WHAT THE LEGISLATURE GIVETH THE JUDICIARY TAKETH AWAY: THE POWER TO TAKE PRIVATE PROPERTY FOR REDEVELOPMENT IN NEW JERSEY AND *GALLENTHIN REALTY DEVELOPMENT, INC. V. BOROUGH OF PAULSBORO*

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I. INTRODUCTION

Until the recent past, eminent domain has always been an accepted part of American law, not unlike jury duty and taxes.[1] Americans by and large have accepted the principle that, on occasion, the government may need to take private property in order to serve an important common purpose.[2] When, however, the purpose to be served is private redevelopment, neither the validity of the taking nor the support of the public are so settled. For judges, legislatures, and the public, the million dollar question is the same: Where should the line be drawn? Is the exercise of eminent domain to replace a drug-infested sprawl with affordable apartments acceptable, while use of the power to replace modest single family homes with revenue-generating retail complexes is extending the power too far? In New Jersey, these questions are particularly relevant. Despite its small size, New Jersey is extraordinarily diverse, containing urban, suburban, and rural communities and boasting a strong commercial presence.[3] It is the most densely populated state in the nation and is plagued by high property prices and taxes.[4] Scarcity of land and resources

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[1] *See generally* JULIUS L. SACKMAN, 1-1 NICHOLS, THE LAW OF EMINENT DOMAIN §§ 1.21[5], 1.22[14] (3d ed. 1990); N.J. DEP'T OF THE PUBLIC ADVOCATE, REFORMING THE USE OF EMINENT DOMAIN FOR PRIVATE REDEVELOPMENT IN NEW JERSEY, app. at i (May 18, 2006), *available at* http://www.state.nj.us/publicadvocate/reports/pdfs/pareporton eminentdomainforprivateredevelopment.pdf [hereinafter PUBLIC ADVOCATE REPORT].

[2] Abbott v. Beth Israel Cemetery Ass'n, 100 A. 2d 532, 540 (N.J. 1953); PUBLIC ADVOCATE REPORT, *supra* note 1, at app. at i; Editorial, *Home Sweet Home, Whose Domain is It?*, N.J. LAW., Aug. 27, 2007, at 6.

Indeed, acquiescence as to the inherent power of the State to expropriate private property is neither unique to the United States nor a recent phenomenon. Such a power can be found in common law legal systems pre-dating the American republic, dating as far back as the Magna Carta, and was also acknowledged by our founding fathers. *Abbott*, 100 A. 2d at 540; SACKMAN, *supra* note 1 at § 1.21; PUBLIC ADVOCATE REPORT, *supra* note 1, at app. at i.

[3] State of New Jersey, Dep't of Labor & Workforce Dev., Urban and Rural Population: New Jersey, Counties and Municipalities, Census 2000, http://www.wnj pin.net/OneStopCareerCenter/LaborMarketInformation/lmi25/sfl/ur_pop.pdf (last visited Aug. 1, 2008); PSE&G, New Jersey Demographic Profile, http://www.loc ation nj.com/demog_nj_general.asp (last visited Aug. 1, 2008).

[4] WorldAtlas.com, United States Population Density Rankings by State, http://www.worldatlas.com/aatlas/populations/usadensityh.htm (last visited Aug. 1, 2008); The Tax Foundation, New Jersey's State and Local Tax Burden 1977-2008, http://www.tax foundation.org/taxdata/show/469.html (last visited Aug. 1, 2008).

are primary concerns.[5] The reach of eminent domain is therefore significant: reach too far and municipalities may sacrifice citizens' homes to build yet another superfluous retail complex; reach too little and the state's worst neighborhoods will fall into further disrepair and trigger the degeneration of surrounding areas as well.

While the Takings Clause of the United States Constitution serves as the primary basis for the federal government's power to take private property, the contours of the states' power is largely a question of state law.[6] Further, in the context of redevelopment, it is often an individual municipality, not a state entity, that does the taking.[7] In New Jersey, the state's power of eminent domain is governed by two authorities, the Blighted Areas Clause of the state Constitution[8] and the Local Redevelopment and Housing Law[9] (hereinafter "LRHL"), which work in tandem: the Blighted Areas Clause provides the basis for the power of state municipalities to redevelop "blighted areas," and the LRHL sets forth the criteria and procedures pursuant to which a municipality may take such action.[10] Prior to June 2007, when the New Jersey Supreme Court issued its landmark ruling in *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*,[11] the reach of eminent domain under these authorities was regarded as broad. Many considered it to be over-reaching.[12] In *Gallenthin*, however, the court narrowed the meaning of the LRHL, effectively pulling back the reach of

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5 Peter G. Sheridan, Kelo v. City of New London: *New Jersey's Take on Takings*, 37 SETON HALL L. REV. 307, 324 (2007).

6 U.S. CONST. amend. V; Sheridan, *supra* note 5, at 324.

7 *See generally* cases discussed *infra* Parts II-VI and accompanying notes.

8 N.J. CONST. art. I, ¶ 20, art. VIII, § 3, ¶ 1.

9 N.J. STAT. ANN. § 40:12A-1 to -49 (West 2007).

10 N.J. CONST. art. I, ¶ 20, art. VIII, § 3, ¶ 1; N.J. STAT. ANN. § 40:A: 12A-5 (West 2007).

11 924 A.2d 447 (N.J. 2007).

12 *See, e.g.*, PUBLIC ADVOCATE REPORT, *supra* note 1, at 1, 5; N.J. DEP'T OF THE PUBLIC ADVOCATE, IN NEED OF REDEVELOPMENT: REPAIRING NEW JERSEY'S EMINENT DOMAIN LAWS—ABUSES AND REMEDIES, A FOLLOW-UP REPORT, at 2-3 (May 29, 2007), *available at* http://www.state.nj.us/publicadvocate/home/ reports/pdfs/Eminent %20Domain-Color.pdf [hereinafter FOLLOW-UP REPORT]; Dana E. Sullivan, *Eminent Domain: Milgram Joins the Chorus for Eminent Domain Reform*, N.J. LAW., Aug. 13, 2007, at 3; Editorial, *Tightening 'Blight' in Eminent Domain*, N.J.L.J., July 9, 2007, at 18 [hereinafter *Tightening Blight*].

eminent domain for redevelopment in the state.[13]

This Note will examine and explore the interplay between the Blighted Areas Clause, the LRHL, and *Gallenthin*, in order to provide a better understanding of the history and current status of the use of eminent domain for municipal redevelopment in New Jersey. Part II will offer a brief history of the government's power of eminent domain, while Part III will focus on municipal redevelopment law in New Jersey. Part IV will address the *Gallenthin* case and the reasons for the court's holding. Part V will examine how the court's decision narrowed the scope of eminent domain for redevelopment in New Jersey. Part VI will examine how *Gallenthin* may further refine redevelopment law in the future and whether legislative reform is still necessary.

II. HISTORICAL OVERVIEW

Although the power of eminent domain has generally been recognized as an inherent power of every sovereign state, the formal basis for the government's power to take private property lies in the Takings Clause of the Constitution, which provides that private property shall not be taken for public use without just compensation.[14] In this way, the Takings Clause serves both as a tacit recognition of the federal government's authority to expropriate private property and as a limitation on that power.[15] On the state level, eminent domain was also recognized as a power of the states, as either an inherent attribute of independent government or under the general police power.[16] When the

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[13] Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447 (N.J. 2007).

[14] U.S. CONST. amend. V.

[15] United States v. Carmack, 329 U.S. 230, 241-42 (1946); Boom Co. v. Patterson, 98 U.S. 403, 406 (1879).

[16] Wilson v. City of Long Branch, 142 A.2d 837, 843 (N.J. 1958) (stating that such authority derived from the police power); Chicago B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 236-37 (1897) (stating that such authority is inherent to all governments). *See generally* SACKMAN, *supra* note 1 at § 1.14. The Takings Clause was not applicable to the states until 1897, with the passage of the Fourteenth Amendment.

While the exercise of eminent domain by the states was thus unrestrained by the limitations of the Fifth Amendment prior to 1897, the public use and just compensation requirements were largely perceived as a product of natural law. Kelo v. City of New London, 545 U.S. 469, 512 (2005) (Thomas, J., dissenting); Green v.

Takings Clause was made applicable to the states through the Fourteenth Amendment in 1897, however, the states simultaneously gained constitutional recognition of the eminent domain power of state governments and became subject to its limitations.[17]

While of little relevance in the early days of the republic, when land and resources abounded, use of the eminent domain doctrine grew as the nation became more developed and so did the debate regarding its proper scope in light of the Takings Clause.[18] Throughout the nineteenth century, the courts fluctuated between liberal and literal readings of the Takings Clause, with the government's power to take private property waxing and waning, respectively.[19] It was not until the end of the nineteenth century, however, that the Supreme Court began to review exercises of the government's power to expropriate private property.[20] Perhaps in part to accommodate the needs of a growing nation, by the latter half of the nineteenth century, the narrower reading of the Takings Clause that flourished for much of the century was abandoned and a more liberal standard took its place.[21] Under the public purpose test adopted by the Court, the government may take private property as long as the taking is

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Frazier, 253 U.S. 233, 238 (1920).

[17] *Green*, 253 U.S. at 238; *Chicago B.*, 166 U.S. at 233, 236-37; *Kelo*, 545 U.S at 512 (Thomas, J., dissenting).

[18] Sheridan, *supra* note 5, at 309-10; Comment, *The Public Use Limitation of Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 601-08 (1948) [hereinafter *The Public Use Limitation*].

[19] Sheridan, *supra* note 5, at 309-10 (citing *The Public Use Limitation*, *supra* note 18, at 599-600). During the early days of the nation, the public use limitation was interpreted liberally, such that any taking that was for the public good constituted a public use. During the mid-nineteenth century, the courts applied a narrower standard, in which only property that was actually to be used by the public satisfied the public use requirement. Sheridan, *supra* note 5, at 310 (citing Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 67 OR. L. REV. 203, 208 (1977)).

[20] *See* Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906); *see also* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158-64 (1896). *See generally* Sheridan, *supra* note 5, at 309, 311; *Kelo*, 545 U.S. at 479-81; *id.* at 515-16 (Thomas J., dissenting).

[21] *Kelo*, 545 U.S. at 479-80 (citing Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158-64 (1896); Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co., 240 U.S. 30, 32 (1916); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014-15 (1984)); Sheridan, *supra* note 5, at 310-11.

"rationally related to a conceivable public purpose."[22] Despite the broadness of such language, two major limitations were placed on the government's power: (1) the government could not take private property to give to another private person; and (2) the fact that the public might marginally benefit from the transfer was not enough.[23] With these guidelines in place, the fundamental contours of eminent domain law, at least on the federal level, remained relatively stagnant until the 1950s, when many would argue the Court further expanded the government's eminent domain power in *Berman v. Parker*.[24] After *Berman*, the law remained relatively stable for another fifty years,[25] until the Supreme Court

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[22] *Kelo*, 545 U.S. at 490 (Kennedy, J., concurring) (citing Haw. Housing Auth. v. Midkiff, 467 U.S. 229, 241 (1984)); *Strickley*, 200 U.S. at 531 (characterizing the use by the public test as inadequate and applying the public purpose test); *Fallbrook*, 164 U.S. at 158-64 (applying the public purpose test). *See generally* Sheridan, *supra* note 5, at 310-11; *Kelo* at 479-81 (majority opinion); *id.* at 515-16 (Thomas J., dissenting).

[23] Sheridan, *supra* note 5, at 310-11; Mo. Pac. Ry. Co. v . Neb., 164 U.S. 403, 417 (1896); Thompson v. Consolidated Gas Corp., 300 U.S. 55, 78-80 (1937).

[24] 348 U.S. 26 (1954). *Berman* involved a Congressional act that provided for the rebuilding of blighted areas in the District of Columbia in the interest of "public health, safety, morals, and welfare." *Id.* at 28. In response, the National Capital Planning Commission targeted a predominantly residential area in the Southwest part of the city in which 60.3 percent of the dwellings had no baths, 29.3 percent lacked electricity, and 83.8 percent lacked central heating for reconstruction. *Id.* at 30-31. The plaintiff owned a department store, which, while not itself dilapidated, was within the area designated for condemnation. *Id.* at 31. In hearing the case, the Court was confronted with two issues: (1) whether Congress could designate any entire area for condemnation or had to proceed on a structure-by-structure basis; and (2) whether Congress could authorize conveyance of the condemned property to another private party for redevelopment. *Id.* at 33, 35. Stressing that great deference should be afforded to the legislative branch in determining what constitutes a public purpose and declaring that "the role of the judiciary in determining whether that [eminent domain] power is being exercised for a public purpose is an extremely narrow one," the *Berman* Court found Congress's actions to be permissible. *Id.* at 32-36; *see also* Glen H. Sturtevant, Jr., *Economic Development as Public Use: Why Justice Ryan's* Poletown *Dissent Provides a Better Way to Decide* Kelo *and Future Public Use Cases*, 15 FED. CIR. B.J. 201, 210-13 (2005) (discussing the significance of *Berman*).

[25] Sheridan, *supra* note 5, at 312.

While *Hawaii Housing Authority v. Midkiff* was a high profile case occurring between *Berman* and *Kelo*, it presented an extraordinary set of facts and largely affirmed rather than departed from precedent. *Midkiff* involved a statute enacted by the Hawaii legislature which allowed title in real property to be taken from lessors and transferred to lessees through eminent domain in order to eliminate a problematic concentration of fee simple in the state. 467 U.S. at 232-34. Ninety-two percent of non-government owned land was owned by seventy-two landowners, who would not sell their property, which the legislature found skewed the real estate

issued its ruling in *Kelo v. City of New London* in 2005.[26]

In *Kelo*, a decision that sparked a firestorm of controversy across the nation,[27] the Supreme Court upheld the government's right to take private property and convey it to another private party solely for economic redevelopment purposes.[28] While affirming the principle that the government may neither take private property for the sole purpose of transferring it to another private individual nor take property under the pretext of a public purpose when the real purpose is to bestow a private benefit, the Court reasoned that if the development plan at issue served a public purpose, the public use requirement of the Fifth Amendment was satisfied and the scheme was valid.[29] Giving

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market, inflated prices to the public detriment, and prevented the middle class from acquiring real property. *Id.* at 232-33. While reaffirming the principle that one person's property may not be taken for the benefit of another private person without a justifying public purpose, the Court held that the statute's objective of breaking up a real estate oligopoly satisfied this test. *Id.* at 241, 245. While the plaintiffs argued the law was unconstitutional because it would result in private property being placed in the hands of other private persons, or, alternatively, that a heightened standard of review was appropriate in such cases, the Court rejected both arguments. *Id.* at 239-44. *But c.f.* Anastasia C. Sheffler-Wood, *Where Do We Go From Here?: States Revise Eminent-Domain Legislation in Response to* Kelo, 79 TEMP. L. REV. 607, 620 (2006) (suggesting that *Midkiff* represented a further expansion of the public use test because the properties at issue in *Midkiff*, unlike those in *Berman*, were not blighted).

[26] *Kelo*, 545 U.S. 469. The facts of *Kelo* can briefly be summarized as follows: New London, Connecticut was facing a downward economic spiral in the early 1990s and had been declared a "distressed municipality" by the state. In 1998, the city initiated an effort to spur economic development in the Fort Trumbull area of the city. The following year, the pharmaceutical company Pfizer committed to construct a $300 million research facility adjacent to the area. In addition to the construction of office and research space, the proposed development included the construction of a hotel, new residences, a museum, and a marina. The proposed site called for the destruction of over one hundred privately owned homes. While a private agreement was reached with most of the affected homeowners, fifteen refused to sell and the city instituted condemnation proceedings. *Id.* at 473-75. The landowners claimed that the taking of their property to give to another private citizen violated the Takings Clause of the Fifth Amendment because giving the property to Pfizer did not constitute a public use. *Id.* at 475.

[27] For a discussion of the public outcry following *Kelo* and executive, legislative, and voter responses to the case, see Patricia H. Lee, *Eminent Domain: In the Aftermath of* Kelo v. City of New London, *a Resurrection in* Norwood*: One Public Interest Attorney's View*, 29 W. NEW. ENG. L. REV. 121 (2006).

[28] *Kelo*, 545 U.S. at 469.

[29] *Id.* at 477-80.

deference[30] to the City's determination that its plan would spur needed economic rejuvenation, the Court upheld the redevelopment plan.[31]

III. NEW JERSEY MUNICIPAL REDEVELOPMENT LAW

While *Kelo* affirmed that a municipality had the right under the Takings Clause to condemn private property for

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[30] A second issue in *Kelo* was the standard of review that courts should apply in evaluating challenges to a public use determination. While in exactions cases, the Court had held that an "essential nexus" between the demanded exaction and the policy used to justify it was required, the precedent set by the Court in public use cases was more deferential. *Compare* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) *and* Dolan v. City of Tigard, 512 U.S. 374 (1994), *with* Berman v. Parker, 348 U.S. 26 (1954). Following such precedent in *Kelo*, and echoing the rational basis test used to review economic regulation under the Due Process and Equal Protection Clauses, the majority articulated the standard of review as requiring only that the legislature's purpose was "legitimate" and that its means were "not irrational." *Kelo*, 545 U.S. at 488. Justice Kennedy, while concurring, suggested that a more stringent standard of review might be appropriate in other cases. *Id.* at 493 (Kennedy, J., concurring). Justice O'Connor, dissenting, only tangentially discussed the standard of review to be employed, instead focusing her criticism on the expansion of the meaning of the term 'public use' beyond its constitutional limitations. *Id.* at 494-505 (O'Connor, J., dissenting). Justice Thomas, also dissenting, argued that a more searching judicial review was needed, and that the Court owed no deference to a legislature's determinations. *Id.* at 514-23 (Thomas, J., dissenting). For thoughts as to the appropriate standard of review among legal scholars, see Nicole Stelle Garnett *The Public Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934 (2003); Orlando E. Delogu, Kelo v. City of New London-*Wrongly Decided and a Missed Opportunity for Principled Line Drawing with Respect to Eminent Domain Takings*, 58 ME. L. REV. 17 (2006).

[31] *Kelo*, 545 U.S. at 471-90. As suggested, many legal experts felt that the *Kelo* decision was not surprising given existing precedent. *See, e.g.*, Ilya Somin, *The Limits of Anti-*Kelo *Legislation*, REASON, Aug./Sept. 2007, *available at* http://www.reason.com/news/show/120765.html (citing *Berman* and *Midkiff* and arguing that the public backlash following *Kelo* was caused by the publicity the case received, which made Americans realize for the first time that private property could be condemned and transferred to other private entities); Clayton P. Gillette, Kelo *and the Local Political Process*, 34 HOFSTRA L. REV. 13, 13-16 (2005) (declaring that the substantive result of *Kelo* was neither surprising nor novel and that *Kelo* was in fact a "very conservative opinion"). *But c.f. Kelo*, 545 U.S. at 500-501 (Connor, J., dissenting) (arguing that the language relied upon by the Court as precedent in *Berman* and *Midkiff* was dicta and that the pre-condemnation use of the properties at issue in those cases fostered a direct public purpose being realized when such uses were eliminated, making the fact that the property was turned over to private use inconsequential); Lee, *supra* note 27, at 124 (arguing that *Kelo* was quite distinguishable from *Berman* and *Midkiff* because the public use to be served was more speculative and indirect).

redevelopment, provided the designation served a public purpose, it did not in fact stand for the proposition that a municipality had the unqualified right to seize private property for redevelopment —i.e. that state legislatures could not limit such a right by state constitution or statute. Rather, *Kelo* held that if a state *elected* to confer such a right upon its localities, such action was in keeping with the restrictions imposed by the federal Constitution. [32] Examining the Connecticut constitution and the Connecticut municipal redevelopment statute, the Connecticut Supreme Court and the U.S. Supreme Court confirmed that the Connecticut Legislature had indeed conferred such a right.[33] In New Jersey, as in Connecticut, a locality's authority to take private property for redevelopment purposes has also been conferred by the Legislature.[34] In New Jersey, this has been accomplished through a two step process: the New Jersey Constitution provides that municipalities may be authorized by the Legislature to undertake redevelopment efforts, and the LRHL enacted pursuant to that authorization actually empowers municipalities to take such actions.[35] In contrast to Connecticut's constitution and municipal redevelopment statute, the broad language of which places few limitations upon the government's power to seize private property for economic redevelopment purposes beyond those imposed by the Fifth Amendment, New Jersey's constitution and municipal redevelopment statute are

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[32] *Kelo*, 545 U.S. at 489 (emphasizing that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power" and recognizing that "many States already impose 'public use' requirements that are stricter than the federal baseline").

[33] CONN. CONST. art. I, § 11 (providing that "the property of no person shall be taken for public use, without just compensation therefore[e]"); CONN. GEN. STAT. § 8-186 (2005) ("It is found and declared that the economic welfare of the state depends upon the continued growth of industry and business within the state . . . that permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes and, in distressed municipalities, to lend funds to businesses and industries within a project in accordance with such planning objectives are public uses and purposes . . . and that the necessity in the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination."); *Kelo*, 545 U.S. at 476.

[34] N.J. CONST. art. I ¶ 20, art. VIII, § 3, ¶1; N.J. STAT. ANN. § 40A: 12A-1 to-49 (West 2007).

[35] N.J. CONST. art. I ¶ 20, art. VIII, § 3, ¶ 1; N.J. STAT. ANN. § 40A: 12A-5 to -49 (West 2007).

substantially stricter, imposing requirements for redevelopment beyond the federal baseline.[36]

A. *Statutory Criteria for Designation of Blight*

Two separate provisions of the New Jersey Constitution define the constitutional contours of the State's eminent domain power. Article I, paragraph 20 refers to the eminent power generally, tracing the language of the Takings Clause and providing that private property shall not be taken for public use without just compensation.[37] Article VIII, section 3, paragraph 1 of the New Jersey Constitution addresses the specific use of the power for private redevelopment, providing in pertinent part:

> The clearance, replanning, development or redevelopment of blighted areas shall be made 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 any of them, may be exempted from taxation, in whole or 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.[38]

Thus, unlike the federal Constitution, the New Jersey Constitution itself provides that the redevelopment of blighted areas is a public purpose. Adopted in 1947, the purpose of the provision was to enable the clearing of city slums and to prevent the domino effect such areas had on surrounding areas by giving municipalities the power to intervene to stop further degradation and encourage private investment.[39] While granting the

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[36] *Compare* CONN. CONST. art. I § 11 *and* CONN. GEN. STAT. §§ 8-125(b), 8-186 (2007) (defining "redevelopment area" to encompass any area in the state that is "deteriorated, deteriorating, substandard or detrimental to the safety, health, morals or welfare of the community . . . ") *with* N.J. CONST. art. I ¶ 20, art. VIII, § 3, ¶ 1 *and* N.J. STAT. ANN. § 40A: 12A-5 (West 2007).

[37] N.J. CONST. art. I, ¶ 20.

[38] N.J. CONST. art. VIII, § 3, ¶1.

[39] Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447, 458 (N.J. 2007).

It should be noted that such an objective was not unique among New Jersey

Legislature the authority to enact legislation authorizing the redevelopment of "blighted areas," conspicuously absent from the provision is a definition of blight.[40]

In 1949, pursuant to the constitutional authority granted in the Blighted Areas Clause, the New Jersey Legislature enacted the Blighted Areas Act, which remained in effect until replaced by the LRHL in 1992. As originally enacted, the Act embraced an expansive definition of the term "blighted area."[41] Two years later, in 1951, the Legislature amended the Act to be even more encompassing. As originally amended, the Act provided that a blighted area existed if any of the following criteria were met:

> (a) The generality of buildings used as dwellings or the dwelling accommodations therein are substandard, unsafe, insanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living;
> (b) The discontinuance of the use of buildings previously used for manufacturing or industrial purposes, the abandonment of such buildings or the same being allowed to fall into so great a state of disrepair as to be untenantable;
> (c) Unimproved vacant land, which has remained so for a period of ten years prior to the determination hereinafter referred to, 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

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lawmakers, nor was the use of the word "blighted." From the construction boom of the 1920s, an urban renewal movement was born, committed to the reconstruction of urban areas through government intervention. Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain,* 21 YALE L. & POL'Y REV. 1, 13-21 (2003). Writing extensively on the subject, urban renewal advocates developed a lexicon of terms to describe the phenomena that plagued America's cities, with the terms "slum" and "blight" assuming prevalence. *Id.* at 15-17. Their actions influenced the public and political discourse, and by the 1940s, roughly half of the states had passed some form of urban renewal legislation. *Id.* at 27-28, 31-32. However, the contours of such legislation varied from state to state. *Id.* at 32; *see also* Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law,* 35 REAL PROP. PROB. & TR. J. 389 (2000).

[40] N.J. CONST. art. VIII, § 3, ¶ 1.

[41] Blighted Areas Act, ch. 187, 1949 N.J. LAWS 626 (codified as amended at N.J. STAT. ANN. § 40:55-21.1 to -21.4 (West 1991) (repealed 1992). For a discussion of how other states have defined blight, see Colin Gordon, *Developing Sustainable Urban Communities: Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight,* 31 FORDHAM URB. L.J. 305 (2004).

> thereof, or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital;
> (d) Areas (including slum areas), with buildings or improvements which by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals or welfare of the community;
> (e) A growing or total 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 service of the public health, safety and welfare.[42]

Although not specifically enumerated in the Act, the legislation was interpreted by the courts to further allow condemnation of non-blighted property if located within an area designated as "blighted."[43]

Over the next forty years, the Blighted Areas Act was amended and supplemented with various related legislative enactments.[44] The LRHL, which served as its successor, attempted to unify the patchwork of separate enactments that had come to govern New Jersey eminent domain law.[45] The LRHL provides that a municipality can designate a delineated area as "in need of redevelopment" if one of eight criteria is met. The reader will notice that the LRHL largely adopts the language of its predecessor *verbatim*, with only slight variations in wording:

> (a) The generality of buildings are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess any such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living or working conditions.

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[42] Act of June 19, 1951, ch. 248, 1951 N.J. LAWS 865 (codified at N.J. STAT. ANN. § 40: 55-21.1 (West 1991) (repealed 1992) (emphasis added). Subsection (e) was not part of the original Act and was added in 1951. For a detailed history of the enactment of subsection 5(e), see Levin v. Twp. Comm. of Bridgewater, 274 A. 2d 1, 3-4 (N.J. 1971).

[43] *See* Wilson v. City of Long Branch, 142 A.2d 837, 847-48 (N.J. 1958); Levin v. Twp. of Bridgewater, 274 A.2d 1, 19 (N.J. 1971).

[44] For a brief tracing of these enactments, see Forbes v. Bd. of Trustees, 712 A.2d 255, 257-59 (N.J. Super. Ct. App. Div. 1998).

[45] *Id.* at 257.

(b) The discontinuance of the use of buildings previously used for commercial, manufacturing, or industrial purposes; the abandonment of such buildings; or the same being allowed to fall into so great a state of disrepair as to be untenantable.
(c) Land that is owned by the municipality, the county, a local housing authority, redevelopment agency or redevelopment entity, or unimproved vacant land that has remained so for a period of ten years prior to adoption of the resolution, and that by reason of its location, remoteness, lack of means of access to developed sections or portions of the municipality, or topography, or nature of the soil, it is not likely to be developed through the instrumentality of private capital.
(d) Areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.
(e) A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real 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.
(f) Areas, in excess of five contiguous acres, whereon buildings or improvements have been destroyed, consumed by fire, demolished or altered by the action of storm, fire, cyclone, tornado, earthquake or other casualty in such a way that the aggregate assessed value of the area has been materially depreciated.
(g) In any municipality in which an enterprise zone has been designated pursuant to the 'New Jersey Urban Enterprise Zones Act,' P.L. 1983, c. 303 (*C. 52:27H-60* et. seq.). . . .
(h) The designation of a delineated area is consistent with smart growth planning principles adopted pursuant to law or regulation.[46]

As noted, the 1992 legislation and the amended Blighted Areas Act are virtually identical with only minor variations in

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[46] N.J. STAT. ANN. § 40A: 12A-5 (West 2007). While a detailed discussion of smart growth is beyond the scope of this Note, in the most basic sense, smart growth refers to future change and alternative uses for land.

language that are largely cosmetic.[47] However, two linguistic changes, while perhaps also appearing cosmetic, would be of substantial significance for the court in *Gallenthin* and, therefore, for the future of eminent domain law in the state.[48] First, the LRHL replaced the term "blighted area" in the introductory clause with the phrase "area . . . in need of redevelopment."[49] Indeed, the word "blight" is conspicuously absent from the entire act. Second, while retaining most of the language of subsection 5(e) of the Blighted Areas Act, the LRHL made several changes, which, while minor in form, would become significant in substance. While subsection 5(e) of the 1951 statute cites "a growing or total lack of proper utilization caused by condition of the title, diverse ownership of the real property therein *and* other conditions, resulting in a stagnant *and unproductive* condition" as one basis for condemnation, the LRHL replaces both "and"s with "or"s and "unproductive" with "not fully productive," such that subsection 5(e) allows for "a growing lack *or* total lack of proper utilization of areas caused by condition of the title, diverse ownership of the real property therein *or* other conditions, resulting in a stagnant or *not fully productive* condition . . . " to warrant condemnation.[50]

B. Statutory Procedures for Redevelopment

In addition to setting forth the criteria necessary for a redevelopment designation, both the Blighted Areas Act and the LRHL provide statutory procedures which must be followed in order for a municipality to target a property or group of properties for redevelopment and proceed with a redevelopment project. These procedures are set forth in section 6 of the LRHL.[51] Before a municipality can adopt a redevelopment plan, the area must be declared as "in need of redevelopment" pursuant to

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[47] A variation of subsection 5(f), while not in the original Blighted Areas Act, was added by the Legislature in 1986. *Forbes*, 712 A.2d at 258.

[48] *Id.* at 259 (stating that all of the alterations made to the 1992 legislation, including those changes made to the introductory clause and to subsection 5(e), were cosmetic in nature).

[49] N.J. STAT. ANN. § 40A: 12A-5.

[50] N.J. STAT. ANN. § 40A:55-21.1 (West 1991) (repealed 1992) (emphasis added); N.J. STAT. ANN.§ 40A: 12A-5 (West 2007).

[51] N.J. STAT. ANN. § 40A: 12A-6 (West 2007).

certain procedures.[52] Among the most important of these procedures are the preliminary investigation report and planning board hearing.[53] In targeting an area for redevelopment, a municipality must engage a professional planner to prepare a preliminary investigation report.[54] The act does not specify what the report must include, other than a map of the boundaries of the proposed area and a statement declaring the basis for the designation.[55] Generally, reports also include: (1) a description of the physical conditions within the area, including existing land uses, building and environmental conditions, and site layout; (2) a review of the zoning and master plan designations for the area; and (3) an analysis describing how the area meets the statutory criteria contained in section 5 of the law.[56] The report is presented to the planning board and forms the primary factual basis for a finding that an area is in need of redevelopment. [57]

C. *Judicial Review of Planning Board's Findings and Burden of Proof*

Subsection 6(b)(5) of the LRHL provides that a designation of blight must be supported by "substantial evidence."[58] As the

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52 *Id.*; William J. DeSantis, *Avoiding Redevelopment Litigation*, N.J.L.J., Jan. 22, 2007, at 43.

53 N.J. STAT. ANN. § 40A: 12A-6(b)(1) (West 2007); DeSantis, *supra* note 52.

54 DeSantis, *supra* note 52.

55 N.J. STAT. ANN. § 40A: 12A-6(b)(1); DeSantis, *supra* note 52.

56 DeSantis, *supra* note 52.

57 *Id.*

58 N.J. STAT. ANN. § 40A: 12A-6(b)(5) (West 2007).

It should be noted that while the Supreme Court in *Kelo* and in other cases has employed rational basis review to eminent domain cases involving the public use question, states are free to apply a different standard of review through either legislation or state courts. The "substantial evidence" standard found in the LHRL is an example of the former. Furthermore, irrespective of legislative dictates (as federal courts reviewing municipal condemnation actions must apply the law of the state in which the municipality is located), there is evidence that state courts may be less deferential in their review of eminent domain cases than federal courts. Marc R. Poirier, *Federalism and Localism in* Kelo *and* San Remo, *in* PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 101, 116 (Robin Paul Malloy ed., 2008) (citing Thomas W. Merrill, *The Economy of Public Use*, 72 CORNELL L. REV. 61, 96 (1986) (classic study showing that while federal courts had never overturned condemnation based on the public use restriction from 1954 to 1985, state courts did at a rate of one to six and further noting that such a rate of reversal continued on the state level from 1986 to 2003); *see also* Norwood v. Horney, 853 N.E. 2d 1115,

LRHL fails to define this term, New Jersey courts have been left to interpret its meaning. While the plain meaning of the phrase suggests that the courts must weigh the evidence in order to determine whether a municipality's designation is to be upheld, case law dictates that municipal actions are to bear a presumption of validity.[59] This is a tension that even the state's highest courts have found difficult to resolve, and the judiciary has used a hodgepodge of language over the years in its interpretation of the appropriate standard.[60] It is clear, however, that the courts have read the LRHL to require a substantially less searching review than "rough proportionality."[61] Indeed, in a passage frequently quoted by New Jersey courts in municipal redevelopment cases, the New Jersey Supreme Court interpreted the substantial evidence standard to require essentially a rational basis review:

> Ordinarily, judicial review [of a municipality's designation under the Act] would not proceed beyond the ascertainment of whether the local government action was arbitrary or capricious, or corrupt, irrational or baseless. It is not necessary

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1123, 1142 (Ohio 2006) (holding, in a factual scenario similar to *Kelo*, that the fact that appropriation would provide an economic benefit to the government was not enough, standing alone, to constitute a public use under the Takings Clause of the Ohio Constitution and that the courts did not owe any deference to a legislative determination that the proposed taking would provide a financial benefit to the community).

[59] Concerned Citizens of Princeton, Inc. v. Mayor and Council of Princeton, 851 A.2d 685, 699 (N.J. Super. Ct. App. Div. 2004); Levin v. Twp. Comm. of Bridgewater, 274 A.2d 1, 18 (N.J. 1971); Forbes v. Bd. of Trustees, 712 A.2d 255, 262 (N.J. Super. Ct. App. Div. 1998). This is the general rule not only for redevelopment designations, but for all municipal actions. *Concerned Citizens*, 851 A.2d at 699; *see also* Quick Chek Food Stores v. Springfield, 416 A.2d 840, 845 (N.J. 1980) (municipal ordinances are presumed valid); Pantasote Co. v. Passaic, 495 A.2d 1308, 1310 (N.J. 1985) (municipality's tax assessments entitled to presumption of validity).

[60] *Compare* Wilson v. City of Long Branch, 142 A.2d 837, 854 (N.J. 1958) (stating that a municipality's designation should be upheld unless it was arbitrary or capricious) *with* Levin, 274 A.2d at 18 (stating that the judicial eye must find a "reasonable basis") *and* HJB Assocs. v. Council of Belmar, No. A-6510-05T5, 2007 WL 2005173 (N.J. Super. Ct. App. Div. July 11, 2007) (remaining silent on the question).

[61] Rough proportionality, sometimes alternatively referred to as the "reasonable relationship test," is an intermediate level of judicial review and has been employed by the Supreme Court in exactions cases. *See supra* note 30 and authorities cited therein. Rough proportionality requires an individualized determination that the municipality's action is roughly proportionate to the end it seeks to achieve. *See* Garnett, *supra* note 30, at 964. The plain language of the LRHL, requiring that a designation of blight be supported by "substantial evidence," suggests such a level of review.

> to explore the possible nuance of whether, if the evidence shows that the municipal determination was not arbitrary or capricious, it follows, as of course, that the evidence in support is substantial.[62]

While in certain other cases, courts have articulated the standard to require that the designation be supported by "substantial credible evidence"[63] or rest upon a "reasonable basis,"[64] their application of the standard has been more akin to rational basis review.[65]

In addition, in challenging a designation, the property owner bears the burden of proof.[66] As discussed, New Jersey case law dictates that a reviewing judge must give deference to municipal action, and redevelopment designations are vested with a presumption of validity.[67] Thus, if a property owner challenges a designation, he must submit evidence and persuade the court that the designation is not supported by substantial evidence. It is not the municipality that must show that the designation is appropriate.[68] This is a departure from cases involving other rights that receive constitutional protection, in which the government bears the burden of justifying its actions.[69]

D. Interpretation and Application of the Local Redevelopment and Housing Law by the New Jersey Judiciary

A survey of the case law demonstrates that the New Jersey judiciary has construed municipalities' condemnation powers under the Blighted Areas Clause and the LRHL with exceptional liberality over the years.[70] Prior to *Gallenthin*, in an article surveying

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62 *Wilson*, 142 A.2d at 854 (citations omitted); *see also* Carroll v. Camden, 170 A.2d 417, 417 (N.J. 1961); Kimberline v. Planning Bd. of Camden, 178 A.2d 678, 682 (N.J. Super. Ct. Law Div. 1962) (quoting *Wilson*, 142 A.2d at 854).

63 *Concerned Citizens*, 851 A.2d at 700.

64 *Levin*, 274 A.2d at 18.

65 *See* Sheridan, *supra* note 5, at 325-29; FOLLOW-UP REPORT, *supra* note 12, at 15 (calling the judicial review "anemic"); *see also* Twp. of W. Orange v. 769 Assocs., 800 A.2d 86 (N.J. 2002).

66 *Concerned Citizens*, 851 A.2d at 700; *Levin*, 274 A.2d at 18; FOLLOW-UP REPORT, *supra* note 12, at 15-16.

67 *See supra* note 59.

68 *Id.*

69 FOLLOW-UP REPORT, *supra* note 12, at 15.

70 *See* discussion *infra* Part III.D and accompanying notes; Sheridan, *supra* note 5,

the current situation, one New Jersey judge tersely summarized the eminent domain law of the state as follows: "The individual must bow to the public welfare and accept just compensation for his deprivation."[71]

This liberal tradition began in 1958, when the constitutionality of the original Blighted Areas Act reached the New Jersey Supreme Court in *Wilson v. City of Long Branch.*[72] In *Wilson*, the plaintiffs challenged the expansive definition of blight adopted by the Legislature in the Blighted Areas Act as outside the scope of the authority granted in the Blighted Areas Clause of the state Constitution.[73] Rejecting this argument, the court first reasoned that because the clause authorized the Legislature to empower municipal governments to undertake the redevelopment of "blighted areas" without defining the term, the framers manifestly expected that the term would be defined in any subsequent legislation. [74] Then, turning to the Legislature's articulation of "blight" vis-à-vis the five criteria set forth in the Blighted Areas Act, the court found that no reasonable argument could be made that the legislation overreached the public purpose sought to be promoted by the constitutional provision and upheld the statute's validity.[75]

In the decades following, *Wilson* has been cited over one hundred times by the New Jersey courts as a basis for upholding the constitutionality of the Blighted Areas Act or its successor, the LRHL.[76] In addition, in *Forbes v. Board of Trustees,* the appellate division affirmed the constitutionality of the LRHL in light of its departure from the Blighted Areas Act with respect to the introductory clause and section 5(e) hitherto discussed.[77] In *Forbes,* the plaintiff argued that this departure fostered a designation of

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at 326-30.

[71] Sheridan, *supra* note 5, at 326 (quoting Wilson v. City of Long Branch, 142 A.2d 837, 843, 856-57 (N.J. 1958)).

[72] Wilson v. City of Long Branch, 142 A.2d 837, 842-48 (N.J. 1958).

[73] *Id.* at 847.

[74] *Id.* at 849.

[75] *Id.*

[76] *See, e.g.,* Carroll v. City of Camden, 170 A.2d 417, 418 (N.J. 1961); Jersey City Chapter, P.O.D.A. v. Jersey City, 259 A.2d 698, 704 (N.J. 1969); Levin v. Twp. Comm. of Bridgewater, 274 A.2d 1, 3 (N.J. 1971).

[77] *See* discussion *supra* Part III.A.

his property as blighted under subsection 5(e) that did not comply with the constitutional requirements of the Blighted Areas Act.[78] Rejecting the plaintiff's argument, the court concluded that the concept of blight embraced the conditions set forth in the section and upheld the LRHL's constitutionality.[79]

Further, the case law suggests that municipalities commonly declare blight based upon reports that cite statutory language without analysis of the property selected or connection to the criteria upon which the designation is based.[80] One recent example of this tendency can be seen in *LBK Associates v. Borough of Lodi*, which involved the designation of a trailer home community as an area "in need of redevelopment."[81] The municipality was considering a redevelopment project that would replace the homes with "active adult" dwellings and a retail complex and hired planners to study the area in order to determine whether it could be declared "in need of redevelopment."[82] Relying only on tax records, public information, aerial topography, and exterior inspections, the planners concluded that the complex was indeed "blighted" within the scope of the LRHL.[83] At trial, neither the planner nor the town was able to point to a single safety or health hazard that made the area unlivable or otherwise established any factual support for the designation.[84]

ERETC v. City of Perth Amboy, another recent high profile case, involved the owner of a manufacturing building whose property

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78 Forbes v. Bd. of Trustees, 712 A.2d 255, 257 (N.J. Super. Ct. App. Div. 1998).

79 *Id.* at 257-59; *see also* Concerned Citizens of Princeton, Inc. v. Mayor and Council of Princeton, 851 A.2d 685, 702 (N.J. Super. Ct. App. Div. 2004) (holding the terms "blighted areas" and "areas in need of redevelopment" to be identical).

80 William J. Ward, *Defining Blight: Step One in New Jersey's Redevelopment Process*, N.J.L.J., June 25, 2007, at S4; Kris W. Scibiorski & Robert G. Seindenstein, *Pullback on Eminent Domain Taking Hold*, N.J. LAW, July 23, 2007, at 3; A Reversal of Blight: Eminent Domain and Redevelopment, New Jersey Eminent Domain Blog, http://www.njeminentdomain.com/state-of-new-jersey-a-reversal-of-blight-eminent-domain-and redevelopment. html (July 2, 2007) [hereinafter A Reversal of Blight].

81 LBK Assocs. v. Borough of Lodi, No. BER-L-8768-03, slip op. at 1-2 (N.J. Super. Ct. Law Div. Oct. 6, 2005), *aff'd*, 2007 WL 2089275 (N.J. Super. Ct. App. Div. July 24, 2007); *see also* FOLLOW-UP REPORT, *supra* note 12, at 7, 9-10 (discussing *LBK Assocs.*).

82 FOLLOW-UP REPORT, *supra* note 12, at 9.

83 *Id.*

84 *Id.* at 10. In light of this failure, the trial court in *LBK Assocs.* invalidated the designation.

had been designated as an area "in need of redevelopment."[85] The building was occupied by the owner's business and several commercial tenants, had never been cited for code violations, and had over $300,000 worth of improvements made to it within the last five years.[86] Further, nearly 350 individuals were employed in the building.[87] No inspection of the interior of the building was conducted, and the testimony given by the expert was conclusory, rather than based upon specific facts. [88] Indeed, the only negative finding cited by the investigator was the underutilized parking lot on the property.[89]Nonetheless, the city decided to include the building as part of an area "in need of redevelopment."[90]

In many cases, such inadequate designations have been upheld by New Jersey courts, especially at the trial level.[91] Prior to *Gallenthin,* the nature of review was such that the general feeling among legal commentators was that courts would not generally interfere with a municipality's exercise of its eminent domain powers in the absence of fraud, bad faith, or manifest abuse.[92] In short, the policy of the State has been to use eminent domain as a means of redevelopment vis-à-vis the Blighted Areas Act or the LRHL, and, whether in agreement with or acquiescence to this policy, New Jersey courts have generally adhered to it.[93]

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85 ERETC v. City of Perth Amboy, 885 A.2d 512, 513-15 (N.J. Super. Ct. App. Div. 2005) (reversing trial court's holding that there was substantial evidential to support the city's findings).

86 *Id.* at 516.

87 *Id.* at 513.

88 *Id.* at 520.

89 *Id.*

90 *Id.* at 513, 520. While the trial court upheld the city's designation, the appellate court reversed. *Id.* at 518, 520.

91 *See* Gallenthin Realty Dev., Inc. v. Borough of Belmar, No. A-6941-03T1, 2006 WL 1932581 (N.J. Super. Ct. App. Div. July 14, 2006) (affirming trial court, which upheld the borough's designation), *rev'd,* 924 A.2d 447 (N.J. 2007); *ERETC,* 885 A.2d 512; Hirth v. City of Hoboken, 766 A.2d 803 (N.J. Super. Ct. App. Div. 3001) (reversing trial court's grant of summary judgment to the municipality); City of Long Branch v. Brower, No. MON-L-4987-05, 2006 WL 1746120 (N.J. Super. Ct. Law Div. June 22, 2006) (upholding municipality's designation); HJB Assocs., Inc. v. Council of Belmar, No. A-6510-05T52007, WL 2005173 (N.J. Super Ct. App. Div. July 11, 2007) (reversing trial court's upholding of municipality's designation).

92 Sheridan, *supra* note 5, at 327 (citing SACKMAN, *supra* note 1 at § 7.02); *see also* discussion *supra* Part III.D.

93 Sheridan, *supra* note 5, at 326-30; *see also* Brian S. Montag & Dawn M. Monsen, *A Narrower Definition of Blight: Courts Will be Taking a Harder Look at Evidence in Support*

Nonetheless, there are at least some cases in which the courts have invalidated a municipality's designation of blight, especially post-*Kelo*.[94] The municipalities' actions in *LBK Associates* and *ERETC* were ultimately struck down on the ground that they were not supported by substantial evidence.[95] In *Qualgliariello v. Township of Edison*, Edison Township's determination that a charter bus facility was an area in need of redevelopment was set aside because only cursory exterior inspections of the grounds had been made and because the town did not show that the taking would further any public purpose.[96] In *Township of Bloomfield v. 110 Washington Street Associates*, an Essex County judge invalidated the blight designation of an area he agreed was underutilized, vacant, and externally neglected on the grounds that such conditions were largely due to the town's own actions and were not connected to the health, safety, or welfare of the community.[97] Whether this handful of cases constituted a post-*Kelo* trend toward stricter scrutiny by the New Jersey judiciary is

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of a Blight Designation, N.J.L.J.,Nov. 12, 2007, at S14; Lisa Brennan, *Court's Redefinition of 'Blight' Helps Property Owners Win Eminent Domain Cases*, N.J.L.J., Aug. 6, 2007, at 25.

[94] Brennan, *supra* note 93 (suggesting that "since *Kelo*, New Jersey has interpreted its own constitutional restrictions on condemnation more strictly, to the benefit of property owners."); *see also* Sheridan, *supra* note 5, at 330-31 (suggesting in 2006 that post-*Kelo*, "the tables having seemingly turned on the condemners" in New Jersey and that in response to *Kelo*, New Jersey courts and the Legislature might reverse their prior policy of using eminent domain as a means of fostering economic development); Howard D. Geneslaw & Shepard A. Federgreen, *The New Rules of Redevelopment: Courts More Skeptical of 'Area in Need of Redevelopment' Designations*, N.J.L.J., Oct. 22, 2007, at S6 (asserting that New Jersey courts "have recently become . . . more receptive to challenges by property owners.").

[95] LBK Assocs. v. Borough of Lodi, No. A-1829-05T2, 2007 WL 2089275 (N.J. Super. Ct. App. Div. July 24, 2007); *ERETC*, 885 A.2d at 520; FOLLOW-UP REPORT, *supra* note 12, at 10.

[96] Quagliariello v. Twp. Of Edison, No. MID-L29992-02, slip op. at 5, 11-13 (N.J. Super. Ct. Law Div. Mar. 31, 2004), *available at* http://www.gibbonslaw.com/files/quagliariello.pdf; *see also* FOLLOW-UP REPORT, *supra* note 12, at 11. In *Qualgliariello*, the redeveloper for the site had failed in his bid to build a Walgreen's across the street due to public opposition, and the town apparently sought the plaintiff's property as an alternative site for him. *Quagliariello*, slip. op. at 10.

[97] Twp. of Bloomfield v. 110 Washington St. Assocs., No. ESX-L-2318-05, slip. op. at 5-7 (N.J. Super. Ct. Law Div. Aug. 3, 2005), *available at* http://www.njeminentdomain.com/Order%20of%20Dismissal%20-%20Bloomfield .pdf, *aff'd*, No. A-6770-0415 (N.J. Super. Ct. App. Div. Aug. 29, 2006); *see also* A Reversal of Blight, *supra* note 80.

debatable.[98]

E. *Calls for Reform*

The United States Supreme Court's ruling in *Kelo* triggered a firestorm of controversy across the nation, and New Jersey was no exception.[99] But state redevelopment experts did not quite understand the outcry from New Jersey citizens.[100] As a cursory glance of the state constitution reveals, New Jersey explicitly provides that the taking of private property for redevelopment purposes constitutes a public use, pursuant to which hundreds of *Kelo*-like takings had occurred over the years.[101] Thus, had the court ruled that the taking of private property for municipal redevelopment did *not* constitute a public use, *Kelo*'s impact on New Jersey eminent domain law would have been significant. But because *Kelo* essentially reaffirmed the federal constitutionality of such a provision, the court's decision had little direct impact on New Jersey law.

Regardless of whether the New Jersey public thought that *Kelo* authorized the taking of private property for redevelopment purposes, or whether *Kelo* simply made New Jersey citizens aware that their state laws already explicitly provided for such takings, the call for legislative reform was strong.[102] In June 2006, the Assembly responded by passing Assembly Bill 3257, which would have served as an amendment to the LRHL.[103]

First and foremost, the proposed bill would have reformed the definition of blight under section 5 of the LRHL. The bill would have removed vague and expansive terms from the LHRL and would have added a requirement that the condition of the property be determined to be directly detrimental to the safety,

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98 *See generally* sources cited *supra* notes 80-97.

99 *See generally* Sheffler-Wood, *supra*, note 25; Sullivan, *supra* note 12; *Tightening Blight*, *supra* note 12.

100 Sullivan, *supra* note 12.

101 N.J.CONST. art. VIII, § 3, ¶ 1; Sullivan, *supra* note 12.

102 Lisa Brennan, Kelo *Fallout: New Jersey Legislators and the State Public Advocate Launch Efforts to Reform the Use of Takings for Private Development*, N.J.L.J., May 29, 2006, at 1; Sullivan, *supra* note 12.

103 Assem. 3257, 212th Leg., 1st Sess. (N.J. 2006) (as reported by Assem. Commerce and Econ. Dev't Comm., June 19, 2006).

health, or welfare of the community.[104] Subsection 5(e) would have been amended to read: "A deterioration in the condition of the property caused by diverse ownership of the real property or other conditions of title which, by virtue of these factors are determined to be detrimental to the safety, health, or welfare of the community."[105]

The proposed legislation would also have done away with the deferential standard of review of the LRHL, which critics have complained is inappropriate given the significance of the issue at stake.[106] The bill would also have replaced the troublesome "substantial evidence" standard with a requirement that the municipality establish a valid basis for its designation by a preponderance of the evidence.[107]

Despite endorsement by such powerful entities as the state Attorney General, the New Jersey Public Advocate, the New Jersey League of Municipalities, and the Governor, as of *Gallenthin*, the legislation remained stalled in the Senate.[108]

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104 *Id.* § 4.

105 *Id.*

106 FOLLOW-UP REPORT, *supra* note 12, at 24-25; *see also* Garnett, *supra* note 30; Delogu, *supra* note 30. (discussing what the appropriate standard of review should be in eminent domain cases more generally).

107 Assem. 3257 § 4.

108 N.J. Dep't of the Public Advocate, *What is Eminent Domain and Why is it a Problem?*, May 2005, *available at* http://www.state.nj.us/public advocate/public/issues/whatised.html; Sullivan, *supra* note 12.

One concern voiced by those who opposed the bill was that A-3257 would curb redevelopment in the State to undesirable levels, stunting the State's economic growth and thwarting the revitalization of depressed areas. Editorial, *Don't Cripple Eminent Domain*, N.Y. TIMES, Mar. 11, 2007, at 19L. Additionally, New Jersey is facing a housing shortage, leading some to worry that the proposed legislation would aggravate this problem. *See* Duncan Currie, *Property Rights at Risk in New Jersey*, THE AMERICAN, Apr. 23, 2007, *available at* http://www.american. com/archive/2007/april-0407/property-rights-at-risk-in-new-jersey.html. Among reform proponents, the concern was just the opposite: Some felt that the proposal did not reform eminent domain in the state enough; others that the reform measures were adequate on paper, but easily corruptible in practice. *See* New Jersey Eminent Domain Blog, http://www.njeminentdomain.com/state-of-new-jersey-eminent-domain-new-jersey-bill-a3257-amending-the-lrhl.html (June 19, 2006).

Notwithstanding these concerns, however, baser considerations may also have been at play. Following *Kelo*, almost forty states have enacted some version of eminent domain reform legislation, and the call for the New Jersey Legislature to follow suit is strong among New Jersey citizens. *See* Currie, *supra*. But many local politicians and the vast majority of developers vehemently oppose reform. *See id.*; *see*

IV. GALLENTHIN REALTY V. BOROUGH OF PAULSBORO

In its June 13, 2007, ruling in *Gallenthin Realty Development, Inc. v. Borough of Paulsboro,* the New Jersey Supreme Court effectively brought an end to the arguably near *carte blanche* power of state municipalities to take private property for redevelopment. Gallenthin Realty was the owner of 63 acres of largely vacant wetlands on the Delaware River in Paulsboro.[109] Since 1902, the land had been used sporadically as a dredging depot.[110] Additionally, Gallenthin had harvested a wild-growing reed from the property three times per year since 1997 and had leased part of the land to an environmental cleanup organization in 1997 and 1998.[111] In 2003, Paulsboro, seeking new industrial, commercial, retail, and recreational uses on its waterfront, classified the Gallenthin property as "in need of redevelopment" under subsection 5(e) of the LRHL on the basis that it was "not fully productive."[112] Gallenthin challenged the Borough's designation, and the matter was heard before the New Jersey Superior Court, Law Division.[113] The law division dismissed the action, concluding that the Borough had "meticulously adhered" to the procedural requirements of the LRHL, and that its inclusion of the land in its redevelopment plan was supported by substantial evidence.[114] The

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also Posting of Timothy P. Duggan to New Jersey Law Blog, http://www.njlawblog.com/2004/11/articles/condemnation/eminent-domain-kelo-v-city-of-new london (Nov. 9, 2004) (suggesting that one reason why New Jersey politicians oppose reform is the tremendous pressure placed upon them by constituents to lower taxes, which many redevelopment plans do by creating new ratables). While this is true in many states, in New Jersey these two groups are particularly vocal and well-organized. Currie, *supra.* Additionally, New Jersey's "pay to play" system, in which companies win lucrative contracts by making political donations, undermines legislators' desires to enact reform legislation. *Id.*

Despite remaining on the table during the remainder of the 212th legislative session, advocates of the bill could not garner enough votes to send the bill for a floor vote in the Senate before the conclusion of the term at the end of 2007. Michael Booth, *Eminent Domain Compromise Bill, Pleasing No One, Stalls in Senate.* N.J.L.J., Dec. 3, 2007, at 23. In 2008, two new bills were introduced in the Senate; however, as of the writing of this article, neither has been enacted. *See infra* note 182.

109 Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447,449-50 (N.J. 2007).

110 *Id.* at 450.

111 *Id.*

112 *Id.* at 450-51.

113 *Id.* at 453.

114 *Id.*

appellate division affirmed.[115]

Gallenthin petitioned the New Jersey Supreme Court for certification, challenging: (1) the constitutionality of subsection 5(e) as applied to its property under the Blighted Areas Clause of the New Jersey Constitution; and (2) the law division's application of the substantial evidence standard of review.[116] In a landmark decision, a unanimous court reversed the appellate division, invalidated the Borough's designation of Gallenthin's property as "in need of redevelopment," and held that subsection 5(e) applies only to property that has become stagnant and unproductive because of issues related to title, diversity of ownership, or other conditions of the same kind.[117] The court rejected the Borough's contention that the phrase "or other conditions" in subsection 5(e) referred to any possible condition, thus encompassing the condition of not being fully productive.[118] The court found that the Borough's interpretation of this phrase exceeded the delegation of authority granted to municipalities under the Blighted Areas Clause, which authorized redevelopment only of "blighted areas," not simply those that were not fully productive.[119]

After holding that municipalities only had the right to redevelop "blighted areas," the court considered the meaning of the term "blighted" in order to determine whether the Borough's interpretation of the LRHL was within the scope of the meaning of that term.[120] While acknowledging that the term has evolved over time, the court concluded that the core meaning of blight remained the same: deterioration or stagnation that negatively affects surrounding properties.[121] The court noted that if it were to adapt Paulsboro's all-encompassing definition of blight—i.e. any property that is stagnant or not fully productive yet capable of

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115 Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447, 453-54 (N.J. 2007).

116 *Id.* at 454.

117 *Id.* at 449.

118 *Id.* at 455. Because the LRHL replaced the conjunctive "and" of the Blighted Areas Act with the conjunctive "or," the town argued that the "other conditions" in subsection 5(e) did not have to be connected to conditions of title or diversity of ownership.

119 *Id.* at 460.

120 *Id.*

121 Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447, 459 (N.J. 2007).

contributing to the general welfare—any property operating in a less than optimal manner would arguably be blighted.[122] The court thus concluded that the Borough's interpretation of subsection 5(e) could not be reconciled with the New Jersey Constitution.[123]

The court next considered the constitutionality of the LRHL. Because the court had held that municipalities were only authorized to redevelop "blighted areas" and that blight referred to a condition of deterioration or stagnation that negatively affected surrounded properties, at issue was whether subsection 5(e) of the LHRL could retain its constitutionality in light of these findings.[124] The court asked whether the section was "reasonably susceptible" to an alternative interpretation which was consistent with the New Jersey Constitution.[125] The court found in the affirmative, concluding that the Legislature had intended to make the section function in a constitutional manner and holding that the term "or other conditions" applied only to conditions of title and diversity of ownership.[126]

The court, however, affirmed a municipality's authority to include non-blighted property in a redevelopment plan if necessary for rehabilitation of a larger blighted area, relying on the substantial line of cases supporting this conclusion.[127] Indeed, the court noted that had the Gallenthin property been "in any way connected to a larger redevelopment plan . . . the result may have been different."[128]As the town's sole basis for designation was that the property, in isolation, was "in need of redevelopment," the court did not need to address this issue.[129] The court did, however, note that nothing in its opinion prejudiced the town from making future inquiry regarding whether the Gallenthin property was in

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122 *Id.* at 460.

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.* at 460-63. In reaching this conclusion, the court relied upon the following rules of construction: (1) that the disjunctive "or" in a statute may be construed as the conjunctive "and"; and (2) that the court is to presume that the Legislature intended the statute to function in a constitutional manner. *Id.* at 460-62.

127 Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447, 464 (N.J. 2007) (citing Levin v. Twp. Comm. of Bridgewater, 274 A.2d 1 (N.J. 1971)).

128 *Id.*

129 *Id.*

fact "in need of redevelopment" based on this or other grounds.[130]

V. NEW JERSEY MUNICIPAL REDEVELOPMENT LAW POST-GALLENTHIN

In *Gallenthin*, the New Jersey Supreme Court effectively rewrote subsection 5(e) of the LRHL to comply with the constitutional limitations of the Blighted Areas Clause. In order to designate a property for condemnation under subsection 5(e), a municipality must be able to point to conditions of title or diverse ownership that result in the growing lack or total lack of utilization of the property.[131] This represents a major departure from prior law, aptly illustrated in the outcome of those cases immediately following *Gallenthin*.[132]

In *Mulberry Street Area Property Owner's Group v. City of Newark*, decided July 19, 2007, the disparity between the courts' previous construction of the LRHL and its post-*Gallenthin* interpretation was on full display.[133] At issue in *Mulberry* was the City's plan to condemn property in its downtown area to sell to private developers for a condominium project, which had hitherto been regarded as a "done deal."[134] The proposed development site included parking lots, empty lots, boarded up buildings, occupied homes, and a few functioning businesses, and a significant portion of the property had already been acquired.[135] While questions of self-interest may have tipped the court's sympathies toward the plaintiff homeowners,[136] ultimately *Gallenthin* determined its

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130 *Id.* at 464-65.

131 *Id.* at 464.

132 *Compare* discussion *supra* Part III.C-D *with* discussion *infra* Part V.

133 Mulberry St. Area Prop. Owner's Group v. City of Newark, No. ESX-L-9916-04, (N.J. Super. Ct. Law Div. July 19, 2007), *available at* http://www.nj.gov/publicadvocate/home/whatiseminentdomain.html.

134 *Mulberry St.*, slip op. at 69; Editorial, *The Better Way for Newark*, STAR-LEDGER (Newark, N.J.), July 24, 2007, 10, *available at* http://njrereport.com/ index.php/2007/07/page/2/.

135 *Mulberry St.*, slip op. at 2-54; *The Better Way for Newark*, *supra* note 134.

136 The developers had donated over $50,000 to municipal council members, and the deal was made during the administration of Newark's Mayor Sharpe James, who had been indicted for fraud for facilitating the sale of city owned land to his mistress at cut-rate prices. *The Better Way for Newark*, *supra* note 134; *Former Newark Mayor Sharpe James Indicted; Allegedly Traveled, Spent Lavishly on Newark Credit Cards, and Engaged in Fraudulent Land "Flipping" with Companion*, U.S. DEP'T OF JUSTICE,

ruling. The court held that under *Gallenthin*, the City's designation of the Mulberry Street area as "in need of redevelopment" did not meet the constitutional requirements of blight.[137] The court explained that the City's designation of the area on the basis that it was not properly used or fully productive and could be put to a more beneficial use did not satisfy the constitutional requirement of blight.[138] Further echoing the New Jersey Supreme Court's words in *Gallenthin*, the court noted that while non-blighted properties may be included in a redevelopment plan, there must be evidence that they are necessary for the rehabilitation of a larger blighted area.[139] The City failed to show that the plaintiffs' properties were necessary for such rehabilitation, and, further, that the Mulberry Street area as a whole was a "blighted" area, as defined by the *Gallenthin* court.[140] Failing to satisfy the substantial evidence standard to support its designation, the City's plan was invalidated by the court.[141]

In *HJB Associates v. Council of Belmar*, decided July 11, 2007, the appellate division invalidated a designation of blight by the Borough of Belmar on similar grounds.[142] Belmar had designated an established bakery as in need of redevelopment under subsection 5(e).[143] The bakery was targeted for its "faulty layout" and its "excessive land coverage," the latter feature causing the land upon which the bakery was built to be less than fully productive and the former attribute creating an unattractive environment for potential development nearby.[144] While acknowledging that the bakery's design might not be optimal for its commercial use, the court stressed that this did not make the bakery a "blighted area."[145] Citing *Gallenthin*, the court reiterated

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(Trenton, N.J.) July 12, 2007, *available at* http://www.usdoj.gov/usao/ nj/press/ files/pdffiles/jame0712.rel.pdf. James was convicted in April 2008. Richard G. Jones, *Former Mayor Guilty of Fraud in Newark Sales*, N.Y. TIMES, April 17, 2008, at A1.

137 *Mulberry St.*, slip op. at 60-61.

138 *Id.*

139 *Id.* at 62.

140 *Id.*

141 *Id.* at 69.

142 HJB Assocs. v. Council of Belmar, No. A-6510-05T5, 2007 WL 2005173 (N.J. Super. Ct. App. Div. July 11, 2007); *see also* Scibiorski & Seidenstein, *supra* note 80.

143 *HJB Assocs.*, 2007 WL 2005173, at *1.

144 *Id.* at *1, *3.

145 *Id.* at *3.

that the "other conditions" language in subsection 5(e) referred only to issues of title or ownership, and did not refer to the condition of a property being used in a less than optimal manner.[146]

Similarly, in *Land Plus, LLC v. Mayor and Council of Hackensack*, the superior court invalidated the City's designation of riverfront property as "in need of redevelopment" on the basis that it could be put to better use.[147] The property owner had engendered the criticism of the municipality for amassing land holdings and keeping them stagnant, and subsequently found his property the primary subject of a city redevelopment study.[148] After three hearings, in which the property owner argued before the Planning Board that he should be allowed to develop the property himself, the Board rejected the property owner's arguments and recommended to the City Council that the area be designated as "in need of redevelopment."[149] Ruling that the government's authority to take private property extended only to property that was blighted, the judge invalidated the City's designation.[150]

Another, perhaps less obvious, effect of *Gallenthin* upon the LRHL has been a reinvigoration of the substantial evidence standard. While the courts' review of blight designations was perhaps accurately criticized as "anemic" pre-*Gallenthin*,[151] post-*Gallenthin* blight designations have been reviewed with closer scrutiny.[152] The conclusion to the *Gallenthin* opinion stresses that municipalities "must establish a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met,"[153] and it appears that New Jersey courts are taking heed.[154]

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146 *Id.*

147 Land Plus, L.L.C. v. Mayor and Council of Hackensack, No. BER-L-8029-06 (N.J. Super. Ct. Law. Div. June 29, 2007), *available at* http://www.nj. gov/public advocate/home/whatiseminentdomain.html; Scott Fallon, *Hackensack Judge Again Rejects Hackensack Land Seizure*, THE RECORD (Hackensack, N.J.), Sept. 22, 2007, at A4.

148 Fallon, *supra* note 147.

149 *Land Plus*, slip op. at 4-5; Fallon, *supra* note 147.

150 *Land Plus*, slip op. at 17.

151 FOLLOW-UP REPORT, *supra* note 12, at 15.

152 *See* cases discussed herein Part V.

153 Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447,464 (N.J. 2007).

154 *See* cases discussed herein Part V.

Conclusory statements no longer appear sufficient with respect to both properties themselves designated as "blighted" and those designated as non-blighted but as necessary to the redevelopment of a larger blighted area. For example, in *Evans v. Township. of Maplewood*, decided July 27, 2007, the township had designated the plaintiff's property for condemnation as part of a broader designation under subsection 5(e).[155] While the plaintiff's property was not itself blighted, the town argued that it was necessary for the remediation of the area.[156] While not disputing the legal theory supporting the town's designation, the court invalidated the designation on the basis that the town had not provided substantial evidence that the plaintiff's property was necessary to the remediation of the area.[157]

Furthermore, in *Cramer Hill Residents' Association v. Primas*, the appellate division held that the level of scrutiny applied by the Court in *Gallenthin* also applied to the court's review of a city's exercise of eminent domain under the Fair Housing Act.[158] In *Cramer Hill*, the City of Camden sought to acquire land in its Cramer Hill section for construction of low and moderate income housing under the Fair Housing Act.[159] The plan called for the demolition of 43 occupied homes, but did not specify the number of homes that would replace them.[160] The court held that for the City to exercise eminent domain power under the Fair Housing Act, it was not enough for the City to profess that the acquisition would increase the number of affordable housing units in the town; rather, the trial judge must find the acquisition would actually accomplish this goal.[161]

In light of such stricter scrutiny from the courts,

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155 Evans v. Twp. of Maplewood, No. ESX-L-6910-06, 2007 WL 2227123, at *2 (N.J. Super. Ct. Law Div. July 27, 2007).

156 *Id.* at *13-14.

157 *Id.* at *4-5, *13-14. Failure to meet the substantial evidence standard served as an additional basis for invalidating the City's designation in *Mulberry St.* Mulberry St. Area Prop. Owner's Group v. City of Newark, No. ESX-L-9916-04, slip. op. at 60-61 (N.J. Super. Ct. Law Div. July 19, 2007), *available at* http://www.nj.gov/publicadvocate/home/whatiseminentdomain.html.

158 Cramer Hill Residents' Ass'n v. Primas, 928 A.2d 61, 63-64, 71 (N.J. Super. Ct. App. Div. 2007).

159 *Id.* at 63-64.

160 *Id.* at 69.

161 *Id.* at 69-71.

municipalities seeking to redevelop private property will have to change the way in which they undertake their redevelopment projects or face the serious risk of an outcome like the City of Newark in *Mulberry Street* or the City of Camden in *Cramer Hill.* First, the preliminary report can no longer merely recite statutory language in evaluating whether a property exhibits the conditions necessary to satisfy a particular criterion under the LRHL. As the *Gallenthin* ruling and the cases succeeding it demonstrate, such boilerplate opinions are clearly no longer adequate; post-*Gallenthin*, the particular conditions relied upon in making the determination must be clearly supported in the record. Second, municipalities need to be careful that the determination is consistent with the Blighted Areas Clause, not only with the LRHL. As *Gallenthin* made demonstrably clear, the fact that a municipality's basis for condemnation seems supported by the language of the statute on its face may still cause it to be struck down if the statutory language relied upon does not comport with the limitations imposed by the Blighted Areas Clause.[162]

Finally, municipalities need to become more pro-active with respect to designations of areas not themselves blighted but scheduled for condemnation due to their presence within a larger blighted area. As the *Gallenthin* court articulated, for such a designation to be valid, the municipality must be able to show that the property is in fact necessary—not merely desirable or convenient—for the redevelopment of the broader area.[163] While such a standard may operate as a limitation upon a municipality's power in certain situations, through careful planning, it may also serve to enable it. If a particular piece of property cannot be characterized as blighted, the necessary-for-redevelopment-of-a-larger-area allowance permits an alterative route for condemnation.[164]

VI. IS REFORM STILL NECESSARY?

In light of the New Jersey Supreme Court's decision in

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[162] Gallenthin v. Borough of Paulsboro, 924 A.2d 447, 462 (N.J. 2007).

[163] *Id.* at 464.

[164] Michael V. Elward, *No More Rubber Stomping: Municipalities and Redevelopment*, N.J. LAW., July 20, 2007, http://www.njlnews.com/articles/2007/07/20/in_re_magazine/f3-elward.txt.

Gallenthin and the subsequent decisions of other courts in redevelopment cases, is legislative reform still necessary? While the Court's holding in *Gallenthin* represented a major change in the way the courts heretofore reviewed municipal redevelopment cases, a legislative response is not only advisable but crucial. While courts deciding the first wave of post-*Gallenthin* cases have drawn upon *Gallenthin* heavily and invalidated numerous improper condemnations, this should not be interpreted to mean that the problems plaguing New Jersey municipal redevelopment law have been resolved. Rather, as the courts continue to hear such cases in the months following *Gallenthin,* the breadth of a municipality's power to condemn property for private redevelopment is likely to become even more uncertain. As one New Jersey redevelopment lawyer explained: The first phase of post-*Gallenthin* cases are the easy cases, where "judges are overturning blight designations that would probably have been knocked out anyway because they are based on hastily hatched redevelopment plans. What's coming next as new redevelopment zones are planned are new reports that will contain substantial evidence to support blight designations."[165]

Furthermore, as additional cases are decided by the courts, decisions like those in *Mulberry, HJB Associates,* and *Land Plus* will no doubt continue to be rendered with respect to designations under subsection 5(e). What remains uncertain, however, is the effect *Gallenthin* will have on other criteria for condemnation under the LRHL. Although the *Gallenthin* court did not reach the issue of whether other sections of the LRHL are also inconsistent with the New Jersey Constitution, if the court's reasoning is to be applied to other subsections of the LRHL, such a conclusion would seem to follow. Subsection 5(d), for example, which is most similar to subsection 5(e) in wording, contains the troublesome phrase "or any combination of these or other factors," which is similar to the "other conditions" catch-all phrase in subsection 5(e) that the *Gallenthin* court found to constitute an overly expansive delegation of authority.[166] While subsection 5(d) further

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[165] Brennan, *supra* note 93.

[166] N.J. STAT. ANN. § 40A: 12A-5(d) (West 2007) ("Areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land

requires that any of these "other factors" be detrimental to the safety, health, morals, or welfare of the community,[167] once again, the overly expansive interpretation permitted by such open-ended terminology is problematic. *Gallenthin* holds it is not enough for a designation to satisfy the criteria of the LRHL; the designation must also satisfy the "blight" requirement of the New Jersey Constitution.[168] While a plethora of conditions can be linked to public safety, health, morals, or welfare, the presence of such conditions may not be so malignant as to constitute blight. Subsection 5(f), which refers to areas whereon buildings have been destroyed or altered by various natural disasters or "other casualties" such that the aggregate value of the area has "materially depreciated,"[169] seems similarly problematic due to its vagueness.

Constitutional issues may also arise regarding subsection 5(c), which allows for the redevelopment of unimproved land that has been vacant for more than ten years and is "unlikely to be developed through . . . private capital" due to location, remoteness, topography, soil conditions, or lack of access to developed areas.[170] Additionally, subsection 5(h), which allows for the redevelopment of areas "consistent with smart growth planning principles. . . . " may also be problematic.[171] The *Gallenthin* decision could be interpreted to require that properties designated for redevelopment pursuant to either section further exhibit some degree of deterioration.[172]

What also remains to be seen is whether all New Jersey courts will apply *Gallenthin* so faithfully. This is crucial, as all New Jersey municipalities may not take the court's words in *Gallenthin* to heart. For example, on October 12, 2007, *The Record* ran a story about a redevelopment project to build a new retail complex in

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coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals or welfare of the community.").

167 *Id.*

168 Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447,459 (N.J. 2007).

169 N.J. STAT. ANN. § 40A: 12A-5(f) (West 2007).

170 N.J. STAT. ANN. § 40A: 12A-5(c) (West 2007).

171 N.J. STAT. ANN. § 40A: 12A-5(h) (West 2007).

172 Kevin J. Moore, *Narrowing the Scope of Redevelopment Law*, N.J.L.J., July 16, 2007, at 23; Elward, *supra* note 164.

Lodi which calls for the acquisition of several privately owned properties.[173] While the redeveloper has reached an agreement with all the other owners, one property owner is holding out.[174] The property, formerly home to a lumber business, currently houses a carwash and auto garage.[175] If an agreement between the remaining property owner and the redeveloper cannot be reached, borough officials plan to condemn the property and seize it through eminent domain.[176] The town continues to defend the project on the grounds that municipalities have a right to redevelop rundown areas and bring ratables to taxpayers.[177] In defending the Borough's action, borough manager Tony Luna told *The Record*: "Anyone can go and look at that property and see that nothing has been done to that property for years."[178] After *Gallenthin*, however, this is clearly not enough. The *Gallenthin* court held explicitly that property must be blighted and not merely able to be put to better use in order to be subject to condemnation for redevelopment.[179]

Thus, while New Jersey judges may be able to easily dispose of many of the municipal redevelopment cases that arrive in their courtrooms immediately post-*Gallenthin*—i.e. those that were conceived and drawn up prior to *Gallenthin*—as failing to satisfy the "substantial evidence" standard, once this first wave of cases is decided, the task becomes more difficult. New Jersey judges will be left with a more difficult question: whether the condition of the property is so distressed as to constitute "blight" under the narrow definition applied by the New Jersey Supreme Court in *Gallenthin*. While *Gallenthin* effectively closed the book on what conditions were permissible for a finding of "blight" under subsection 5(e) of the LRHL, the construction and constitutionality of other subsections of the statute remain to be seen.[180] At a more fundamental level, courts may not be in

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173 Giovanna Fabiano, *Property vs. Progress: Widow Stands Firm Against Buyout*, THE RECORD (Hackensack, N.J.), Oct. 13, 2007, at L1, L6.

174 *Id.*

175 *Id.*

176 *Id.*

177 *Id.*

178 *Id.*

179 Gallenthin v. Borough of Paulsboro, 924 A.2d 447, 460 (N.J. 2007).

180 *See* discussion *supra* Part VI.

agreement as to the precise scope of blight. What constitutes blight should not be determined on a case-by-case basis by the courts; the Legislature needs to articulate what it does and does not want the term to encompass. Provided with such a framework, the courts can then apply the law in a consistent and uniform manner. Legislative reform is therefore necessary to achieve uniformity and certainty in this area of the law, for New Jersey courts, New Jersey municipalities, and New Jersey home owners.

Leaving procedural inadequacies of the current system aside as outside the scope of this comment, of principal importance in any reform legislation is most obviously a more precise and objective definition of blight. In order to determine the constitutional question in *Gallenthin*, the court was forced to examine various definitions of blight, from this gauge the central characteristic of the term, and then apply this meaning to the section at issue. While courts post-*Gallenthin* could presumably rely on the overarching "deterioration or stagnation that negatively affects surrounding properties" attribute articulated by the *Gallenthin* court, this also invites too much subjectivity into the analysis.[181] To truly achieve the uniformity and certainty which the issue deserves, any reform legislation must replace the vague criteria of the current law with more specific and objective criteria delineating what constitutes blight within the meaning of the New Jersey Constitution.

Replacement of the vague terms of the LRHL with a bill containing more specific criteria would avoid costly, time-consuming litigation to both New Jersey municipalities and New Jersey citizens. If *Gallenthin* is properly interpreted and applied by the courts, scheduled condemnations of properties by virtue of their "lack of proper utilization," will be overturned. While, post-*Gallenthin*, property owners may ultimately prevail in a court action, *Gallenthin* alone cannot ensure that improper condemnation determinations will not be made. Both the town and the property owner lose in this situation. If the property owner challenges the condemnation, he will have to bear the costs and discomfort of litigation, even if he ultimately prevails. The town—or perhaps more accurately the taxpayers—will also have to bear such costs, only to have the designation invalidated.

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181 *Gallenthin*, 924 A.2d. at 459.

Clearer guidelines for determining what constitutes blight will help prevent municipalities from pursuing redevelopment projects that will ultimately be struck down by the courts if challenged. Not only would those property owners who would bring lawsuits based on improper condemnation of their property benefit from such reform, but so would the many property owners who would not take legal action. Advocates for reform have long stressed that the extent of the abuses of the system cannot be fully appreciated because so many homeowners do not challenge improper condemnations. A new law that would chill municipalities from over-aggressive condemnation designations would obviously benefit such citizens too—preventing an abuse of the system that would otherwise be acquiesced to.[182]

VII. CONCLUSION

New Jersey citizens do not want to live in a municipality in which they fear that their homes may be taken from them at any time, nor do they want their neighborhoods falling into disrepair. For all the negative publicity government redevelopment projects

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[182] To its credit, the New Jersey Legislature seems to have recognized that reform is still necessary, although it has been unsuccessful in efforts as of the writing of this article. Following the expiration of the pre-*Gallenthin* A-3257 with the conclusion of the 212th legislative session, a new bill was introduced to the Senate on January 8, 2008 which would have served to amend the LRHL. S.757, 213th Leg., 1st Sess. (N.J. 2008). The bill laudably took into account the New Jersey Supreme Court's discussion on the parameters of "blight" under the New Jersey Constitution, eliminating § 5(e) of the LRHL entirely. However, the other criteria for blight remained largely intact. *Id.* at § 12. Furthermore, while A-3257 would have required the municipality to establish by a preponderance of the evidence that its designation fits one of the criteria of §5 of the LHRL, S. 757 left the highly problematic "substantial evidence" standard in place, although shifting the burden of proof on the municipality. *Id.* at § 13. Regardless, like its predecessor, the new bill could not garner enough votes in the Senate and was subsequently altered and replaced with S. 559 in May. StateSurge.com, New Jersey: Revises Procedures for the Use of Eminent Domain in Municipal Redevelopment Programs, http://www.statesurge.com/bills/357422-s757-new-jersey (last visited Aug. 1, 2008); Realty Reality, *Eminent Domain Bill Still in Committee,* http://realty-reality.com/2008/05/senate-community-and-urban-affairs.html (last visited Aug. 1, 2008). S. 559 would reintroduce a reworked version of § 5(e) to read: "A deterioration in the condition of the property caused by diverse ownership of the real property or other conditions of title, which by virtue of these factors are determined to be detrimental to the safety, health, or welfare of the community." S. 559, 213th Leg., 1st Sess. (N.J. 2008). As of September 2008, the bill had not yet been put to a vote. StateSurge.com, *supra.*

receive, it is important to remember their merits—redevelopment can help rebuild decaying buildings, bring in needed revenue, and revitalize communities. Although, in an effort to lay out the redevelopment landscape in New Jersey and arguments for reform, this Note has predominantly focused on the abuses of the system, there have also been great success stories. Even the staunchest advocates for reform seek to end the abuse of eminent domain, not eradicate it altogether.[183] As of yet, *Gallenthin* has been lauded as ending the era of rubber-stamping municipalities' designations of blight.[184] Embedded in the court's decision, however, is the danger that *Gallenthin* will cause New Jersey redevelopment law to swing too far in the opposite direction, invalidating redevelopment plans in municipalities that need them most. The most interesting development which remains to be seen after *Gallenthin* is whether the elusive balance between the interest of property owners and the interest of the community as a whole will finally be achieved in New Jersey.

Prudently drafted legislation that provides New Jersey municipalities with the statutory means to undertake redevelopment efforts while also protecting the interests of New Jersey property owners would do much toward achieving this goal. As this Note has shown, the vague terms of the LRHL have proven unsatisfactory and need to be reformed. *Gallenthin* illustrates the potential for some measure of reform through the judiciary; however, it is clear that a statutory response is also needed. While *Gallenthin* addressed subsection 5(e) of the LRHL, other sections of the statute remain problematic.[185] Indeed, with respect to the broader question of the breadth of a municipality's power to condemn property for private redevelopment, this comment has suggested that *Gallenthin* raised more questions than it resolved.[186] In light of such uncertainty and the importance of achieving uniformity and consistency in this area of the law, the LRHL needs to be reexamined and rewritten—a task only the Legislature can undertake.

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183 *See* FOLLOW-UP REPORT, *supra* note 12, at 25; Ward, *supra* note 80.

184 *E.g.*, Montag and Monsen, *supra* note 93; Brennan, *supra* note 93; Elward, *supra* note 164.

185 *See* discussion *supra* Part VI.

186 *See* discussion *supra* Part VI.

At the core of such reform must be a new framework specifying the conditions that must be present in order for a property to be deemed "blighted" and targeted for redevelopment. Such criteria should be more concrete than those of the LRHL and in keeping with the meaning of "blight" endorsed by the New Jersey Supreme Court in *Gallenthin.* If such legislation is artfully written, it will not impede upon municipalities' power of eminent domain, but rather better define it and provide New Jersey courts with a viable framework for determining when a locality has exceeded its bounds. Furthermore, such a framework would provide both municipalities and citizens with a better understanding of the scope of their respective rights, which in turn would engender a more efficient system.[187]

[187] *See* discussion *supra* Part VI.