification*, 20 *FORDHAM URB. L.J.* 699, 713 (1993) (discussing New York’s Tenement House Act).

47. *Id.*; Pritchett, *supra* note 43, at 7-8.

48. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 786-87* (2003); David A. Marcello, *Housing Redevelopment Strategies in the Wake of Katrina and Anti-Kelo Constitutional Amendments: Mapping a Path Through the Landscape of Disaster*, 53 *LOY. L. REV.* 763, 769 n.20 (2007); Pritchett, *supra* note 43, at 7.

49. *Id.* at 8. Although this legislation did not authorize condemnation for purposes of giving the property to private developers, some contemporary advocates endorsed such a position as early as the early 1900s. *Id.* at 8 n.27.

became a viable premise in American jurisprudence.<sup>50</sup> Indeed, “the principle that one person’s property could not be taken and given to another was ingrained in” early American legal thought.<sup>51</sup> Nevertheless, that dogmatic principle was tempered by the pragmatic realization that government intervention was necessary to curb the rapid urban decline caused by the construction boom of the 1920s.<sup>52</sup> As early as the 1930s, states began to authorize the taking of private property by the exercise of eminent domain for the construction of public housing.<sup>53</sup> These initiatives were aimed at ensuring that “persons of low income” were not “forced to reside in . . . insanitary and unsafe accommodations.”<sup>54</sup>

The majority of courts that reviewed these statutes upheld their constitutionality.<sup>55</sup> A few courts, however, ruled that the taking of private property for public housing was not a “public purpose” justifying the exercise of the state’s eminent domain power.<sup>56</sup> For example, in 1935, a federal district judge in Kentucky ruled that public housing was not a public purpose because

[i]f the property of the citizen can be condemned and taken . . . simply because the legislative department . . . may determine that the use to which this property is to be put is for the general welfare, the property of every citizen in this country would be subject to the whims and

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50. *Id.* at 13-14.

51. *Id.* at 13. Further bolstering this belief was the fervent conviction that the best protection against socialism was the heightened protection of individual property rights. *Id.*

52. See generally JOEL SCHWARTZ, *THE NEW YORK APPROACH: ROBERT MOSES, URBAN LIBERALS AND REDEVELOPMENT OF THE INNER CITY* (1993) (discussing the effect of construction boom of 1920’s on New York’s housing stock). The construction boom meant that land in the cities was increasingly at a premium. As a result, there was increasing pressure to ensure that land was put to the most efficient and appropriate use. Pritchett, *supra* note 43, at 13-14.

53. See Wendell E. Pritchett, *Beyond Kelo: Thinking About Urban Redevelopment in the 21st Century*, 22 GA. ST. U. L. REV. 895, 899 (2006). This state action was aided by federal legislation that provided cities and states with funds for slum clearance. See Housing Act of 1949, ch. 338, 63 Stat. 413 (1949) (codified at 42 U.S.C §1441 (2000)); see also Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 BROOK. L. REV. 861, 868-70 (2001) (discussing the Housing Act of 1949’s Slum Clearance and Urban Renewal Program).

54. 1938 Local Housing Authorities Law, ch 19, 1938 N.J. Laws 65; see also *Romano v. Hous. Auth. of Newark*, 10 A.2d 181, 182 (N.J. 1939) (referencing work of Jacob Riis for the proposition that slum clearance legislation was designed to protect tenants from slums created by landlords).

55. See, e.g., *New York City Hous. Auth. v. Muller*, 1 N.E.2d 153, 153-54 (N.Y. 1936); see also Pritchett, *supra* note 43, at 25.

56. See *id.* at 23 (collecting cases).

theories of any temporary majority.<sup>57</sup>

Although these public housing initiatives were aimed at preventing the spread of blight and slums, they did not expressly authorize the taking of private property for redevelopment by other private persons or entities.<sup>58</sup> Rather, these statutes authorized government housing authorities to take *and retain* private property for the purpose of constructing and operating public housing.<sup>59</sup> Indeed, property owners were actually perceived as causing the slums by exploiting poor tenants.<sup>60</sup> Thus, these statutes authorized the taking of private property for construction and ownership of public housing by government agencies, not private redevelopment.<sup>61</sup> In fact, most statutes prohibited government housing authorities from operating public housing projects for a profit.<sup>62</sup>

### *B. New Jersey's Extensive Early Experience with Redevelopment*

New Jersey was an active participant in this early debate. In 1938, the New Jersey legislature enacted the Local Housing Authorities Law ("LHAL"),<sup>63</sup> which was the Garden State's first redevelopment statute. The

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57. *United States v. Certain Lands in Louisville*, 9 F. Supp. 137 (D. Ky. 1935), *aff'd*, 78 F.2d 684 (6th Cir. 1935); see Pritchett, *supra* note 43, at 24-25 (discussing *United States v. Certain Lands in Louisville*).

58. See Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 606-07 (1949).

59. Indeed, most statutes provided that the favorable tax treatment afforded the housing authorities was lost if the property was not owned and controlled by the housing authority. See, e.g., 1938 Local Housing Authorities Law, ch. 19, § 21, 1938 N.J. Laws 84 ("[S]uch housing authority projects are hereby declared to be public property devoted to an essential public and governmental purpose . . . as long as such property remains under the exclusive control and jurisdiction of a housing authority or public body which owns or holds such property.").

60. See also *Romano v. Hous. Auth. of Newark*, 10 A.2d 181, 182 (N.J. 1939) (citing work of Jacob Riis for the proposition that slum clearance legislation was designed to protect tenants from slums created by landlords). The essential point is that these early statutes differ from modern redevelopment statutes because they were primarily concerned with protecting tenants and not the elimination of blight.

61. See, e.g., 1938 Local Housing Authorities Law, ch. 19, §§ 5-8, 1938 N.J. Laws 70-75.

62. See, e.g., *id.* § 9, 1938 N.J. Laws 75 ("[N]o housing authority shall construct or operate any such project for profits, or as a source of revenue for the municipality or the county."). This declaration is significant given the stated purpose of modern redevelopment statutes to increase local revenue by eliminating blight and encouraging more profitable uses. *Id.* § 3, 1938 N.J. Laws 65-66.

63. 1938 Local Housing Authorities Law, ch. 19, 1938 N.J. Laws 65. The Legislature also enacted the 1938 Housing Co-Operation Law, ch. 20, 1938 N.J. Laws 87, and

LHAL authorized local governing bodies to create public “Housing Authorities.”<sup>64</sup> These Housing Authorities were endowed with “essential government functions”<sup>65</sup> including the power of eminent domain.<sup>66</sup> The Authorities were created to abolish and clear slums<sup>67</sup> and provide “decent safe and sanitary dwellings, apartments or other living accommodations for persons of low income.”<sup>68</sup>

Pursuant to the LHAL, the City of Newark passed an ordinance creating the Housing Authority of the City of Newark.<sup>69</sup> In March 1939, the Housing Authority determined that certain parcels of privately owned property were “necessary to acquire . . . for the purposes of building a public housing project for families of low income.”<sup>70</sup> The property owners sued, claiming that the taking of private property “to effect slum clearances” was not a “public use” justifying the exercise of the state’s eminent domain power.<sup>71</sup>

The New Jersey Supreme Court rejected the property owners’ position.<sup>72</sup> In *Romano v. Housing Authority of Newark*, the court held that “there is no more reason why the legislature of our state may not, under its power of eminent domain, take private property in order to effect slum clearances than

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amendments to the 1938 Eminent Domain Act, ch. 21, 1938 N.J. Laws 92, in conjunction with the LHAL.

This legislation was in direct response to available federal funds under the Housing Act of 1949. HOUSING AUTHORITY OF THE CITY OF CAMDEN, HOUSING IN CAMDEN (1942), available at <http://www.dvrbs.com/hacc/camdenNJ-housingauthority.htm> [hereinafter HOUSING IN CAMDEN] (discussing negotiation of Local Housing Authorities Law and its relationship to the Federal Housing Act).

64. 1938 Local Housing Authorities Law, ch. 19, § 5, 1938 N.J. Laws 69.

65. *Id.* § 8 1938 N.J. Laws 73.

66. *Id.* at 74. The State’s eminent domain statute was expressly amended to include a section entitled “Condemnation by a housing authority.” 1938 Eminent Domain Act, ch. 21, § 2, 1938 N.J. Laws 93. This section authorized the use of eminent domain for the purposes described in the LHAL. *Id.*

67. 1938 Local Housing Authorities Law, ch. 19, § 4, 1938 N.J. Laws 68. The LHAL defined slums as “any area where dwellings predominate which, by reason of dilapidation, overcrowding, faulty arrangement of design, lack of ventilation, light or sanitation facilities, or any combination of these factors, are detrimental to the public safety, health and morals.” *Id.* Notably, the clearing of slums was authorized only if the property was converted “into a public area, like a park, and other recreational purposes.” *Id.* The Authorities were not authorized to convert demolished slums by giving property to other private developers. *Id.*

68. *Id.*

69. *Romano v. Hous. Auth. of Newark*, 10 A.2d 181, 182 (N.J. 1939).

70. *Id.*

71. *Id.* The property owners also argued that the LHAL was invalid because it improperly delegated legislative power to the Housing Authority, and the tax exemption provided under the LHAL was improper. *Id.* at 183.

72. *Id.* at 184.

that it may take private property in order to provide for roads, railroads and swamp clearances.”<sup>73</sup> The court held that slum clearance was a “valid public purpose” because “[p]oor housing conditions . . . definitely produce disease, an early death rate, as well as many juvenile delinquents.”<sup>74</sup> The court concluded, therefore, that the property owners’ rights must give way to the general welfare and the taking of private property was justified.<sup>75</sup>

However, a little more than a year later, the court was asked to clarify its holding. In *Ryan v. Housing Authority of Newark*,<sup>76</sup> several Newark property owners sued to stop the taking of their property for the construction of a public housing project.<sup>77</sup> The property owners argued that the Authority could not take their properties because, unlike *Romano*, the subject properties were not sufficiently deteriorated to constitute a “slum.”<sup>78</sup> The Authority argued that the taking of private property for the construction of public housing was, in itself, a “public use” justifying the exercise of eminent domain.<sup>79</sup> The court agreed and held that the construction and operation of low-income public housing was a “public use” justifying the exercise of eminent domain.<sup>80</sup> Integral to the court’s holding was the fact that the LHAL prohibited the “operation of such project[s] for ‘profit, or as a source of revenue to the municipality or the county.’”<sup>81</sup>

These rulings paved the way for the proliferation of public Housing Authorities in New Jersey. As the court noted in *Romano*, by 1939, at least eleven other municipalities had created Housing Authorities.<sup>82</sup> These Authorities had been approved for more than \$15,905,100 in combined

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73. *Id.*

74. *Id.* at 182-83.

75. *Id.* at 184.

76. 15 A.2d 647 (N.J. 1940).

77. *Id.* at 649.

78. *Id.* at 651-52.

79. *Id.* at 651. The court’s opinion was a telling precursor to the court’s opinion, more than sixty seven years later, in *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447 (N.J. 2007). Specifically, the Borough in *Gallenthin* argued that a subsequent amendment to New Jersey’s constitutions, *see infra* Part II, divested the judiciary of the authority to determine which uses were public uses for the purposes of eminent domain. *Gallenthin*, 924 A.2d at 456. The court rejected that argument. *Id.* Similarly, in *Ryan* the court stated that “in the ultimate analysis it is a judicial question whether the use is ‘public’ in nature.” 15 A.2d at 650.

80. *Ryan*, 15 A.2d at 650.

81. *Id.* at 652 (citing 1938 Local Housing Authorities Law, ch. 19, § 9, 1938 N.J. Laws 75). Thus, it appears that the court believed that the constitutionality of the LHAL was saved, in part, by the fact that the property would not be taken for the making of a profit.

82. *Romano v. Hous. Auth. of Newark*, 10 A.2d 181, 183 (N.J. 1939).

federal funds designated for slum clearance and public housing initiatives.<sup>83</sup> These programs often had a salutary effect on their communities without controversy from property owners.<sup>84</sup> In Camden, for example, the Housing Authority obtained more than \$2 million in federal funds to construct moderate-income housing in 1933, which directly benefited many Camden residents.<sup>85</sup>

However, the LHAL was very limited in scope. Unlike modern redevelopment statutes, it was directed to the particular problem of insanitary housing conditions for low-income people.<sup>86</sup> The primary goal of the LHAL was to provide safe housing for the poor.<sup>87</sup> Redevelopment was incidental to this aim. The LHAL also lacked a key element that characterizes modern redevelopment statutes. Although the LHAL vested local Housing Authorities with the power to take private property for slum clearance,<sup>88</sup> the LHAL did not authorize the taking of private property for private redevelopment.<sup>89</sup> Indeed, the housing projects were publicly owned and operated, and the LHAL prohibited their operation for a profit.<sup>90</sup> This would soon change, however.

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83. *Id.* The court noted that as of 1939, the following authorities had obtained federal funds: "Asbury Park, \$675,000; Atlantic City, \$1,855,000; Camden, \$1,281,000; Elizabeth, \$4,094,000; Harrison, \$993,000; Jersey City, \$4,496,000; Long Branch, \$546,000; Newark, \$11,835,000; North Bergen, \$863,000; Perth Amboy, \$1,145,000; Summit, \$391,000; Trenton, \$2,429,000." *Id.*

84. *See* 400 Housing Units to Be Added Near Present Projects, CAMDEN COURIER POST, Feb. 6, 1950, available at <http://www.dvrbs.com/hacc/CamdenNJ-HousingAuthority.htm> (discussing success of early projects in Camden).

85. *See* HOUSING IN CAMDEN, *supra* note 63.

86. *See* 1938 Local Housing Authorities Law, ch. 19, § 3, 1938 N.J. Laws 65 (declaring that the purpose of the LHAL was to alleviate "unsanitary and unsafe dwelling accommodations . . .").

87. *See id.* (declaring that LHAL was intended to provide safe and sanitary accommodations for "persons of low income").

88. 1938 Local Housing Authorities Law, ch. 19, § 8(d), 1938 N.J. Laws 74.

89. *Id.* (describing powers of housing authorities and specifically prohibiting authorities from operating housing projects at a profit).

90. This is not to suggest that the power of eminent domain was never before delegated to private entities or individuals. On the contrary, New Jersey's 1844 Constitution contemplated such delegation. *See* art. IV, § 7, para. 9 ("Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners."); *Glazier v. New Jersey & N.Y.R. Co.*, 37 A. 614, 615 (N.J. 1897) (involving delegation of eminent domain authority to private railroad company). However, this delegation had no early application to redevelopment projects.



C. *The 1944 Redevelopment Companies Law and the 1946 Urban Redevelopment Law*

New Jersey's experience with redevelopment took a significant turn with the legislature's enactment of the 1944 Redevelopment Companies Law ("RCL")<sup>91</sup> and the 1946 Urban Redevelopment Law ("URL").<sup>92</sup> Unlike the LHAL, which was directed towards the specific problem of insanitary housing,<sup>93</sup> the RCL was concerned with the more general problem of urban decay.<sup>94</sup> Indeed, the legislature's statement declared that "in certain areas of municipalities located within this State there exists substandard conditions . . . owing to obsolescence, deterioration and dilapidation of buildings, or excessive land coverage, lack of planning, of public facilities, of sufficient light, air and space, and improper design and arrangement of living quarters."<sup>95</sup> The legislature concluded that these conditions "depress and destroy the economic value of large areas and by impairing the value of private investments threaten the sources of public revenue" and that "rehabilitation" and "modernization" of these areas was "essential to the protection of the financial stability of" the municipalities.<sup>96</sup> Thus, the public detriment targeted by the RCL was the financial insolvency of municipalities.<sup>97</sup>

Significantly, the RCL also departed from the LHAL because it intentionally authorized the solicitation and use of private capital to fund redevelopment.<sup>98</sup> The RCL stated that "the reclamation or rehabilitation of our centers of population cannot be carried out with public revenue or funds alone and that private capital and enterprise must be enlisted if the very essential task of reclamation and rehabilitation is to be discharged."<sup>99</sup> Under the LHAL, on the other hand, redevelopment was entirely dependent on public financing.<sup>100</sup>

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91. 1944 Redevelopment Companies Law, ch. 169, 1944 N.J. Laws 613.

92. 1946 Urban Redevelopment Law, ch. 52, 1946 N.J. Laws 109.

93. See 1938 Local Housing Authorities Law, ch. 19, § 3, 1938 N.J. Laws 65 (declaring that the purpose of the LHAL was to alleviate "unsanitary and unsafe dwelling accommodations").

94. See 1944 Redevelopment Companies Law, ch. 169, § 2, 1944 N.J. Laws 615.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 616.

99. *Id.*

100. See 1938 Local Housing Authorities Law, ch. 19, § 13, 1938 N.J. Laws 77 (authorizing the issuance of bonds to finance public housing).

The RCL also departed from the LHAL by authorizing the creation of “Redevelopment Companies” by three or more private individuals, who simply needed to file a certificate with the appropriate county clerk.<sup>101</sup> Redevelopment Companies were deemed “quasi-public” in nature, were subject to taxation, and were intended to operate for profit.<sup>102</sup> Unlike the LHAL, which authorized redevelopment only for low-income public housing, the RCL authorized redevelopment “for business, commercial, industrial, cultural or recreational purposes.”<sup>103</sup>

The RCL attempted to synchronize the private and public aspects of redevelopment by authorizing Redevelopment Companies to adopt redevelopment plans.<sup>104</sup> These plans were then offered for public comment and considered by a supervising public agency, usually the governing municipality.<sup>105</sup> If a municipality approved the redevelopment plan, the municipality could condemn private property “needed or convenient for the project” and then convey that property to the Redevelopment Company.<sup>106</sup> The RCL also authorized municipalities to grant tax exemptions for property included in a redevelopment plan in order to encourage private investment.<sup>107</sup>

The URL broadened New Jersey’s redevelopment efforts even further. The URL authorized any private entity or person to submit an application to a municipality for the private construction and operation of sanitary housing upon land located within the municipality that contained in whole or in part unsanitary or unsafe structures.<sup>108</sup> If the municipality approved the redevelopment application, the municipality was then authorized to acquire “by the exercise of eminent domain, all of the property included within the said tract of land” and lease the acquired property to the private developer for a period of forty years with a right to renew for twenty years.<sup>109</sup> The URL

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101. *Id.* § 4, 1944 N.J. Laws 620.

102. *Id.* The Authorities were required to state in their certificate that they were created to “serve a public purpose” and that they were subject to supervision and control of public authorities. *Id.* at 621.

103. *Id.* § 14, 1944 N.J. Laws 627 (“The project or projects of any redevelopment company shall be designed and used primarily for housing purposes but portions of the project may be planned and used for business, commercial, industrial, cultural or recreational purposes appurtenant thereto as approved in the project.”).

104. *Id.* § 3(7) 1944 N.J. Laws 618.

105. *Id.* § 15(n)(3), 1944 N.J. Laws 630.

106. *See id.* § 20, 1944 N.J. Laws 634.

107. *Id.* § 26, 1944 N.J. Laws 641.

108. 1946 Urban Redevelopment Law, ch. 52, § 3 1946 N.J. Laws 110.

109. *Id.* § 5, 1946 N.J. Laws 112.

also provided tax exemptions for buildings erected on the property.<sup>110</sup> Although the URL was limited to the construction of housing developments on decadent properties, its express purpose was to privatize redevelopment initiatives.<sup>111</sup>

The RCL and URL were bold initiatives that, at least in theory, significantly expanded municipalities' redevelopment authority. Both statutes were precursors to modern redevelopment statutes because they sought to provide incentives for private investment in redevelopment projects and authorized the use of eminent domain to facilitate private redevelopment.<sup>112</sup> Notwithstanding these ambitious objectives, however, the laws were completely ineffective at facilitating redevelopment.<sup>113</sup> Developers were reluctant to invest in redevelopment projects because of the risk that New Jersey's courts would declare the statutes unconstitutional.<sup>114</sup> This concern effectively undermined these statutes and prompted a significant constitutional revision that now frames the contemporary redevelopment debate in New Jersey.

## II. THE 1947 CONSTITUTIONAL CONVENTION AND THE GENESIS OF THE "BLIGHTED AREAS CLAUSE"

When the legislature enacted the LHAL, RCL, and URL, New Jersey's constitution was silent on the issue of redevelopment.<sup>115</sup> Although the

110. *See id.* § 3, 1946 N.J. Laws 117.

111. *See id.* § 2, 1946 N.J. Laws 109.

112. *See id.* at 110 ("[T]hat to accomplish such purpose investment of private capital and participation by private enterprise should be encouraged."); 1944 Redevelopment Companies Law, ch. 169, § 2, 1944 N.J. Laws 614. ("[T]hat provision must be made to encourage the investment of funds.").

113. *See* I STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947: CONVENTION PROCEEDINGS RECORD 743-44 (1952) [hereinafter I PROCEEDINGS] ("No corporations have been willing, so far, to undertake such projects with the fear of the law's being held unconstitutional hanging over their head."). Corporations also feared that the RCL's tax exemption provisions would be declared unconstitutional. *Id.*

114. *Id.* This fear was not unfounded. Indeed, in *Ryan v. Hous. Auth. of Newark*, 15 A.2d 647 (N.J. 1940), the court stated that it was upholding the constitutionality of the LHAL, at least in part, because the LHAL prohibited the taking of private property to be operated by the municipality for a profit. *Id.* at 652.

115. However, the constitution, ratified in 1844, contained three provisions directly addressing the taking of private property. First, the constitution provided that "[p]rivate property shall not be taken for public use without just compensation." N.J. CONST. OF 1844, art. I, para. 16. Second, it endorsed the taking of private property for public schools. *Id.* art. IV, § 7, para. 6. Third, and perhaps most surprisingly, the constitution provided that

constitution contemplated the taking of private property for public use, the only public use that it expressly identified was the taking of property for public schools.<sup>116</sup> Thus, New Jersey's courts were responsible for deciding which uses were constitutional.<sup>117</sup> This created a great deal of uncertainty regarding the constitutionality of the RCL and URL, which boldly declared that *private* redevelopment was a "public" use justifying the use of eminent domain.<sup>118</sup> Indeed, before 1947, not a single corporation invested in a New Jersey redevelopment project.<sup>119</sup> Thus, when Governor Alfred E. Driscoll successfully convened a constitutional convention in 1947,<sup>120</sup> a prime issue for the delegates was whether the new constitution should expressly address redevelopment.

*A. The Committee on the Legislative Rejects a Constitutional Provision Addressing Redevelopment*

The Committee on the Legislative, which was charged with drafting a Legislative Article for the new constitution,<sup>121</sup> was the first to discuss a constitutional provision dealing with redevelopment.<sup>122</sup> Mr. Ernest G. Fifield,

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"[i]ndividuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners." *Id.* art. IV, § 7, para. 9.

116. *Id.* art. IV, § 7, para. 6.

117. See *Ryan v. Housing Authority of Newark*, 15 A.2d 647, 650 (N.J. 1940); *Tide-Water Co. v. Coster*, 18 N.J. Eq. 518 (N.J. 1866) (affirming that the judiciary was responsible for revisiting the legislature's declarations of public use).

118. See *Holcombe v. W. Union Tel. Co.*, 162 A. 760, 762 (N.J. 1932) (stating that no authority exists to take property except for public use); I PROCEEDINGS, *supra* note 113, at 743-44 ("No corporations have been willing, so far, to undertake such projects with the fear of the law's being held unconstitutional hanging over their head.").

119. I PROCEEDINGS, *supra* note 113, at 744.

It is possible, of course, that these laws would not be declared unconstitutional, but no business corporation wants to be the guinea pig and sink large sums into a project without assurance that it will be safe in its investments. The result is that while this program of rehabilitation has been endorsed by the Legislature twice, no redevelopment is being undertaken in the State, even now when the acute housing shortage would make it an attractive venture to capital.

*Id.*

120. See ROBERT F. WILLIAMS, *THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE* 15-16 (1990).

121. II STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947: CONVENTION PROCEEDINGS RECORD 1061 (1952) [hereinafter II PROCEEDINGS].

122. III STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947: CONVENTION PROCEEDINGS RECORD 537 (1952) [hereinafter III PROCEEDINGS].

a representative of the Montclair Planning Board, initially proposed a constitutional provision to the committee.<sup>123</sup>

Mr. Fifield's proposed provision stated that the acquisition of real property for development or redevelopment of any area in accordance with a plan duly adopted in a manner prescribed by the Legislature, whether the uses to which such area is to be devoted be public or private uses or both, is hereby declared to be a public use.<sup>124</sup>

The provision also stated that the legislature could authorize municipalities to exempt redevelopment improvements from taxation and create redevelopment authorities or corporations.<sup>125</sup> Notably, the proposal did not expressly define or describe the types of property that could be redeveloped.<sup>126</sup> Rather, the proposal stated that the "[l]egislature shall make laws governing the acquisition, use and disposal of such property."<sup>127</sup>

Mr. Fifield explained that the provision was necessary because "blighted areas" within "older towns and cities" were "dangerous not only to the area themselves, but to property values throughout the town or city," and "the police power of the municipalities [was] not . . . sufficient to stop the spread of this deterioration."<sup>128</sup> The result, according to Mr. Fifield, was that many municipalities were spending more money on services for these areas than

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123. *Id.* at 538. For the Montclair Planning Board's written proposal *see id.* at 860. There was also a written proposal by the New Jersey Federation of Official Planning Boards which was essentially the same as the Montclair planning board's proposal. *Id.* at 880.

124. *Id.* at 544.

125. *Id.* The complete text of the proposed provision was as follows:

The acquisition of real property for development or redevelopment of any area in accordance with a plan duly adopted in a manner prescribed by the Legislature, whether the uses to which such area is to be devoted be public or private uses or both, is hereby declared to be a public use. The Legislature shall make laws governing acquisition, use and disposal of such property by an agency of the State or a political subdivision thereof. The Legislature may authorize the organization of corporations or authorities to undertake such development or redevelopment or any part thereof and may authorize municipalities to exempt their improvements from taxation, in whole or in part, for a limited period of time, under conditions as to special public regulations to be specified by law or by contract between any such corporation or authority and the municipality, provided that during the period of such tax exemption the profits of the corporation and the dividends paid by it shall be limited by law.

*Id.*

126. *Id.*

127. *Id.*

128. *Id.*

they could collect in ratables, which created an unsustainable financial situation.<sup>129</sup>

Mr. Fifield's proposed solution was "to tear down some of these neighborhoods, assemble them by the exercise of the power of eminent domain and rebuild them through private capital or public funds into a well-planned neighborhood."<sup>130</sup> Mr. Fifield further explained that it was necessary for the new constitution to include a provision stating that "the clearing out of blighted areas which are a damaging influence in the development of the town and its proper plan constitute a public purpose . . ." and that although "[t]he highest courts of Illinois and New York have declared that [the removal of blight] is a public purpose," it was essential that the new constitution contain an "express provision" authorizing this type of redevelopment in order to eliminate any doubt regarding its constitutionality.<sup>131</sup>

Not surprisingly, the Committee was concerned that Mr. Fifield's proposal could lead to a "great deal" of abuse regarding private property rights.<sup>132</sup> Concerned citizens also made submissions in opposition to the proposal, claiming that the proposal was "socialistic in the extreme" and threatened to "bring about a further centralization of power and control over private property."<sup>133</sup> Municipalities responded to those allegations by stating that "private property must always be subordinated to public uses"<sup>134</sup> and that redevelopment was "essential" to the public welfare.<sup>135</sup> However, the Committee was apparently unconvinced by the municipalities' presentation and it did not include the proposed clause in its draft Legislative Article.<sup>136</sup>

### *B. The Convention Adopts a Redevelopment Provision*

The proposal, with at least one significant variation, was revived by delegate Jane Barus as an amendment to the Article on Taxation and

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129. *Id.*

130. *Id.* at 545.

131. *Id.*

132. *Id.* at 546.

133. *Id.* at 806 (quoting a letter from A. Thornton Bishop to Committee on the Legislative); *see also id.* at 547 (presenting the letter to the Committee on the Legislative).

134. *Id.* at 548. The Montclair town planner also submitted a reply letter. *Id.* at 804.

135. *Id.* at 804-05.

136. II PROCEEDINGS, *supra* note 121, at 1078 (citing the committee report to the convention).

Finance.<sup>137</sup> Ms. Barus brought the proposed amendment to the convention as a whole.<sup>138</sup> Ms. Barus reiterated the municipalities' position that the power of eminent domain and tax exemption was necessary to curb the spread of urban blight and the financial impact of blight on local municipalities.<sup>139</sup> Ms.

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137. Ms. Barus initially moved the Convention to amend the Legislative Article to include the "blighted areas clause" but was apparently convinced by Senator O'Mara, Chairman of the Committee on the Legislative, that the clause was more appropriate under the Article on Taxation and Finance. I PROCEEDINGS, *supra* note 113, at 420. Ms. Barus subsequently reintroduced the amendment per Senator O'Mara's suggestion. *Id.* at 742. Curiously, the language of Ms. Barus' proposed amendment to the Legislative Article differs significantly from the proposal that she ultimately presented to the Convention as an amendment to the Article on Taxation and Finance and which now appears as Article VII, § 3, para. 1 of the New Jersey Constitution. *See* II PROCEEDINGS *supra* note 121, at 1094, amend. 13 (listing Ms. Barus' initial proposal to the Convention as amendment to the Legislative Article); *id.* at 1245, amend. 14 (listing Ms. Barus' revised proposal to the Convention as amendment to the Article on Taxation and Finance). Ms. Barus' original proposal to the Convention was identical to the language proposed to the Committee on the Legislative by Mr. Ernest G. Fifield and the Montclair Planning Board. *See supra* note 125 and accompanying text (discussing Mr. Fifield's proposal to the Committee on the Legislative). The Convention Proceedings Record contains no explanation regarding the changes that Ms. Barus made to the proposal before reintroducing it in the form that the Convention ultimately adopted.

138. I PROCEEDINGS, *supra* note 113, at 420 (noting that the initial presentation as an amendment to the Legislative Article that was withdrawn); *id.* at 742 (noting the ultimate presentation as an amendment to the Article on Taxation and Finance).

139. *Id.* at 742-743. Ms. Barus described the problem as follows:

The older cities in the State, in common with most older cities everywhere, I imagine, have been facing an increasingly difficult situation as the years advance. Certain sections of those cities have fallen in value, and have become what is known as "blighted" or "depressed" areas. This has happened, sometimes, because the population has shifted from one part of the town to another, or one section has become overcrowded. Sometimes it has happened because the district has turned to business instead of residential, or partly to business; and sometimes simply because the buildings themselves, although they were originally good and may have been fine homes, have become so outdated and obsolescent that they are no longer desirable, and hence, no longer profitable.

These depressed areas go steadily down hill. The original occupants move away, the rents fall, landlords lose income and they make up for it by taking in more families per house. It's impossible to keep the properties in good condition, the houses deteriorate more and more, and what was once a good section of the town is on the way to becoming a slum.

Naturally, this slump in value is not confined to the original area affected. It spreads to neighboring blocks. No one person, no house owner or landlord in this neighborhood, can counteract this spread, because no one can afford to sink money into a blighted area. Even if one or two of the houses are modernized, the money is

Barus emphasized that private capital was essential to successful redevelopment.<sup>140</sup> A constitutional provision was necessary, therefore, because although urban “rehabilitation ha[d] been endorsed by the legislature twice, no redevelopment [was] undertaken in the State.”<sup>141</sup> Ms. Barus noted that “no business corporation wants to be the guinea pig and sink large sums into a project without assurance that it will be safe in its investments.”<sup>142</sup> According to Ms. Barus, the proposed amendment would “remove this fear and would make possible a program of rehabilitation of our cities.”<sup>143</sup> Ms. Barus emphasized that the proposed amendment would apply to “only certain cities” and “would not affect any community where it would not be useful.”<sup>144</sup>

Ms. Barus’s proposed language differed from Mr. Fifield’s proposal in one significant respect. Mr. Fifield’s proposal did not describe the kind of property that was subject to redevelopment and expressly delegated responsibility for that determination to the legislature.<sup>145</sup> However, Ms. Barus’s proposal stated 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” and that “such clearance, replanning, development or redevelopment” may “be authorized by law.”<sup>146</sup> Thus, based on the text alone, Ms. Barus’s proposal appeared to limit redevelopment to “blighted areas.”

However, there is no evidence in the convention proceedings record that the delegates discussed whether the Amendment was intended to limit redevelopment to only “blighted areas” or whether the Amendment was intended to delegate authority for defining the meaning of “blighted areas” to the legislature. Unlike the testy debate that occurred in the Committee on the Legislative, Ms. Barus’ proposal was not the subject of significant

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thrown away and nothing is gained, because the improvement is so small that it cannot turn the tide of deterioration. The only way in which the section can be rehabilitated is by a complete rebuilding of a whole neighborhood. But, naturally, that is an extremely expensive matter and one which is not attractive to capital.

*Id.*

140. *Id.* at 743.

141. *Id.* at 744 (referring to the RCL and the URL).

142. *Id.*

143. *Id.*

144. *Id.* at 742.

145. *Id.* at 860; *see also supra*, notes 126-127 and accompanying text.

146. II PROCEEDINGS, *supra* note 121, at 1245 (emphasis added).



controversy among the delegates.<sup>147</sup> The amendment, which is now known as the “blighted areas clause” was approved by a majority of the delegates<sup>148</sup> and the constitution was ratified by an overwhelming majority of the public.<sup>149</sup> The provision remains in effect and has not been amended since it was adopted in 1947.

### III. THE PERCEPTION OF PLENARY LEGISLATIVE REDEVELOPMENT AUTHORITY AFTER 1947

The convention’s adoption of the blighted areas clause was a turning point for redevelopment in New Jersey. Prior to 1947, redevelopment initiatives were entirely unsuccessful at attracting private capital because of uncertainty regarding the constitutionality of private redevelopment.<sup>150</sup> The blighted areas clause was intended to remove any doubt in that regard, and, consequently, encourage significant redevelopment.<sup>151</sup> However, latent in the blighted areas clause was an ambiguity that seriously threatened property owners’ rights and resulted in a highly deferential standard of review after 1947.

#### A. *The Blighted Areas Clause as a Grant of Plenary Redevelopment Authority*

The Convention clearly intended the blighted areas clause to resolve any uncertainty regarding the constitutionality of redevelopment laws such as the RCL<sup>152</sup> and the URL.<sup>153</sup> Viewed within this context, the blighted areas clause could reasonably be understood as a constitutional sanction of those laws

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147. I PROCEEDINGS, *supra* note 113, at 742-45. In fact, the only comment on the provision was from Senator O’Mara, who seconded Ms. Barus’s proposed amendment. *Id.* at 744. Senator O’Mara concurred that private capital was necessary for redevelopment of New Jersey’s older cities and that a constitutional amendment was necessary to give investors confidence in New Jersey’s redevelopment legislation. *Id.* at 744-45.

148. Although the convention record does not reveal the exact vote, the amendment was not passed unanimously. *Id.* at 745.

149. WILLIAMS, *supra* note 120, at 16.

150. See discussion *supra* Part II.

151. See *supra* note 139 and accompanying text.

152. See *supra* notes 93-107 and accompanying text; see also *supra* Part II (discussing the direct importance of the RCL in the adoption of the blighted areas clause).

153. See *supra* notes 108-114 and accompanying text; see also *supra* Part II (discussing the direct importance of the URL in the adoption of the blighted areas clause).

and, therefore, not the source of any property right protections.<sup>154</sup> Indeed, the blighted areas clause is best viewed as a constitutional declaration that a property owner's "bundle of rights"<sup>155</sup> does not include the right to withhold property from government taking if the government determines that the property is blighted.<sup>156</sup> More important, however, because the blighted areas clause authorized the legislature to pass implementing legislation, the Clause could reasonably be understood to vest the legislature with plenary authority to define "blight."<sup>157</sup>

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154. Indeed, this was exactly the position that the Borough of Paulsboro and several amici curiae took before the New Jersey Supreme Court in *Gallenthin*, 924 A.2d at 456 (N.J. 2007); Brief for New Jersey State League of Municipalities, Downtown New Jersey, Inc. and New Jersey Chapter-American Planning Ass'n as Amici Curiae at 9, *Gallenthin*, 924 A.2d at 447 (N.J. 2007) (No. A-51).

155. See, e.g., David Schultz, *Scalia, Property, and Dolan v. Tigard*, 29 AKRON L. REV. 1, 12 (1995) (explaining the oft used metaphor of property ownership as a "bundle of rights").

156. Because state legislatures are presumed to have plenary law-making authority restricted only by federal preemption and conflicting individual rights provisions, see *Client Follow-Up Co. v. Hynes*, 390 N.E.2d 847, 849-50 (Ill. 1979), an express delegation of redevelopment authority to the Legislature was presumably unnecessary. See *Wilson v. City of Long Branch*, 142 A.2d 837, 842-43 (N.J. 1958) (suggesting that authority to engage in redevelopment is arguably within the state's police power and no additional authorization is necessary).

Thus, the precise constitutional question that most jeopardized earlier redevelopment statutes such as the RCL and URL was not whether the Legislature was *authorized* to enact redevelopment legislation in furtherance of the public welfare, but whether such legislation conflicted with the scope of property rights protected by New Jersey's constitution, i.e. the constitutional guarantee that property be taken only for "public use." See N.J. CONST. art. I, para. 20; see also *Wilson*, 142 A.2d at 842-53 (explaining that the blighted areas clause was intended to address the apparent conflict between the scope of property rights and the state's police power).

The blighted areas clause was intended to resolve any uncertainty regarding the constitutionality of redevelopment by affirmatively limiting property rights in the context of redevelopment. In this sense, the blighted areas clause was a delegation of authority by the People, who presumably had the right to resist the taking of their property for redevelopment purposes, to the Legislature, which now had authority to take property to redevelop "blighted areas." See *Gallenthin*, 924 A.2d at 456 (characterizing the blighted areas clause as a "trust" created by the "People," with the Legislature acting as trustee).

157. The blighted areas clause declares that the redevelopment of blighted areas is a public use for which the Legislature can exercise its powers of eminent domain and that the Legislature can delegate that authority to municipalities. N.J. CONST. art. VIII, § 3, para. 1. The clause also includes two other express grants of legislative authority. The clause authorizes the Legislature to: 1) permit "municipal, public or private corporations . . . to undertake" the "clearance, replanning, development or redevelopment of blighted areas;" and 2) to regulate the "conditions of use, ownership, management and control of such improvements" incident to redevelopment projects. *Id.*

In that event, the legislature's redevelopment authority would be restricted only by other relevant provisions of the constitution, such as the just compensation clause<sup>158</sup> and due process principles.<sup>159</sup> This understanding of the blighted areas clause is not inconsistent with the provision's history<sup>160</sup> and is reasonably consistent with the provision's language.<sup>161</sup> However, it poses an obvious risk to property owners because the only check on the legislature's authority to define the scope of redevelopment would be procedural due process principles. Stated differently, if a property satisfies the statutory definition of "blight," the owner could not challenge the taking of the property by arguing that the property was not "blighted" in a constitutional sense.<sup>162</sup> Despite this obvious opportunity for abuse by municipalities and the legislature, this expansive interpretation of the blighted areas clause characterized redevelopment statutes and judicial review of these statutes after 1947.<sup>163</sup>

*B. The Legislature's Assumed Authority to Define "Blight" and Progressive Expansion of the Scope of Redevelopment*

Almost immediately after the blighted areas clause was adopted,<sup>164</sup> the legislature assumed authority for defining the term "blighted area," and based on its presumed plenary authority, has progressively expanded the scope of redevelopment. In 1949, the legislature enacted the Blighted Areas

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158. N.J. CONST. art. I, § 20.

159. The New Jersey Constitution does not contain an express due process guarantee. See WILLIAMS, *supra* note 120, at 31. However, New Jersey's courts have long recognized that due process is an implicit constitutional guarantee of N.J. CONST. art. I. para. 1, which provides that all individuals possess certain "unalienable rights". See *Nicoletta v. North Jersey Dist. Water Supply Comm.*, 390 A.2d 90, 97 (N.J. 1978) (finding due process guarantees implicit in article one, paragraph one); see also WILLIAMS, *supra* note 120, at 31-32.

160. See *supra* Part II (discussing the provision's history).

161. See *supra* note 157 (discussing express delegation of legislative authority in the blighted areas clause).

162. This was the argument advanced by the Borough of Paulsboro and various amicus curiae in *Gallenthin*. See *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 456 (N.J. 2007) (summarizing the Borough of Paulsboro's position); Amici Brief, *supra*, note 154, at 6; see also *Levin v. Twp Comm. of Bridgewater*, 274 A.2d 1, 3 (N.J. 1971) (stating that if property fits statutory criteria for blight that determination is "unassailable").

163. See, e.g., *Levin* 274 A.2d at 3 (stating that if property fits statutory criteria for blight that determination is "unassailable"); see also *Wilson v. City of Long Branch*, 142 A.2d 837, 855 (N.J. 1958).

164. The 1947 Constitution, which contained the blighted areas clause, was ratified by popular vote in 1948. WILLIAMS, *supra* note 120, at 17.

Act (“BAA”),<sup>165</sup> which was the first redevelopment statute under New Jersey’s new Constitution and the blighted areas clause. The preface to the BAA declared that the BAA was “[a]n Act defining ‘blighted area.’”<sup>166</sup>

The BAA defined “blighted area” as an area “wherein there exist[ed] to a large extent:” (a) structures unfit for human habitation; (b) structures configured and “used as to have therein more inhabitants than can be fitly and safely housed;” (c) “a disproportion between the cost of municipal services rendered to the area as compared with the tax revenue derived therefrom;” or (d) a “prevalence of factors conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, crime and poverty.”<sup>167</sup> The BAA also established procedures for municipalities to follow when declaring an area blighted, including public notice and hearings,<sup>168</sup> and authorized municipalities to take blighted property by eminent domain for redevelopment by a “private corporation” pursuant to the RCL and URL.<sup>169</sup> The BAA clearly evidenced the legislature’s belief that the blighted areas clause authorized the legislature to define the term “blighted area” and, consequently, the type of properties that could be redeveloped or taken by eminent domain.<sup>170</sup>

The legislature amended its definition of “blighted area” twice between 1949 and 1986.<sup>171</sup> In 1951, the legislature significantly expanded the definition by declaring that blighted areas included:

Unimproved vacant land, which has remained so for a period of ten years . . . and which land by reason of its location, or remoteness from developed sections or portions of such municipality, or lack of means of access to such other parts thereof, or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital .

. . .<sup>172</sup>

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165. See 1949 Blighted Areas Act, ch. 187, § 1, 1949 N.J. Laws 626 (defining “blighted area”).

166. *Id.* preface, 1949 N.J. Laws 626.

167. *Id.* § 1, 1949 N.J. Laws 626.

168. *Id.* §§ 2-9, 1949 N.J. Laws 626-29.

169. *Id.* § 10, 1949 N.J. Laws 629.

170. *Id.* preface, 1949 N.J. Laws 626 (granting authority of eminent domain for redevelopment of “blighted areas” pursuant to the blighted areas clause); *Id.* § 1, 1949 N.J. Laws 626 (defining “blighted areas”).

171. For a review of all amendments to New Jersey’s statutes defining “blight” from 1947 until 1992, see *Reforming Eminent Domain in New Jersey*, *supra* note 2, at 10-13; see also *Forbes v. Bd. of Trustees of South Orange*, 712 A.2d 255 (N.J. Super. Ct. App. Div. 1998).

172. Act of May 29, 1949, ch. 248, § 1(c), 1951 N.J. Laws 865; see *Forbes*, 712 A.2d at 257-58 (stating the 1951 amendment expanded the definition of “blight”).

The legislature further defined “blighted areas” to include “[a] growing lack of proper utilization of areas caused by the condition of the title, diverse ownership of the 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>173</sup> In 1986, the legislature included in its definition of “blighted areas” areas in “excess of 10 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.”<sup>174</sup> These amendments greatly expanded the definition of blight from its original description in the BAA and confirm the legislature’s perception that the blighted areas clause gave it plenary, or at least expansive, authority to define the meaning of blight and the scope of redevelopment.<sup>175</sup>

In 1992, the legislature enacted New Jersey’s current redevelopment statute, the Local Redevelopment and Housing Law (“LRHL”),<sup>176</sup> which repealed and replaced the BAA, URL, and RCL.<sup>177</sup> The LRHL was a bold expansion of municipal redevelopment authority.<sup>178</sup> Indeed, the LRHL dispensed with the constitutional term “blighted areas” and replaced it with the phrase “in need of redevelopment.”<sup>179</sup> The legislature decreed that “[a]n area determined to be in need of redevelopment pursuant to this section shall be deemed to be a ‘blighted area’ for the purposes of [the blighted areas clause] of the Constitution.”<sup>180</sup>

The LRHL also significantly enlarged the scope of redevelopment by modifying the definition of “in need of redevelopment” to include areas where there exists lack of proper utilization “because of conditions of title,

173. Act of May 29, 1949, ch. 248, § 1(e), 1951 N.J. Laws 866.

174. Act of Nov. 17, 1986, ch. 151, § 1(f), 1986 N.J. Laws 821.

175. It should be noted that in 1985 the Legislature added an additional category to its definition of blight, criterion (g), Act of Jan. 13, 1986, ch. 435, § 1, 1985 N.J. Laws 1811, which provides for redevelopment in “Urban Enterprise Zones”.

176. 1992 Local Redevelopment and Housing Law, ch. 79, 1992 N.J. Laws 784 (codified at N.J. STAT. ANN. §§ 40A:12A-1, et seq. (West 2008)).

177. See *id.* §§ 56(a), 59, 1992 N.J. Laws 838, 843 (listing all legislation repealed by LRHL) (codified at N.J. STAT. ANN. § 40A:12A-55 (West 2008)).

178. See Reforming Eminent Domain in New Jersey, *supra* note 2, at 10-13 (describing the legislature’s expansion of the definition of the term “blight”).

179. 1992 Local Redevelopment and Housing Law, ch. 79, § 5, 1992 N.J. Laws 789 (codified as N.J. STAT. ANN. § 40A:12A-5 (West 2008)). *But see* Forbes v. City of Long Branch, 712 A.2d 255, 259 (N.J. 1998) (stating that change in phrase was “cosmetic only”).

180. 1992 Local Redevelopment and Housing Law, ch. 79, § 6, 1992 N.J. Laws 791 (codified as N.J. STAT. ANN. § 40A:12A-6 (West 2008)).

diverse ownership of real property therein or other conditions, resulting in a stagnant or not fully productive condition of land.”<sup>181</sup> This provision was significantly broader than the Blighted Areas Act because, on its face, it appeared to authorize redevelopment of any area that was not fully productive for any reason whatsoever.<sup>182</sup>

The legislature’s steady expansion of the scope of redevelopment following the adoption of the blighted areas clause demonstrates that the legislature believed that the blighted areas clause gave it plenary authority for defining “blighted areas.” Indeed, the legislature expressly declared in the LRHL that the constitutional term “blighted areas” was to be understood as synonymous with its broad definition of the term “in need of redevelopment.”<sup>183</sup>

### C. Judicial Review of Redevelopment Legislation Under the Blighted Areas Clause

Judicial review of redevelopment legislation after 1947 was also characterized by the perception that the legislature possessed plenary power to define the scope of redevelopment by broadly defining “blighted areas.”<sup>184</sup> Courts repeatedly upheld redevelopment designations without questioning whether the ever-mutating statutory criteria fairly defined “blight” within the

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181. 1992 Local Redevelopment and Housing Law, ch. 79, § 5, 1992 N.J. Laws 789 (codified as N.J. STAT. ANN. § 40A:12A-5(e) (West 2008)). This was the provision at issue in *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447 (N.J. 2007).

182. See *Reforming Eminent Domain in New Jersey*, *supra* note 2, at xvii (discussing how this provision represented a significant expansion of the Legislature’s prior definition of the term blight). Indeed, this expansive interpretation of subsection 5(e) was the interpretation adopted by the Borough of Paulsboro in *Gallenthin*. See *infra* Part V.A.1 (discussing Paulsboro’s interpretation of subsection 5(e) in *Gallenthin*). Paulsboro argued that the phrase “or other conditions” should be interpreted to mean “any other conditions.” See *infra* Part V.A.1. Paulsboro also argued that the property need not be stagnant because the phrase “stagnant or not fully productive” should be interpreted to require only that the property be “not fully productive.” See *infra* Part V.A.1. Although the court in *Gallenthin* held that this interpretation was not correct because it would render the statute unconstitutional, Paulsboro’s interpretation of the statute’s language is certainly reasonable and, in fact, supported by at least some of the legislative history. See *Reforming Eminent Domain in New Jersey*, *supra* note 2, at xvii.

183. 1992 Local Redevelopment and Housing Law, ch. 79, § 6, 1992 N.J. Laws 791 (codified as N.J. STAT. ANN. § 40A:12A-6 (West 2008)).

184. See, e.g., *Levin v. Twp. Comm. of Bridgewater*, 274 A.2d 1, 19 (N.J. 1971); *Wilson v. City of Long Branch*, 142 A.2d 837, 837 (N.J. 1958); *Forbes v. Bd. of Trustees of South Orange*, 712 A.2d 255, 259 (N.J. Super. Ct. App. Div. 1998).

meaning of the blighted areas clause.<sup>185</sup> The case that set the tone for this analysis was the supreme court's 1958 decision in *Wilson v. City of Long Branch*.<sup>186</sup>

In *Wilson*, several property owners challenged the City of Long Branch's designation of their property as "blighted" under the 1951 amendments to the BAA.<sup>187</sup> The property owners argued that the BAA was unconstitutional because the authority to define "blighted areas" resides "in the judicial and not the legislative branch of the government."<sup>188</sup> In a scolding retort to this argument, Justice Francis wrote:

This is entirely specious. The [blighted areas clause] declares that redevelopment of "blighted" areas shall be a public purpose and authorizes the Legislature to empower municipal governments to undertake such redevelopment. Manifestly, the grant of power contemplated development and implementation by the Legislature. Definition of blight was the ordinary and expected incident of the exercise of that power and no reasonable argument can be made that the connotation ascribed to it overreaches the public purpose sought to be promoted by the Constitution.<sup>189</sup>

Although the court did not foreclose the possibility that a different statutory definition of blight could "overreach" the constitutional meaning of that term, the court's ringing endorsement of redevelopment legislation<sup>190</sup> set

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185. See e.g., *Levin*, 274 A.2d at 3 (stating that if property fits statutory criteria for blight that determination is "unassailable").

186. 142 A.2d 837 (N.J. 1958).

187. *Id.* at 841.

188. *Id.* at 849. The property owners advanced seven other constitutional arguments challenging the validity of the BAA. See *id.* at 843-49. Among these was the argument that the taking of property for redevelopment by another private entity violated the New Jersey and Federal Constitutions. *Id.* at 846. The court properly dispensed with this argument by noting that this was the precise reason that the Convention adopted the blighted areas clause. *Id.*

189. *Id.* at 849.

190. *Id.* In a separate portion of the court's opinion, Justice Francis wrote this broad endorsement of the policies underlying redevelopment:

Community redevelopment is a modern facet of municipal government. Soundly planned redevelopment can make the difference between continued stagnation and decline and a resurgence of healthy growth. It provides the means of removing the decadent effect of slums and blight on neighboring property values, of opening up new areas for residence and industry. In recent years, recognition has grown that governing bodies must either plan for the development or redevelopment of urban areas or permit them to become more congested, deteriorated, obsolescent, unhealthy, stagnant, inefficient and costly.

*Id.* at 842.

the tone for the next several decades of judicial review of redevelopment statutes—namely, judicial acquiescence to the legislature’s presumed prerogative to define the contours and scope of redevelopment in New Jersey.<sup>191</sup>

For example, in *Property Owners Protective Ass’n, Etc. v. City Council of Jersey City*,<sup>192</sup> which the court decided eleven years after *Wilson*, the court considered whether Jersey City could properly declare airspace to be a “blighted area.”<sup>193</sup> The dispute arose when the city designated the airspace above a set of below-street-level railroad tracks as “blighted” in order to facilitate commercial development at street level and protect against further deterioration of the surrounding area.<sup>194</sup> Although the court engaged in a sophisticated analysis of the BAA’s text, history, and structure to determine whether the redevelopment of airspace was consistent with the legislature’s enactment of the BAA, it did not even address whether airspace was a “blighted area” within the meaning of the blighted areas clause.<sup>195</sup> The court’s analysis implied that the blighted areas clause does not impose an independent outer limit on the statutory definition of “blight.”<sup>196</sup>

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Justice Francis also suggested that the state likely possesses the authority to take property for private redevelopment by virtue of its plenary police power and that the blighted areas clause may have been an unnecessary precaution by the Convention. *Id.* at 843. The totality of the court’s opinion, therefore, was a forceful and all-encompassing endorsement of redevelopment and the Legislature’s authority the pass laws in furtherance thereof.

191. See, e.g., *Lyons v. City of Camden*, 226 A.2d 625, 632 (N.J. 1967) (stating the constitutionality of the BAA’s definition of blight was disposed of in its entirety in *Wilson* “and there is no need to review the matter again.”); *Paramus Multiplex Corp. v. Hartz Mountain Indus., Inc.*, 564 A.2d 146, 149-50 (N.J. Super. Ct. Law Div. 1987) (“The constitutionality of [the BAA] has long been recognized.”) (citing *Wilson*, 142 A.2d at 837)). *Wilson* was also significant in expanding the perceived scope of redevelopment authority because the court held that “if the condition of the land involved meets the specifications of any one of the five subsections” identified in the BAA, the finding of blight is “unassailable.” See *Levin v. Twp. Comm. of Bridgewater*, 274 A.2d 1, 3 (N.J. 1971) (citing *Wilson*, 142 A.2d at 837).

192. 259 A.2d 698 (N.J. 1969).

193. *Id.* at 701.

194. *Id.* The railroad tracks sat below street level and the railroad required only twenty-three feet above ground level to operate. *Id.* The railroad company had expressed interest in selling the space above the tracks to developers to construct buildings above the tracks that would be accessible at street level. *Id.*

195. *Id.* at 704-07.

196. The court did mention the possibility that the taking of airspace could be unconstitutional. *Id.* at 705. However, its analysis was peculiar. The court did not cite the blighted areas clause, and certainly did not undergo an analysis of the blighted areas clause’s text, history or purpose. *Id.* The court simply stated: “The decisions rejecting various constitutional attacks on urban renewal legislation have clearly recognized that it goes far



Similarly, in *Levin v. Township Committee of Bridgewater*,<sup>197</sup> the court considered whether the Township of Bridgewater could designate 120 acres of largely vacant rural land as “blighted.”<sup>198</sup> The court again engaged in a thorough analysis of whether the redevelopment of rural, rather than urban, areas was consistent with the legislature’s enactment of the BAA,<sup>199</sup> but failed to conduct an independent constitutional analysis of whether such redevelopment was within the scope of the blighted areas clause.<sup>200</sup> The lack of any independent constitutional analysis under the blighted areas clause further suggests that the judiciary perceived that the legislature possessed plenary authority to define “blighted areas.” Indeed, citing *Wilson*, the court held that “[i]f the condition of the land involved meets the specifications of any one of the five subsections [under the BBA’s definition of blight,] the finding of blight is *unassailable*.”<sup>201</sup>

This presumption of plenary legislative authority was finally brought to light in *Forbes v. Board of Trustees of South Orange*.<sup>202</sup> *Forbes*, involved a redevelopment designation under the 1992 LRHL,<sup>203</sup> which removed the term “blighted area” from the statutory scheme and replaced it with the phrase “in need of redevelopment.”<sup>204</sup> Perhaps alerted by this change in the statute, the property owners challenged the application of the LRHL to their property by arguing that the blighted areas clause imposed a perquisite blight

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beyond the elimination of the perceptually offensive slums.” *Id.* at 704 (citing *Wilson*, 142 A.2d at 837). The court then made reference to a New York case upholding redevelopment of an area even though it was not a perceptually offensive slum to conclude there was no constitutional issue implicated in the case. *Id.* at 705. The court’s reliance on a case from a foreign jurisdiction is strong evidence that its analysis was not based on the premise that the blighted areas clause provided an independent limitation on the legislature’s redevelopment authority. Rather, the court seems to have perceived that a constitutional challenge to the BAA implicated the scope of the State’s police power.

197. 274 A.2d 1 (N.J. 1971).

198. *Id.* at 5. The 120 acres area had only eighteen or nineteen dwellings constructed on it. *Id.*

199. *Id.* at 4-5.

200. The totality of the court’s constitutional analysis was as follows: “Finally, plaintiffs argue that subsection 21.1(e) of the statute is unconstitutional because it delegates unbridled legislative power to the municipal agencies without setting out adequate standards to guide and control the exercise of the power. We see no merit in the contention.” *Id.* at 22 (citing *Wilson* 142 A.2d at 847).

201. *Id.* at 3 (emphasis added).

202. 712 A.2d 255 (N.J. Super. Ct. App. Div. 1998).

203. 1992 Local Redevelopment and Housing Law, ch. 79, 1992 N.J. Laws 784 (codified at N.J. STAT. ANN. § 40A:12A-1 et seq. (West 2008)).

204. See *supra* Part III.B (discussing the adoption of the LRHL and its expansion of the definition of “blighted areas”).

determination before the municipality could exercise its redevelopment and eminent domain authority under the LRHL.<sup>205</sup> Although the Appellate Division upheld the Township's designation of the area as "in need of redevelopment" under the LRHL,<sup>206</sup> the panel perceptively noted that notwithstanding *Wilson*'s inference to the contrary, the "Constitution permits the undertaking of public redevelopment only if the area so designated is blighted."<sup>207</sup> Nevertheless, the panel concluded that the redevelopment designation at issue did not offend the blighted areas clause.<sup>208</sup>

In many respects, *Forbes* was the precursor to *Gallenthin* because it resurrected the notion that the blighted areas clause provided an outer limit on the legislature's redevelopment authority, which had been all but lost in the shadow of *Wilson*'s broad endorsement of the BAA. Indeed, in *Forbes*, the Appellate Division concluded, or at least acknowledged, that an independent analysis of the constitutionality of the LRHL under the blighted areas clause was appropriate. Notwithstanding the Appellate Division's analysis in *Forbes*, it was not until *Gallenthin* that the blighted areas clause would be properly recognized as a meaningful limitation on the legislature's redevelopment authority.

#### IV. THE (IN)SUBSTANTIAL EVIDENCE STANDARD AFTER 1947

Post-1947 judicial review of redevelopment designations was characterized by another significant threat to property rights. Both the BAA and the LRHL provided that municipal blight designations were entitled to deference from a reviewing court if the municipality's designation was supported by "substantial evidence" on the record.<sup>209</sup> However, as

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205. *Forbes*, 712 A.2d at 257. The Appellate Division phrased the plaintiff's argument thusly: "They claim that the present governing statute, [the LRHL], was misconstrued by defendants as not requiring a prerequisite blight determination and that defendants proceeded with their designation of the redevelopment area without meeting the blight standard." *Id.*

206. *Id.*

207. *Id.* at 260. The Appellate Division recognized that the supreme court's holding in *Wilson* may be to the contrary. Citing *Wilson* with the introductory signal "*cf.*", the panel commented that *Wilson* suggests "that the police power alone may constitute adequate authority for at least some types of redevelopment." *Id.*

208. *Id.* at 262.

209. See 1992 Local Redevelopment and Housing Law, ch. 79, § 6, 1992 N.J. Laws 791 (codified as N.J. STAT. ANN. § 40A:12A-6(b)(5) (West 2008)); *Lyons v. Camden*, 226 A.2d 625, 630 (N.J. 1967) (stating in regards to the BAA that "[t]he function of the Law Division as prescribed by the statute is to decide whether the determination of the public body is supported by substantial evidence.") (citing N.J. STAT. ANN. § 40:55-21.6 (West 2008)). The LRHL and BAA also required a municipality to undertake an investigation before

redevelopment initiatives proliferated, municipalities frequently made redevelopment designations without adequate research, planning or justification.<sup>210</sup>

In *ERETC, L.L.C. v. City of Perth Amboy*,<sup>211</sup> the City designated a profitable and well-kept commercial building as “in need of redevelopment” under the LRHL.<sup>212</sup> The building was sixty-five to seventy-five percent occupied by tenants who were subject to long-term leases.<sup>213</sup> Three-hundred forty-five individuals were employed in the building, and seventy-five to eighty percent of those employees lived within a five to eight mile radius of the building.<sup>214</sup> The building was in excellent condition and the owner and tenants had recently invested more than \$300,000 in improvements to the building.<sup>215</sup> Nevertheless, the city declared the building to be “in need of redevelopment” based on a conclusory expert report that “merely recited the [statutory] criteria in a conclusory fashion without tying it to the reasons the properties should be included in the redevelopment area.”<sup>216</sup> The expert report was not based on a site investigation, tax records for the property, or any “quantitative information.”<sup>217</sup> Notwithstanding this record, the trial court

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declaring an area in need of redevelopment. See 1992 Local Redevelopment and Housing Law, ch. 79, § 6, 1992 N.J. Laws 791 (codified as N.J. STAT. ANN. § 40A:12A-6 (West 2008)); Act of May 21, 1949, ch. 187, § 2, 1949 N.J. Laws 626. This meant that once a municipality made a redevelopment designation, the property owners bore the burden of proving that it was not based on substantial evidence.

210. The facts in *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447 (N.J. 2007) provide a good example of this problem. See also *infra* Part V.A (discussing the facts in *Gallenthin*). The Borough of Paulsboro declared Gallenthin’s property was “in need of redevelopment” based on an expert report and the testimony of the Borough’s planning expert. *Gallenthin*, 924 A.2d at 452. However, both the report and the planner’s testimony simply stated, in conclusory terms, that Gallenthin’s property satisfied the statutory criteria for redevelopment. *Id.* at 452, 463, 464; see also *Repairing New Jersey’s Eminent Domain Laws*, *supra* note 12 at 15 (characterizing pre-*Gallenthin* judicial review as “anemic”), *id.* at 15 n.36 (collecting cases applying the standard used in *Gallenthin*).

211. 885 A.2d 512 (N.J. 2005).

212. *Id.* at 513.

213. *Id.* The property owner also alleged that this percentage would be higher but for the fact that the municipality required all leases to contain a provision whereby the tenant agreed to move on demand. *Id.*

214. *Id.*

215. *Id.* at 515. The building had never been cited for a code violation except over overgrown weeds. *Id.*

216. *Id.* at 517.

217. *Id.* at 516. The court also observed that the Department of Community Affairs had published guidelines for preparing a redevelopment report and the municipality’s expert did not follow these guidelines. *Id.* at 516-17; see generally WILLIAM M. COX & DONALD M.

upheld the City's redevelopment designation. The Appellate Division held that the redevelopment designation was improper.<sup>218</sup>

Unfortunately, questionable blight designations were not always corrected by the courts. Judicial application of the "substantial evidence" standard was often inconsistent and appeared to grant municipalities unassailable discretion in making redevelopment designations.<sup>219</sup> In *ERETC*, for example, the trial court initially upheld the municipality's redevelopment designation.<sup>220</sup> Had the property owners in *ERETC* not persevered through a time-consuming and costly appeal, they would have been unable to prevent the likely taking of their productive and well-kept property.<sup>221</sup>

Additionally, courts frequently stated the substantial evidence standard in seemingly inconsistent and contradictory terms. In *Mead Johnson & Co. v. Borough of South Plainfield*,<sup>222</sup> for example, the Appellate Division articulated the standard as "such evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>223</sup> Yet, in *D&M Asbury Realty v. City of Asbury Park*, the Appellate Division described substantial evidence as "any set of facts [that] may reasonably be conceived to justify" the redevelopment designation.<sup>224</sup> Most recently, in *City of Long Branch v. Brower*, the trial court held that a challenge to a redevelopment designation "can overcome a presumption of validity only by proofs that there could

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ROSS, NEW JERSEY ZONING AND LAND USE ADMINISTRATION § 38-4 (2007) (describing the basic administrative and procedural requirements for making a redevelopment designation).

218. *ERETC*, 885 A.2d at 520.

219. Compare *Mead Johnson & Co. v. Borough of S. Plainfield*, 231 A.2d 816, 821-22 (N.J. Super. Ct. App. Div. 1967) (describing substantial evidence standard as "such evidence as a reasonable mind might accept as adequate to support a conclusion.") with *City of Long Branch v. Brower*, No. MON-L-4987-05, 2006 WL 1746120, at \*10 (N.J. Super. Ct. Law Div. June 22, 2006) (stating that designation cannot be overturned under substantial evidence standard unless there is "no set of facts that would rationally support a conclusion that the enactment is in the public interest."), *overruled by City of Long Branch v. Anzalone*, No. A-0067-06T2, 2008 WL 3090052 (N.J. Super. Ct. App. Div. Aug. 7, 2008) (per curiam).

220. *ERETC*, 885 A.2d at 515-16.

221. The city required the property owners to include a provision in their leases with tenants stating that the tenants would agree to move out of the building "on demand," suggesting that the municipality did, in fact, intend to take the property. *Id.* at 515.

222. 231 A.2d 816 (N.J. Super. Ct. App. Div. 1967).

223. *Id.* at 821-22.

224. No. A-3033-03T5, 2005 WL 3693210, at \*8 (N.J. Super. Ct. App. Div. Jan. 24, 2006) (per curiam). Likewise, in *Downtown Residents for Sane Development v. City of Hoboken*, 576 A.2d 926, 927 (N.J. Super. Ct. App. Div. 1990), the Appellate Division stated that a court must uphold a redevelopment designation unless it is "shown to be arbitrary or capricious, contrary to law, or unconstitutional" and not merely "debatable."

have been no set of facts that would rationally support a conclusion that the enactment is in the public interest.”<sup>225</sup>

Those varied enunciations of the substantial evidence standard did not provide property owners with a predictable basis for challenging redevelopment designations and provide too great an opportunity for abuse of property rights. Meaningful property right protections require a more reliable standard of review that does not undermine legitimate redevelopment projects, but forces municipalities to justify their designations with genuinely substantial evidence.

#### V. *GALLENTHIN* AND ITS PROGENY: MOVING TOWARDS A BALANCED APPROACH TO REDEVELOPMENT AND PROPERTY RIGHT PROTECTIONS

Viewed within the context of New Jersey’s redevelopment experience, *Gallenthin*’s significance is apparent. First, *Gallenthin* put to rest the notion that the blighted areas clause granted the legislature plenary redevelopment authority. *Gallenthin* unequivocally established that the blighted areas clause circumscribes the legislature’s redevelopment mandate.<sup>226</sup> Second, *Gallenthin* clarified that the substantial evidence standard requires redevelopment designations to be supported by meaningful, quantitative evidence.<sup>227</sup> Further, the cases decided after *Gallenthin* demonstrate that these principles have resulted in increased judicial oversight of municipal redevelopment without inhibiting important redevelopment initiatives that serve the common weal.<sup>228</sup> This section provides an analysis of the court’s decision in *Gallenthin* and surveys several significant post-*Gallenthin* cases.

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225. No. MON-L-4987-05, 2006 WL 1746120, at \*10 (N.J. Super. Ct. Law Div, June 22, 2006) *overruled by* City of Long Branch v. Anzalone, No. A-0067-06T2, 2008 WL 3090052 (N.J. Super. Ct. App. Div. Aug. 7, 2008) (per curiam).

226. See *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 456 (N.J. 2007) (“By adopting the Blighted Areas Clause, the People entrusted certain powers to the Legislature, and the courts are responsible for ensuring that the terms of that trust are honored and enforced.”).

227. *Id.* at 465 (“The substantial evidence standard is not met if a municipality’s decision is supported by only the net opinion of an expert. . . . In general, a municipality must establish a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met.”).

228. See, e.g., *City of Long Branch v. Anzalone*, No. A-0067-06T2, 2008 WL 3090052, at \*10 (N.J. Super. Ct. App. Div. Aug. 7, 2008) (per curiam) (overturning a redevelopment designation but remanding the case for the municipality to have an opportunity develop a record that satisfies the *Gallenthin* standard).

#### A. Gallenthin v. Borough of Paulsboro

##### 1. Paulsboro's Interpretation and Application of the LRHL

The parcel at issue in *Gallenthin* consisted of approximately sixty-three acres of largely vacant wetlands that the Borough of Paulsboro declared to be "in need of redevelopment."<sup>229</sup> The property was adjacent to an inactive British Petroleum storage facility, which Paulsboro had previously included in its redevelopment plan.<sup>230</sup> The New Jersey Department of Environmental Protection's Geographic Information System identified the Gallenthin parcel as protected wetlands.<sup>231</sup> Thus, other than sporadic use as a depository for dredging materials, the site was used only for occasional agricultural purposes and contained no improvements except an unused railroad spur, an active gas pipeline, and several unused mooring pylons.<sup>232</sup>

The Gallenthin property was added to the redevelopment plan based on a cursory report by the Borough's engineer, which simply described the property as stagnant, unproductive, and subject to redevelopment,<sup>233</sup> and the testimony of the Planning Board's professional planner.<sup>234</sup> The planner also stated, in a conclusory manner, that the property was subject to redevelopment because it was stagnant and unproductive.<sup>235</sup> At the public

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229. *Gallenthin*, 924 A.2d at 451.

230. *Id.* at 449-50. Paulsboro first designated the adjacent British Petroleum plant as a redevelopment area and did not include the Gallenthin property in that redevelopment plan. *Id.* at 450.

231. *Id.* at 451.

232. *Id.* at 450. There was some evidence that the Gallenthin property was conveniently situated for construction of a bridge to service the redeveloped plant, but this scenario was untenable because the wetlands designation would likely have precluded construction of a bridge. *Id.*

233. *Id.* at 452.

234. *Id.* at 452-53.

235. *Id.* at 452. In fact, the planner's testimony was expressly based on his interpretation of the statutory criteria. *Id.* The Planning Board's expert stated he believed N.J. STAT. ANN. § 40A:12A-5(e) (West 2008) permitted redevelopment of property that was "not fully productive" for any reason whatsoever if it was useful for the public welfare. *Id.* at 452. Gallenthin's expert testified that the Planning Board's expert was interpreting the statute too broadly. *Id.* Ultimately, the Planning Board based its determination on the testimony of its own expert. *Id.* at 453. However, the most significant point to be drawn from these facts is that the Planning Board relied upon its planning expert to interpret the statute, and, in adopting the expert's recommendation, the Planning Board adopted the planner's interpretation of the statute. The disagreement between the two experts was not about the quantitative evidence that described the condition of the property. Rather, the experts disagreed about the meaning of the statute, which is an issue of law that was not entitled to deference.

hearing before the Planning Board, Gallenthins' expert testified that its property was valuable because it consisted of protected wetlands and had various agricultural uses.<sup>236</sup>

The municipality nevertheless determined that the property met the sixth statutory criterion for redevelopment under the LRHL, which permits a redevelopment designation if the municipality finds:

A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.<sup>237</sup>

In making its redevelopment designation, Paulsboro expressly interpreted the above language to permit redevelopment of any area that is "not fully productive" but is useful for serving the public.<sup>238</sup> Based on this interpretation of the statute, Paulsboro concluded that there was substantial evidence that the property was "not fully productive" and, therefore, "in need of redevelopment."<sup>239</sup> The only evidence relied on by the municipality was the fact that the property consisted of vacant, unimproved wetlands.<sup>240</sup> Gallenthin challenged the redevelopment designation.<sup>241</sup> The trial court upheld the redevelopment designation as based on substantial evidence but did not address whether Paulsboro's interpretation of the LRHL was consistent with the statute or the blighted areas clause.<sup>242</sup> The Appellate Division also upheld Paulsboro's designation without addressing whether

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236. *Id.* at 453.

237. N.J. STAT. ANN. § 40A:12A-5(e) (West 2008).

238. The Borough's interpretation of the statute involved the use of "or" in two separate phrases in subsection 5(e). *Gallenthin*, 924 A.2d at 454-56, 460. First, the Borough interpreted the phrase "stagnant or not fully productive" to mean that the property need only be "not fully productive" and not "stagnant." *Id.* at 454-55. The Borough concluded that because the Gallenthin property could be put to a more enterprising use, it qualified as "not fully productive." Second, the Borough interpreted the phrase "caused by the condition of the title, diverse ownership of the real property therein or other conditions" to mean that the property could be redeveloped so long as its "not fully productive" condition was caused by "other conditions," i.e. any possible conditions. *Id.* at 455. Thus, the Borough interpreted the LRHL to permit redevelopment of any property that is "not fully productive" yet potentially valuable for "contributing to and serving the public health, safety and welfare." *Id.* at 455.

239. *Id.* at 453-54.

240. *Id.*

241. *Id.*

242. *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, No. A-6941-03T1, 2006 WL 1932581, at \*9-11 (N.J. Super. Ct. App. Div. July 14, 2006) (per curiam) (quoting trial court's oral decision), *overruled by* 924 A.2d 447 (N.J. 2007).

Paulsboro's interpretation of the LRHL exceeded the scope of the blighted areas clause.<sup>243</sup>

## 2. The Court's Opinion

Not surprisingly, Paulsboro's threshold argument before the supreme court was that the blighted areas clause divested the judiciary of authority to review the LRHL and gave that the legislature plenary authority to define "blight."<sup>244</sup> Paulsboro relied principally on the court's holding in *Wilson* as support for this argument.<sup>245</sup> Paulsboro also argued that the court should uphold its interpretation of the LRHL because it was consistent with the statute's plain meaning, namely that the statutory phrase "stagnant or not fully productive" means that an area need only be "not fully productive" to be subject to redevelopment.<sup>246</sup>

The court disagreed and invalidated Paulsboro's redevelopment designation.<sup>247</sup> The court's reasoning involved several steps. First, and most important, the court held that the Legislature does not possess plenary authority to define blight.<sup>248</sup> Rather, the court held that the term "blight" has a constitutional meaning that circumscribes the Legislature's redevelopment authority.<sup>249</sup> Second, the court concluded that Paulsboro's interpretation of the statute would render it unconstitutional because "blight" as used in the blighted areas clause does not include all areas that are "not fully

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243. *Id.* at \*18. In fact, the only issue for review identified by the Appellate Division was: "whether the designation of plaintiffs' land as an area in need of redevelopment was supported by substantial credible evidence." *Id.* at \*12. Thus, the court only evaluated whether there was substantial evidence on the record to support Paulsboro's designation, not whether Paulsboro's designation was based on an unconstitutional reading of the statute.

244. *See Gallenthin*, 924 A.2d at 456 (N.J. 2007); Amici Brief, *supra* note 154, at 6-9.

245. *See Gallenthin*, 924 A.2d at 456 (N.J. 2007); Amici Brief, *supra* note 154, at 6-9.

246. *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 454 (N.J. 2007) (emphasis added).

247. *Id.* at 449.

248. *Gallenthin*, 924 A.2d at 449.

249. The nature of the court's constitutional analysis should not be overlooked. The court employed most all modalities of constitutional interpretation. The court reviewed the text of the blighted areas clause, its history, and the intent of the delegates in originally adopting the blighted areas clause. *Id.* at 456-58. The court also emphasized, however, that New Jersey courts have long recognized that the constitution is a living charter that must accommodate changing times. *Id.* at 458. The court also considered authority from other jurisdictions. *Id.* at 459-60. This multi-faceted constitutional analysis suggests that although the court articulated a basic definition of "blight," *id.* at 460, the constitutional meaning of the term is subject to revision with time and experience.



productive.”<sup>250</sup> Finally, the court concluded that because Paulsboro’s interpretation of the LRHL would render it unconstitutional, the Legislature intended an alternative, constitutional meaning that was consistent with the statutes text, structure, and history.<sup>251</sup> Thus, the court held that the particular provision of the LRHL that Paulsboro relied on<sup>252</sup> applies only to “areas that, as a whole, are stagnant and unproductive because of issues of title, diversity of ownership, or other similar conditions.”<sup>253</sup> The court therefore invalidated Paulsboro’s redevelopment designation as beyond the scope of the LRHL.<sup>254</sup>

*B. Reclaiming Judicial Review of Redevelopment Designations: The Legislature’s Circumscribed Redevelopment Authority After Gallenthin*

In response to Paulsboro’s claim that the blighted areas clause divested the judiciary of authority to review the legislature’s definition of “blight,” the court wrote: “By adopting the Blighted Areas Clause, the People entrusted certain powers to the Legislature, and the courts are responsible for ensuring that the terms of that trust are honored and enforced. We find no merit to Paulsboro’s assertion that the Blighted Areas Clause divests the Judiciary of that responsibility.”<sup>255</sup> The court further explained that the “Blighted Areas Clause authorizes governmental entities to exercise eminent domain power in respect of ‘blighted areas.’ . . . The Clause operates as both a grant and a limit on the State’s redevelopment authority.”<sup>256</sup>

Although the court did not overrule *Wilson*,<sup>257</sup> *Gallenthin* signaled a change from the judicial acquiescence that characterized review of

250. *Id.* at 460. The court stated that “[w]e need not examine every shade of gray coloring a concept as elusive as ‘blight’ to conclude that the term’s meaning cannot extend as far as Paulsboro contends.” *Id.*

251. *Id.* at 460-65.

252. N.J. STAT. ANN. § 40A:12A-5(e) (West 2008).

253. *Gallenthin*, 924 A.2d at 449.

254. *Id.* at 464. Technically, therefore, the court did not hold that the designation was unconstitutional. Rather the court held that Paulsboro’s designation exceeded the intended scope of the statute. *Id.* However, this technical reading of the court’s decision should not be over emphasized. The court expressly found that the Legislature could not have intended Paulsboro’s interpretation of the statute because such an interpretation would render the statute unconstitutional. *Id.* at 460.

255. *Id.* at 456.

256. *Id.*

257. Indeed, the court actually cited portions of its opinion in *Wilson* with approval. *See id.* at 458-59.

redevelopment legislation after *Wilson*.<sup>258</sup> As a constitutional matter, *Gallenthin* clarified that the Legislature's redevelopment authority was circumscribed by the blighted areas clause and that the Judiciary was responsible, in the first instance, for monitoring and enforcing the scope of that authority.<sup>259</sup> As a practical matter, *Gallenthin* served as a reminder to lower courts that municipal interpretations of the LHRL's redevelopment criteria are to be reviewed *de novo* and provided the courts with a manageable definition of "blight" by which to review these determinations.<sup>260</sup>

This aspect of the court's holding warrants discussion. First, by declaring that the constitution limits redevelopment to only "blighted areas" and that the Judiciary is responsible for ascertaining and enforcing the constitutional meaning of that term, the court reversed almost fifty years of judicial acquiescence to statutory definitions of "blight."<sup>261</sup> Indeed, the court's analysis under the blighted areas clause—that municipal interpretations of "blight" must be reviewed by the Judiciary to determine whether they are within the scope of the constitution's redevelopment mandate—was the first of its kind by a New Jersey court since *Wilson*.<sup>262</sup> Second, as a necessary predicate to this analysis, the court had to ascertain the constitutional

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258. See *supra* Part III.C (arguing that *Wilson* resulted in judicial acquiescence to the Legislature's expansive definitions of blight).

259. See *Gallenthin*, 924 A.2d at 456 ("By adopting the Blighted Areas Clause, the People entrusted certain powers to the Legislature, and the courts are responsible for ensuring that the terms of that trust are honored and enforced.").

260. Indeed, although it is still too early to ascertain the full effect of *Gallenthin*, it appears that lower courts have begun to engage in more searching review of redevelopment designations after *Gallenthin*. See Posting of Diane Sterner, to NJ Voices, [http://www.blog.nj.com/njv\\_diane\\_sterner/2007/07/courts\\_act\\_will\\_legislature\\_fo.html](http://www.blog.nj.com/njv_diane_sterner/2007/07/courts_act_will_legislature_fo.html) (July 31, 2007, 14:57 EST) (crediting *Gallenthin* with a series of trial court decisions invalidating redevelopment designations in Monmouth County).

261. See *supra* Part III.A (discussing judicial review of redevelopment legislation after 1947 and before *Gallenthin*).

262. In *Forbes v. Bd. of Trustees of South Orange*, 712 A.2d 255, 257 (N.J. Super. Ct. App. Div. 1998), the Appellate Division recognized that an independent analysis under the blighted areas clause may be appropriate. *Id.* However, relying on *Wilson*, the Panel did not examine the blighted areas clause to determine whether it prohibited the LRHL's expansive definition of Blight. See also *Concerned Citizens of Princeton, Inc. v. Princeton*, 851 A.2d 685, 701-03 (N.J. Super. Ct. App. Div. 2004) (recognizing a constitutional challenge to the Legislature's enactment of the LRHL but failing to address whether the municipality's interpretation of the LRHL was constitutionally overbroad).

meaning of the phrase “blighted areas,” a task that no New Jersey court had engaged in since the Clause was adopted in 1947.<sup>263</sup>

The court’s interpretation of the phrase “blighted areas” now provides the outer limits of the State’s redevelopment authority. In defining the term, the court drew upon many modalities of constitutional interpretation. The court first examined the term’s plain meaning and concluded that the phrase “presumes deterioration or stagnation that negatively affects surrounding areas.”<sup>264</sup> The court also reviewed the deliberations at the 1947 Constitutional Convention and concluded that the phrase was intended to include the statutory definitions of “blight” in effect at that time.<sup>265</sup>

The court emphasized that New Jersey courts have long interpreted the constitution as a “living charter—designed to serve the ages and to be adaptable to the developing problems of the times.”<sup>266</sup> The court found that the Legislature’s expansion of the phrase under the BAA and its application to rural and suburban areas was within the constitutional meaning of the phrase.<sup>267</sup> Ultimately, however, the court concluded that notwithstanding the word’s evolution, “the term retains its essential characteristic: deterioration or stagnation that negatively affects surrounding properties.”<sup>268</sup> This description represents the scope of the State’s redevelopment authority and provides the standard for judicial review of redevelopment legislation and municipal interpretations of that legislation.

In the two years after *Gallenthin*, lower courts have navigated the shoals of eminent domain with *Gallenthin* as a compass. For example, in the much publicized case of *City of Long Branch v. Anzalone*,<sup>269</sup> the Appellate Division invalidated a redevelopment designation by the City of Long Branch based on *Gallenthin*’s “heightened standard.”<sup>270</sup> The panel recognized that *Gallenthin* stands for the proposition that the “New Jersey Constitution requires a finding of actual blight before private property may

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263. In *Levin v. Twp. Comm. of Bridgewater*, 274 A.2d 1, 5-6 (N.J. 1971), the court engaged in a thorough analysis of the meaning of “blight.” However, the entirety of this analysis was concerned with whether the challenged designation was within the Legislature’s intent when it enacted the BAA. *Id.* The court did not engage in, or even mention an independent analysis under the blighted areas clause.

264. *Gallenthin*, 457 A.2d at 360.

265. *Id.* at 457-59.

266. *Id.* at 458 (quoting *Vreeland v. Byrne*, 370 A.2d 825, 845 (N.J. 1977)).

267. *Id.*

268. *Id.*

269. A-0067-06T2, 2008 WL 3090052 (N.J. Super. Ct. App. Div. 2008) (per curiam).

270. *Id.* at \*1.

be taken for the purpose of redevelopment.”<sup>271</sup> More revealing, the panel expressly found that *Gallenthin* established a new and “heightened standard” of judicial review for redevelopment designations.<sup>272</sup>

The panel further explained that although *Gallenthin* involved only one of the LRHL’s seven criteria for designating property as “in need of redevelopment,” the court’s “analysis of the constitutional and legislative history applies equally” to all of the LRHL’s redevelopment criteria.<sup>273</sup> Thus, the appellate court reviewed the City’s legal interpretation of each statutory criteria *de novo* to ensure that the municipality had not expanded the LRHL beyond the scope of the blighted areas clause<sup>274</sup>—a probing review that was unheard of before *Gallenthin*. The panel found that although the City had substantial evidence to support its conclusion that “private investment would make the area more productive and contribute to the public health, safety, and welfare,” *Gallenthin* “explained that the meaning of ‘blight’ did not extend to an area in which the only negative condition was suboptimal land use.”<sup>275</sup> The appellate court therefore invalidated the City’s redevelopment designation because the City’s expansive interpretation of the LRHL would run afoul of the blighted areas clause as interpreted in *Gallenthin*.<sup>276</sup>

Similarly, in *BMIA, Inc. v. Belmar*,<sup>277</sup> the Appellate Division reinstated a property owner’s complaint challenging the Borough of Belmar’s redevelopment designation.<sup>278</sup> The Borough of Belmar determined that the subject area met the LRHL’s redevelopment criteria because it was underutilized and unattractive to “private investment of any significant commercial or residential development.”<sup>279</sup> The property owner filed a complaint alleging that the Borough’s interpretation of the LRHL was

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271. *Id.* Thus the Appellate Division held that “[u]nder *Gallenthin*, the absence of substantial evidence of blight invalidates all of the City’s findings under [the LRHL] that appellants’ properties were in need of redevelopment. Therefore, we need not address those findings in further detail.” *Id.* at \*21.

272. *Id.* at \*1. The panel expressly found that in light of *Gallenthin*’s new standard, which was not in effect when the City made its initial redevelopment designation, “fairness” required the matter to be remanded to give the City an opportunity “to amplify the record in an effort to meet the *Gallenthin* standard.” *Id.* at \*1.

273. *Id.*

274. *Id.*

275. *Id.* at \*18.

276. *Id.* at \*21-24 (explaining that because the case was remanded based on city’s misinterpretation of the LRHL, it was unnecessary for the panel to review the evidence on the record).

277. A-5974-05T5, 2008 WL 281687 (N.J. Super. Ct. App. Div. 2008) (per curiam).

278. *Id.* at \*1.

279. *Id.*

unconstitutional, which the trial court dismissed.<sup>280</sup> The Appellate Division reinstated the complaint because “although there [was] evidence that the area could be better utilized,” there was no evidence that the property was “blighted” as defined by the court in *Gallenthin*.<sup>281</sup>

However, post-*Gallenthin* judicial review has not squelched legitimate redevelopment aimed at curing harmful blight. In *Citizens in Action v. Mt. Holly*,<sup>282</sup> for example, the Appellate Division reviewed the Township’s interpretation of the LRHL and concluded that the area was within the State’s redevelopment authority.<sup>283</sup> The Township based its redevelopment designation on three LRHL criteria.<sup>284</sup> The panel concluded that in view of the court’s decision in *Gallenthin*, only one of the criteria identified by the Township properly applied to the subject area.<sup>285</sup> However, the Panel concluded that there was substantial evidence to support the application of that single criterion<sup>286</sup> and, therefore, redevelopment of the area did not offend the blighted areas clause.<sup>287</sup>

This searching yet balanced judicial review stands in sharp contrast to pre-*Gallenthin* judicial review.<sup>288</sup> Property owners can now obtain *de novo* judicial review of a municipality’s interpretation of the LRHL based on an understandable definition of “blight.”<sup>289</sup> This approach is consistent with the blighted areas clause and promises a more predicable and balanced approach to the tension between redevelopment and property rights.

### C. Reclaiming Judicial Review of Redevelopment Designations: The Substantial Evidence Standard After *Gallenthin*

In *Gallenthin*, the Borough argued that its redevelopment designation was supported by substantial evidence based on the testimony of its expert

280. *Id.*

281. *Id.* at \*4. Critical to the panel’s holding was its recognition that “[a] crucial element in determining the sufficiency of the evidence is whether the court below correctly interpreted the statutory criteria.” *Id.* at \*2.

282. A-1099-05T3, 2007 WL 1930457 (N.J. Super. Ct. App. Div. July 5, 2007) (*per curiam*).

283. *Id.* at \*13.

284. *Id.* at \*12.

285. *Id.*

286. *Id.*

287. *Id.*

288. See *supra* Part III.C (discussing pre-*Gallenthin* judicial review).

289. This is also the popular perception of *Gallenthin*’s significance. See Sterner Posting, *supra*, note 260.

planner and a report by a separate professional planner.<sup>290</sup> Both the report and the expert's testimony simply declared that the property met the statutory criteria for redevelopment because it was not being used in an optimal manner and could otherwise be developed to benefit the public.<sup>291</sup>

Although the court concluded that it need not address whether there was sufficient evidence on the record to support Paulsboro's redevelopment designation,<sup>292</sup> it provided clarification on the substantial evidence standard for "the future guidance of planning boards and court."<sup>293</sup> The court stated that redevelopment designations are entitled to deference "provided that they are supported by substantial evidence on the record."<sup>294</sup> However, the opinion emphasized that issues of law are subject to *de novo* review and the substantial evidence standard is not met "if a municipality's decision is supported by only the net opinion of an expert."<sup>295</sup> It further explained that "a municipality must establish a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met."<sup>296</sup>

The court's "guidance" has tightened the "substantial evidence" standard of review in two respects. First, it reaffirmed that *only* findings of fact or legislative fact are entitled to deference. A municipality's interpretation of the statutory criteria necessary for a redevelopment designation is not entitled to deference and should be reviewed *de novo*.<sup>297</sup> Indeed, *Gallenthin* was decided entirely on Paulsboro's misinterpretation of the LRHL.<sup>298</sup> Perhaps because of the misconception that the Legislature had plenary redevelopment authority, pre-*Gallenthin* cases often neglected to review the municipality's interpretation of the applicable statutory criteria to ensure that it was consistent with the constitution.<sup>299</sup> *Gallenthin* underscored the principle that courts must not defer to a municipality's interpretation of the

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290. *Gallenthin*, 924 A.2d 447, 452-53.

291. *Id.*

292. *Id.* at 465 ("Because Paulsboro's redevelopment designation was based on an improper interpretation of the LRHL, we need not address whether there was sufficient evidence on the record to support the Borough's action.").

293. *Id.* at 464.

294. *Id.* at 465.

295. *Id.*

296. *Id.*

297. *See Hodges v. Sasil Corp.*, 915 A.2d 1, 6 (N.J. 2007) (a municipality's legal determinations are subject to *de novo* review by courts).

298. *Gallenthin*, 924 A.2d at 464.

299. *See supra* Part III.C (discussing pre-*Gallenthin* judicial review).

LRHL.<sup>300</sup> Second, *Gallenthin* reaffirmed that “substantial evidence” requires meaningful and quantitative evidence directed to the *relevant* statutory criteria.<sup>301</sup> Conclusory testimony by a planner that the statutory criteria are met is not substantial evidence.<sup>302</sup> The municipality must provide evidence that supports its conclusion that the property is “blighted.”<sup>303</sup>

Again, this portion of the court’s decision has not been lost on lower courts since *Gallenthin*. Indeed, in *Anzalone*, the court invalidated the redevelopment designation based on the municipality’s potential misinterpretation of the LRHL in light of the court’s recent holding in *Gallenthin*.<sup>304</sup> Nevertheless, the panel offered its analysis of whether the statutory criteria were supported by substantial evidence to guide the parties on remand.<sup>305</sup> The City had based its redevelopment designation on, among other things, a survey of the external conditions of the subject properties, which concluded that the properties were generally debilitated and subject to redevelopment,<sup>306</sup> and a conclusory opinion that the subject area could be put to more efficient use through redevelopment.<sup>307</sup> Citing *Gallenthin*, the panel concluded that this did not constitute substantial evidence.<sup>308</sup>

In *BMA, LLC v. Belmar*,<sup>309</sup> the panel expressly embraced *Gallenthin*’s exhortation that a municipality’s interpretation of the LRHL is not entitled to deference.<sup>310</sup> Citing *Gallenthin*, the panel stated that although a municipality’s findings of fact are entitled to deference, “the substantial evidence standard is inappropriate when the municipality’s decision is based on evidence that is not tailored to the correct statutory criteria.”<sup>311</sup> In such circumstances, the municipality’s conclusion that the statute was nevertheless intended to apply is a legal conclusion subject to *de novo* review.<sup>312</sup>

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300. Indeed, the court engaged in a searching review of the record to ascertain the Borough’s interpretation of the statute. *Gallenthin*, 924 A.2d at 455-56.

301. *Id.* at 464-65.

302. *Id.*

303. *Id.*

304. A-0067-06T2 at 54-55, 2008 WL 3090052, at \*1 (N.J. Super. Ct. App. Div. Aug. 7, 2008) (per curiam).

305. *Id.* at \*1-2.

306. *Id.* at \*2.

307. *Id.*

308. *Id.* at \*1.

309. A-5974-05T5, 2008 WL 281687 (N.J. Super. Ct. App. Div. 2008) (per curiam).

310. *Id.* at \*4.

311. *Id.* at \*2.

312. *Id.*

This more searching standard of review benefits both property owners and municipalities. Although it will limit the areas that municipalities can redevelop, it provides clarity concerning the sort of evidence that is necessary to sustain redevelopment designations. Municipalities need only develop a quantitative record directed to relevant statutory criteria in order to proceed with legitimate redevelopment initiatives. It simultaneously provides protection to property owners, who can now expect meaningful judicial review of redevelopment designations.

## VI. UNANSWERED QUESTIONS OF JUDICIAL REVIEW AFTER *GALLENTHIN*

Although *Gallenthin* had “enormous significance”<sup>313</sup> because it clarified that under the New Jersey Constitution only “blighted areas” can be redeveloped and that the Judiciary is responsible for monitoring the State’s redevelopment authority,<sup>314</sup> *Gallenthin* is not a panacea. It is only the beginning and not the end of this ongoing journey. *Gallenthin*’s principles have provided significant clarity to redevelopment practice in New Jersey, but they also raise several new issues affecting courts, municipalities, and the Legislature. Those issues can and will most likely be resolved through legislation, or to borrow Justice Frankfurter’s phrase, through the process of “elucidating litigation.”<sup>315</sup>

### A. *When Does the Constitution Permit Redevelopment of Non-Blighted Property Because it is Part of a Larger Blighted Area?*

The court has long recognized that non-blighted parcels may be included in a redevelopment plan for purposes of redeveloping a larger blighted area.<sup>316</sup> In *Levin*, the court explained that the BAA was “concerned with areas and not with individual properties.”<sup>317</sup> The fact that single parcels in the area are useful and could not be declared blighted if considered in isolation is basis neither for excluding such parcels nor for invalidating a declaration of

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313. See *Harrison Redevelopment Agency v. Derose*, 942 A.2d 59, 78 (N.J. Super. Ct. App. Div. 2008) (describing the proposition, revived by *Gallenthin*, that the blighted areas clause permitted redevelopment of areas if they are determined to be blighted as having “enormous significance”).

314. See *supra* Part V.B.

315. *Int’l Ass’n of Machinists v. Gonzalez*, 356 U.S. 617, 624 (1958).

316. *Levin v. Twp. Comm. of Bridgewater*, 274 A.2d 1, 19 (N.J. 1971); see also *Lyons v. City of Camden*, 226 A.2d 625, 631 (N.J. 1968); *Wilson v. City of Long Branch*, 142 A.2d 837, 847 (N.J. 1958).

317. 274 A.2d at 19.



blight.”<sup>318</sup> Like the BAA, the LRHL provides that a “redevelopment area may include lands, buildings, or improvements which of themselves are not detrimental to the public . . . welfare, but the inclusion of which is found necessary . . . for the effective redevelopment of the area of which they are a part.”<sup>319</sup> Additionally, courts have long deferred to municipalities regarding the appropriate boundaries of a redevelopment area.<sup>320</sup>

These rules were not problematic under the pre-*Gallenthin* paradigm that assumed the Legislature’s plenary redevelopment authority.<sup>321</sup> However, because *Gallenthin* interpreted the blighted areas clause to limit the Legislature’s redevelopment authority to only “blighted areas,”<sup>322</sup> it follows that the Legislature does not possess plenary authority to define the required nexus between non-blighted parcels and a larger redevelopment area. Indeed, the blighted areas clause imposes some limitation on a municipality’s authority to include non-blighted parcels in a larger redevelopment area. The exact nature of the required nexus, however, is an open issue.

The question may be somewhat inconsequential at present because the LRHL already limits the inclusion of non-blighted parcels to those that are “necessary” to redevelopment of the larger blighted area.<sup>323</sup> This is surely a high standard. Additionally, the court affirmed in *Gallenthin* that non-blighted parcels may be included in a larger redevelopment area.<sup>324</sup> Indeed, the court stated that if there had been substantial evidence that the non-blighted parcel at issue was “integral” to the municipality’s larger redevelopment plan, the court may not have invalidated the redevelopment designation.<sup>325</sup> Nevertheless, property owners can challenge—under the blighted areas clause—the inclusion of non-blighted parcels in a redevelopment plan if the proffered nexus to the larger blighted area is

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318. *Id.* See also *Lyons*, 226 A.2d at 631; *Wilson*, 142 A.2d at 847.

319. N.J. STAT. ANN. § 40A:12A-3 (West 2009) (defining “redevelopment area”).

320. *Wilson*, 142 A.2d at 847; see also *Lyons*, 52 N.J. at 98.

321. See *supra* Part III.B.

322. *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 456 (N.J. 2007).

323. N.J. STAT. ANN. § 40A:12A-3 (West 2009) (“A redevelopment area may include lands, buildings, or improvements which of themselves are not detrimental to the public health, safety or welfare, but the inclusion of which is found necessary, with or without change in their condition, for the effective redevelopment of the area of which they are a part.”).

324. *Gallenthin*, 924 A.2d at 465.

325. *Id.*

attenuated.<sup>326</sup> Future courts will have to ascertain the nexus required by the blighted areas clause.

*B. How Often Does the Constitution Require Municipalities to Reevaluate Their Redevelopment Designations?*

Redevelopment designations can remain in effect for decades.<sup>327</sup> Several recent cases have highlighted the likely possibility that an area may be blighted when the municipality initially makes its redevelopment designation but, as a result of the municipality's redevelopment initiatives or the owner's own efforts, the property is no longer blighted.<sup>328</sup> Because *Gallenthin* permits redevelopment of only "blighted areas,"<sup>329</sup> these cases raise another issue: when does the New Jersey Constitution require a municipality to revise its redevelopment plan to account for changes to the area?<sup>330</sup>

In *Dutch Neck Land Company, LLC v. Newark*, for example, the City of Newark conducted an investigation and adopted a redevelopment plan in 1963 that declared certain properties to be blighted.<sup>331</sup> In October 2005, the planning board passed a resolution making it possible for the City to take the property for redevelopment without conducting a new investigation of the property.<sup>332</sup> The property owners challenged the ordinance because the property was used as a profitable container terminal.<sup>333</sup> The City took the remarkable position that "because the subject property ha[d] already been declared blighted in 1963, there was no legal reason for the Planning Board to re-examine that finding in 2005."<sup>334</sup>

*City of Long Branch v. Anzalone* presented a more nuanced situation. There, the City adopted a two-phase redevelopment plan in 1996, which included the subject property in the second phase of redevelopment.<sup>335</sup> The

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326. See *City of Long Branch v. Anzalone*, A-0067-6T2, 57-58, 2008 WL 3090052, \*16 (N.J. Super. Ct. App. Div. Aug. 7, 2008) (per curiam).

327. See, e.g., *Dutch Neck Land Co. v. Newark*, No. A-5825-06T2, 5, 2008 WL 2026506, at \*10 (N.J. Super. Ct. App. Div. May 14, 2008) (per curiam) (explaining that redevelopment plan was originally adopted in 1963 and had a forty-year sunset provision).

328. See, e.g., *Dutch Neck Land Co.*, 2008 WL 2026506 at \*10; *Anzalone*, 2008 WL 3090052 at \*16.

329. *Gallenthin*, 924 A.2d at 456.

330. See *Anzalone*, 2008 WL 3090052 at \*16.

331. 2008 WL 2026506 at \*1.

332. *Id.* at \*6.

333. *Id.* at \*3.

334. *Id.* at \*4.

335. 2008 WL 3090052 at \*9.

City completed the initial phase of the redevelopment plan in 2005 and began proceedings to take the subject properties in order to complete the second phase.<sup>336</sup> The property owners challenged the taking of their property by arguing, among other things, that the first phase of redevelopment had been successful and their properties were no longer necessary for the redevelopment of the larger area.<sup>337</sup> Although the Appellate Division remanded the case on other grounds, it noted that the investment of “substantial funds, public and private,” in the first phase of redevelopment are not factors that can “trump the rights of property owners” to contest the taking of the property based on its current condition.<sup>338</sup>

Those cases raise the important issue of when does a legitimate blight designation become obsolete under the blighted areas clause. There are obvious practical concerns associated with constant revision of redevelopment plans. Most notably, private investors may be deterred from investing in important redevelopment projects if there is a significant chance that the project will not be completed to the extent originally planned.<sup>339</sup> Nevertheless, as illustrated by *Dutch Neck Land Company*, redevelopment designations must be revised at some point. Future cases will require courts to decide at what point the blighted areas clause requires municipalities to review their redevelopment plans.

#### CONCLUSION

Redevelopment has special value in New Jersey because of excessive demands on New Jersey’s developable land. Unlike many less developed states, a fair degree of government intervention is necessary to protect New Jersey’s communities from harmful blight. Redevelopment is important in many of New Jersey’s urban and exurban areas in order to impede further decay. It is imperative, however, that New Jersey provide property owners with appropriate protections from unjustified and excessive redevelopment projects.

The framers of New Jersey’s 1947 Constitution understood that tension. They crafted a constitutional provision that provides incentives for private redevelopment but limits redevelopment to “blighted areas.” In so doing, the

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336. *Id.* at \*16.

337. *Id.* at \*15-16.

338. *Id.* at \*24.

339. This was the position taken by the City in *Anzalone*. See, 2008 WL 3090052, at \*16; Brief of Defendant-Respondent at 57-58, *Anzalone*, A-0067-6T2 (N.J. Super. Ct. App. Div. Aug. 7, 2008).

framers entrusted New Jersey's courts with responsibility for monitoring and enforcing the acceptable balance between redevelopment and property rights. Future cases will wrestle with the evolving meaning of "blight" and the dynamic tension between redevelopment and property rights. *Gallenthin*, however, began to restore structural balance to the debate and revive the Judiciary's responsibility to provide meaningful review of redevelopment designations.

