RUTGERS LAW RECORD

The Internet Journal of Rutgers School of Law | Newark

www.lawrecord.com

Volume 36 **Eminent Domain in New Jersey** **Fall 2009**

WHAT WILL HAPPEN TO REDEVELOPMENT IN NEW JERSEY WHEN THE ECONOMY RECOVERS?*

Robert S. Goldsmith, Esq. and Robert Beckelman, Esq.

I. Introduction

New Jersey is the fifth smallest state geographically, has the eleventh largest population, and is the most densely populated state in the United States.[1] New Jersey has dense, bustling metropolises and urban centers, as well as rural towns and farming communities. New Jersey has downtowns, shopping malls, industrial and office centers, as well as expansive preservation areas, beaches, lakes, forest, mountains, and farms. All of these things in New Jersey take up land, something of a diminishing commodity in this State given development on one side and preservation efforts on the other.

It is in this context that New Jersey has sought in recent times to implement "smart growth" planning principals and practices.[2] Smart Growth has two major elements. The first element is the policy that limits or proscribes development in sensitive areas or in areas in which continued or new development is undesirable and fosters sprawl.[3] The other fundamental policy is to support investment and development in areas where development makes good planning sense, such as urban and suburban centers where infrastructure, population, jobs, commerce, and public transportation already exist.[4]

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* This article is partially a response to Ronald Chen et al., *Compensation and Relocation Assistance for New Jersey Residents Displaced by Redevelopment: Reform Recommendations of the State Department of the Public Advocate*, 36 RUTGERS L. REC. 300 (2009), *available at* http://www.lawrecord.com/files/36-Rutgers-L-Rec-300.pdf.

[1] World Atlas, *United States*, http://www.worldatlas.com/aatlas/populations/usapopl.htm (last visited Oct. 22, 2009).

[2] State of New Jersey, Department of Community Affairs, Office of Smart Growth, http://www.nj.gov/dca/divisions/osg/

[3] National Center for Appropriate Technology, Smart Growth Online, *About Smart Growth*, http://www.smartgrowth.org/about/default.asp

[4] *Id.*

This article assumes that smart growth is a good thing and discusses the necessity of redevelopment in the implementation of smart growth and sound planning for New Jersey's future growth, prosperity and well-being. The article also discusses the validity and necessity of eminent domain as a tool for assembly of property for redevelopment, and the impact and potential future impact of recent efforts to curtail the use of eminent domain in redevelopment projects.

II. A Brief History of Redevelopment in New Jersey and the Evolution of Blight Declarations

The concept of blighted areas began to develop in the early 1920s to describe the phenomenon of urban decay and deterioration, increasing crime in urban centers, lack of investment in property, loss of business patronage, increasingly lower income residents, and the development of urban ghettos. This phenomenon became more prevalent in the post-World War II era as more and more Americans were moving out of the cities and into newly-created suburbs. This was no less the case in New Jersey than other states.

In this context, the 1947 New Jersey Constitution included a clause declaring the redevelopment of blighted areas a public use and public purpose for which the power of eminent domain could be used.[5] In 1949, the New Jersey Legislature adopted the "Blighted Areas Act"[6] to implement this constitutional provision, as well as other statutes over time. These statutes finally culminated in the Local Redevelopment and Housing Law[7] (the "1992 Redevelopment Law"), which was an effort to coordinate and consolidate the various legislation that had been enacted over the prior forty three years.

New Jersey was, of course, not alone in taking governmental action to address conditions of blight and provide tools for redevelopment. The first redevelopment case to be decided by the United States Supreme Court was *Berman v. Parker*.[8] This case established the general parameters of the use of eminent domain for redevelopment purposes. New Jersey's Supreme Court largely adopted the policies of the United States Supreme Court in its first redevelopment case in *Wilson v. City of Long Branch*.[9]

Those cases established some of the general standards and concepts relating to redevelopment which, until recently, remained the accepted and established legal standards and principles. Some of the significant and enduring concepts were that the condemnation of property that would be developed and owned privately did not render the taking invalid, as the public purpose of redevelopment satisfied the Constitution; redevelopment involves areas, not individual properties; determining whether an area qualified as blighted and what property was needed to implement effective redevelopment was a local legislative decision; the local determinations concerning blight and condemnation were owed substantial deference by the courts, which should not second-guess such local municipal determinations, so long as such decisions are supported by the evidence and not arbitrary, capricious, or made in bad faith or with improper motive.

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[5] N.J. CONST., art. VIII.
[6] N.J. STAT. ANN. §§ 40:55-21.1 (*superceded*)
[7] N.J. STAT. ANN. §§ 40A:12A (2006).
[8] Berman v. Parker, 348 U.S. 26 (1954).
[9] Wilson v. City of Long Branch, 142 A.2d 837 (N.J. 1958).

These principals were largely reaffirmed ten years later in *Lyons v. City of Camden*.[10] There was a passage written by Justice Francis worthy of quotation that eloquently captured the essence of the role of the courts in consideration of redevelopment that recently has not been given the credence it deserves:

> [The d]ecision as to whether an area is blighted and as to the boundaries of a particular redevelopment project area is committed by the Legislature to the discretion of the described local governmental agencies. . . . Clearly the extent to which the various elements that informed persons say enter into the blight decision-making process are present in any particular area is largely a matter of practical judgment, common sense and sound discretion. It must be recognized that at times men of training and experience may honestly differ as to whether the elements are sufficiently present in a certain district to warrant a determination that the area is blighted. In such cases courts realize that the Legislature has conferred on the local authorities the power to make the determination. If their decision is supported by substantial evidence, the fact that the question is debatable does not justify substitution of the judicial judgment for that of the local legislators.[11]

The first and, until recently, the only New Jersey Supreme Court case to deal with the concepts of stagnant conditions, underutilization of property, and diverse ownership and title issues (the characteristics supporting a redevelopment designation under what is now Section 5(e) of the 1992 Redevelopment Law) was *Levin v. Bridgewater*, decided in 1971.[12] Again, Justice Francis captured the essence of the intent and purpose behind the criteria supporting a redevelopment designation under Section 5(e), this time quoting from the legislative declaration supporting the amendment to include Section 5(e):

> [T]here are also certain areas where the condition of the title, the diverse ownership of the land to be assembled, the street or lot layouts, or other conditions prevent a proper development of the land, and that it is in the public interest that such areas, as well as blighted areas, be acquired by eminent domain and made available for sound and wholesome development in accordance with a redevelopment plan, and that the exercise of the power of eminent domain and the financing of the acquisition and preparation of land by a public agency for such redevelopment is likewise a public use and purpose.[13]

During that time, there were challenges to redevelopment designations, redevelopment plans, and the exercise of eminent domain in connection with redevelopment projects.[14] Largely,

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[10] Lyons v. City of Camden, 243 A.2d 817 (N.J. 1968).
[11] *Id.* at 821.
[12] Levin v. Twp. Committee of Twp. of Bridgewater, 274 A.2d 1 (N.J. 1971).
[13] *Id.* at 3 (*quoting* N.J. STAT. ANN. § 55:14A-31(d) (2006)).
[14] *See id.*

with very few exceptions, redevelopment designations, plans, and the use of eminent domain were generally sustained in legal challenges.[15]

III. The New World and the Devolution of Blight

The guiding principles discussed above set forth the legal framework for redevelopment designations and the use of condemnation over the next thirty odd years.[16] In June 2007, the New Jersey Supreme Court, in *Gallenthin v. Borough of Paulsboro*,[17] decided its first redevelopment case since *Levin* in 1971. In the thirty-four years between the Court's 1971 decision in *Levin* and 2005, there were relatively few cases concerning challenges to blight or redevelopment designations, with only a tiny fraction of those resulting in the reversal of a redevelopment designation. Indeed, there were two published trial court decisions, both from Camden County, both by Judge Orlando, reversing redevelopment designations.[18] The status quo began to change, however, after the United States Supreme Court decision in *Kelo v. City of New London*,[19] in which the Court held that implementation of an economic revitalization development program designed to improve the general welfare of the community was a sufficient public purpose under the United States Constitution to justify the exercise of eminent domain to acquire private property to be redeveloped by another private interest.

While *Kelo* was not surprising from the standpoint of legal analysis, the social and political implications of the decision were far-reaching, bringing the issue of eminent domain to the forefront of the nation's consciousness and triggering a flurry of legislative activity in states across the country designed to limit or curb the use of eminent domain for what was deemed "private redevelopment" or "economic development." Although the impact of the decision certainly reached New Jersey and has resulted in legislative proposals still under consideration to limit the use of eminent domain for redevelopment, the reaction of the New Jersey judiciary was, initially, not particularly significant. This is no doubt due in large part to the fact that, unlike the economic development statute challenged in *Kelo*, New Jersey's Constitution requires a finding of blight conditions before a municipality may exercise the power of eminent domain to acquire private property to carry out a redevelopment.[20] New Jersey's redevelopment laws have always set forth various criteria that must be met in order for a municipality to designate a property as in need of redevelopment or blighted under the New Jersey Constitution.[21] Additionally, the New Jersey Constitution specifically provides that the redevelopment of blighted areas constitutes a valid public purpose justifying the use of eminent domain.[22]

It should be noted that when the Legislature enacted the 1992 Redevelopment Law, it replaced the term "blighted" with "area in need of redevelopment."[23] Critics have suggested that the

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[15] *See* Gallenthin v. Borough of Paulsboro, 924 A.2d 447, 460 (N.J. 2007).
[16] *See id.*
[17] *Id.*
[18] *See* Winters v. Twp. of Voorhees, 726 A.2d 1013 (N.J. Super. Ct. Law Div. 1998); Spruce Manor Enterprises v. Borough of Belmawr, 717 A.2d 1008 (N.J. Super. Ct. Law Div. 1998).
[19] Kelo v. City of New London, 545 U.S. 469 (2005).
[20] *See* Forbes v. Bd. of Tr. of Twp. of South Orange Village, 712 A.2d 255 (N.J. Super. App. Div. 1998), *cert. denied* 712 A.2d 642 (N.J. 1998).
[21] *See id.* at 260-61.
[22] N.J. CONST., art. VIII, § 3, ¶ 1.
[23] N.J. STAT. ANN. § 40A:12A-3 (2006).

purpose for such a change was to render redevelopment designations easier.[24] However, there was little substantive change to the criteria which were used to support a redevelopment designation from those in place since at least the 1951 version of the Blighted Areas Act.[25] For example, in addressing a constitutional challenge to the 1992 Redevelopment Law, the Honorable Sylvia Pressler, the Presiding Judge of the Appellate Division noted:

> [T]he blight definition of the Blighted Area Act was virtually unchanged by the [1992 Redevelopment Law]. Thus, the Legislature may have taken the word 'blight' out of the statute in favor of the more euphemistic 'area in need of development,' and it may have taken the word 'slum' out for the same euphemistic reason, but what is of paramount import is that the definitional standards were not changed in any material respect.[26]

Indeed, a report prepared by the New Jersey County and Municipal Government Study Commission in January 1987 (the "Commission Report"), which set forth a framework for the 1992 Redevelopment Law, recognized the negative connotation of the term blight and recommended use of the area in need of redevelopment langauge.[27] Significantly, the Public Advocate's campaign for a return to blight in its most stringent sense, which is now being adopted and advanced by the courts, as discussed in more detail below, will bring back those negative unintended consequences, not only rendering designation of redevelopment areas more politically challenging, but having an immediate negative impact upon property values in the area (a trend which has nearly reversed over time since the adoption of the 1992 Redevelopment Law).[28]

Although the *Kelo* decision did not substantially impact redevelopment in New Jersey, the State Supreme Court's decision in *Gallenthin* has significantly altered the field of redevelopment in New Jersey.[29] That case involved a challenge to Paulsboro's inclusion of a 63-acre largely vacant parcel of property in a redevelopment area based on its stagnant and unproductive condition, resulting in an underutilized and not fully productive use of the property.[30] Although the finding arguably fit within the terminology of the Redevelopment Law, the Court found that Paulsboro's determination essentially led to the conclusion that a property may be deemed blighted based solely on its status as "not fully productive."[31] Based upon this reading, the Court reasoned that virtually any property may be deemed blighted and that such an interpretation was unconstitutional and could not serve as a proper basis for the acquisition of private property through eminent domain.[32] The Court further held that with respect to the specific statutory provision at issue, which permitted a finding of blight for stagnant and not fully productive properties based upon conditions of title and diversity of ownership or other conditions, the "other conditions" were not intended to be a

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[24] Bruce D. Greenberg, "The Redevelopment Statute: A Powerful Tool for Municipalities," 154 N.J.L.J. 10 (1998); *see generally* Chester R. Ostrowski, *A "Blighted Area" of the Law: Why Eminent Domain Legislation Is Still Necessary in New Jersey after Gallenthin*, 39 SETON HALL L. REV. 225 (2009).
[25] *Forbes,* 712 A.2d at 258.
[26] *Id.*at 261.
[27] *New Jersey County and Municipal Government Study Commission,* page xiv (January 1987).
[28] Duncan Currie, *Property Rights at Risk in New Jersey*, THE AMERICAN, Apr. 23, 2007, http://www.american.com/archive/2007/april-0407/property-rights-at-risk-in-new-jersey/.
[29] Michael A. Bruno, Esq., *Blight Means Blight*, DEVELOPMENT NEW JERSEY, Sept./Oct. 2007, *available at* http://perspectiverem.com/galleries/pdf/PREMGGIORDANO113007.pdf.
[30] Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447, 451 (N.J. 2007).
[31] *Id.* at 460.
[32] *Id.*

catch-all but must be conditions relating to issues of title and diversity of ownership.[33] The Court held that the meaning of blight inherently must include conditions that have a demonstrable negative impact on the community or surrounding areas.[34] Finally, the Court emphasized that a redevelopment designation must be supported by "substantial" evidence, which would require more than the net opinion of a planner.[35]

On its face, the decision was well-reasoned and balanced. It did not expand the law, nor did it dramatically alter the interpretation of the 1992 Redevelopment Law.[36] The decision essentially holds that the fact that a property is not being put to its optimal use and could be utilized in a more productive manner, standing alone, does not render that property blighted.[37] In other words, purely economic development, as was permitted in the *Kelo* decision, is insufficient to justify the exercise of eminent domain absent a finding of blight, as that term was intended to be applied under New Jersey's Constitution.[38] Moreover, although the Court tightened the reins on what would be required for a finding of blight and made clearclarified that such designations must truly be supported by "substantial" evidence and solidly grounded in professional opinions.[39] However, the Court also largely sustained the validity of the Redevelopment Law, acknowledged the need and legitimacy of eminent domain as a tool for carrying out redevelopment, and, most significantly, sustained the long-established principles of judicial review applicable to redevelopment determinations.[40]

During the several months following the *Gallenthin* decision, however, there were more reversals of redevelopment designations than there had been in the nearly sixty years since the adoption of the first redevelopment laws in New Jersey.[41] In *Land Plus v. Borough of Hackensack*, the Superior Court in Bergen County reversed a redevelopment designation based on the Court's determination in *Gallenthin* holding that the only basis for the designation was the underutilization of the properties.[32] Similarly, in *Mulberry Street Property Owners v. City of Newark*, the trial court in Essex County held that the redevelopment designation of an area consisting largely of privately- owned surface parking lots, storage and vacant lots, and a mix of residential and commercial uses.[33] The Court held that the redevelopment designation of that area was based solely on the not fully productive condition of the properties and there was no finding that this condition had any negative impact on the surrounding area as required under *Gallenthin*.[44] Although not relied upon in the decision, the court did reference the criminal proceedings against former Mayor Sharpe James and

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[33] *Id.* at 462.
[34] *Id.*
[35] *Id.* at 465.
[36] N.J. STAT. ANN. § 40A:12A-3.
[37] *Gallenthin*, 924 A.2d at 465
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *See* Land Plus v. Borough of Hackensack, No. A-1276-07T3, 2008 WL 4648278 (N.J. Super. Ct. App. Div. Oct. 10, 2008); Mulberry St. Prop. Owners v. City of Newark, No. ESX-L-9916-04 (N.J. Super. Ct. Law Div. July 19, 2007); HJB Assoc's., Inc. v. Council of Borough of Belmar, No. A-6510-05T5, 2007 WL 2005173 (N.J. Super. Ct. App. Div. July 11, 2007); BMIA, LLC v. Planning Bd. of Borough of Belmar, No. A-5974-05T5, 2008 WL 281687 (N.J. Super. Ct. App. Div. Feb. 4, 2008); Evans v. Twp. of Maplewood, No. ESX-L-6910-06, 2007 WL 4239952 (N.J. Super. Ct. Law Div. July 27, 2007); LBK Assoc's, LLC v. Borough of Lodi, No. A-1829-05T2, 2007 WL 2089275 (N.J. Super. Ct. App. Div. July 24, 2007).
[42] *Land Plus*, 2008 WL 4648278, at *3.
[43] *Mulberry St.*, No. ESX-L-9916-04.
[44] *Id.*

the suggestion of corruption in the redevelopment process.[45] Redevelopment designations were also reversed, based explicitly upon *Gallenthin*, in Maplewood, Lodi and Belmar.[46] While the Lodi case was an Appellate Division decision affirming a trial court reversal of a blight designation, the two Belmar decisions by the Appellate Division reversed trial court affirmations of redevelopment designations.[47]

In one of the Belmar cases, the Appellate Division rejected the determination that residual contamination that had leaked off-site led to a lack of significant investment in surrounding properties and had a potentially negative impact upon surrounding property values.[48] Belmar asserted that this was an "other condition" as consistent with the intent of the Redevelopment Law and the holding of *Gallenthin*.[49] While not specifically an issue of diverse ownership or a title issue, it falls within the concept of similar conditions because the contamination created "a cloud over several of the properties in that block based on the contamination of the property underneath the parking lot because the plume, if you look at the report, comes right up to the edge of the Mall property. So it raises a cloud."[50] Thus, the property owner's inability to make any improvements or maintain the property caused by the contamination issues led to a stagnant condition of the property as well as the surrounding area, impeding unified development and orderly community growth.[51] Again, the Appellate Division rejected this concept.[52]

A more recent, and far more troubling over-reading of *Gallenthin*, came from the Appellate Division in the cases of *Long Branch v. Anzalone* and *Long Branch v. Brower*.[53] At the outset, the Appellate Division determined that it must review the City's actions under the "heightened standard" of review established by *Gallenthin*.[54] Notably, the Public Advocate argued that the Court should use *Gallenthin* as an opportunity to abandon the established standard of review and presumption of validity in favor of municipal action and place a higher burden upon the municipality to establish the validity of its redevelopment determination.[55] The Court, however, rejected this invitation and affirmed the long-established review standard of presumption of validity

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[45] *Id.*
[46] *See* HJB Assoc's Inc. v. Council of Borough of Belmar, MON-L-2640-05, 2007 WL 2005173 (N.J. Super. Ct. App. Div. July 11, 2007); BMIA, LLC v. Planning Bd. of Borough of Belmar, MON-L-1537-05, 2008 WL 281687 (N.J. Super. Ct. App. Div. Feb. 4, 2008); Evans v. Township of Maplewood, ESX-L-6910-06, 2007 WL 4239952 (N.J. Super. Ct. Law Div. July 27, 2007); LBK Assoc'sLLC v. Borough of Lodi, BER-L-8766-03, L-8768-032007, 2007 WL 2089275 (N.J. Super. Ct. App. Div. July 24, 2007).
[47] *LBK Assoc's*, 2007 WL 2089275, at *1-2; *HJB Assoc's*, 2007 WL 2005173, at *4; *BMIA*, 2008 WL 281687, at *5.
[48] *HJB Assoc's* at *4.
[49] *Id.*
[50] Brief of Defendant-Respondent at 39-40, HJB Assoc's Inc. v. Council of Borough of Belmar, MON- L-2640-05 (N.J. Super. Ct. Law Div. July 11, 2007).
[51] *HJB Assoc's*, 2007 WL 2005173, at *4.
[52] *Id.*
[53] City of Long Branch v. Anzalone, No. A-0067-06T2, A-0195-06T2, A-0198-06T2, A-0191-06T2, A-0196-06T2, A-0654-06T2, A-0192-06T2, A-0197-06T2, 2008 WL 3090052 (N.J. Super. Ct. App. Div. Aug. 7, 2008), *cert. denied*, 199 N.J. 134 (Oct. 30, 2008); City of Long Branch v. Brower, No. MON-L-4987-05, MON-L-141-06, MON-L-320-06, MON-L-5552-05, MON-L-871-06, MON-L-317-06, MON-L-5551-05, MON-L-313-06, MON-L-4996-05, MON-L-309-06, 2006 WL 1746120 (N.J. Super. Law. Div. June 22, 2006).
[54] *Anzalone*, 2008 WL 3090052, at *4.
[55] *See* Brief of Amicus Curiae Public Advocate of New Jersey Supporting Appellants, *Brower* and *Anzalone*, *available at* http://www.state.nj.us/publicadvocate/home/reports/pdfs/Brief.pdf.

to municipal actions, noting only that the net opinion offered by the planner in that case fell short of the evidence required to support a redevelopment designation.[56]

The Appellate Division also interpreted Section 5(e) of the Redevelopment Law criteria providing for redevelopment designations based upon stagnant and unproductive conditions caused by issues of title, diversity of ownership, or other conditions to be limited to the diversity of ownership of each or a single parcel of property rather than to diverse ownership of the multiple parcels comprising the area.[57] This makes no logical sense and renders the statutory language meaningless and absurd. Diverse ownership of a single parcel is not of like kind to title issues, but effectively falls directly under the umbrella of title issues. Under this interpretation, the Appellate Division effectively reads Section 5(e) to apply where stagnant conditions have been caused by issues of title, issues of title or other similar issues of title.[58]

Finally, the Appellate Division held that because *Gallenthin* discussed blight as necessarily having a negative impact upon surrounding areas, Long Branch's findings were flawed because there was no analysis of the negative impact of the blight upon the surrounding areas.[59] The Appellate Division effectively imposed a new requirement that something close to blight in the area surrounding the area sought to be designated must be established.[60] This conflicts with the norms of *Berman v. Parker*, as well as the provisions of the 1992 Redevelopment Law and predecessor Blighted Areas Act which all recognize that the inclusion of properties not demonstrating blight characteristics themselves may be necessary to include in a redevelopment in order to effectively carry out a redevelopment project.

This requirement may also lead to an infinite regress, or the decision to shrink the redevelopment area to exclude surrounding properties that might otherwise be appropriately and sensibly included in the redevelopment area so as to leave out some negatively impacted properties to meet this new requirement. Moreover, the negative impact may not be so readily demonstrable where for example, as in circumstances similar to Long Branch, where the redevelopment area was an "island" separated from surrounding areas by the construction of a divided State highway. Therefore, Long Branch might never be able to demonstrate a direct negative effect on surrounding areas and would be relegated to allowing the area to languish and decay, so long as the blight was contained. This is an absurd and dangerous proposition.

Another recurring issue in the redevelopment context is the timeliness of a challenge where there is a substantial lapse of time between a redevelopment designation and a municipality's efforts to acquire property by eminent domain to implement a redevelopment plan, which often takes several or many years. Some courts have held that although a property owner must challenge a redevelopment designation within forty-five (45) days of its adoption (pursuant to court rules for challenges to municipal actions), a property owner should not be precluded from challenging that very same redevelopment designation as a *defense* to a condemnation, even if condemnation takes place many years later.[61] Other courts have held that the question of whether a property owner may

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[56] *Id.* at *15, 17 (citing *Gallenthin*, 924 A.2d at 464-65).
[57] *Id.* at *20-21.
[58] *See id.*
[59] *Id.* at *15.
[60] *Id.* at *20.
[61] *See, e.g.*, Twp. of Bloomfield v. 110 Washington St. Assoc., Docket No. 6770-04T5 (N.J. Super. Ct. App. Div. Aug. 29, 2006).

be permitted to challenge a redevelopment designation beyond the forty-five day period specified in the court rules (in the context of condemnation or otherwise) should be left to the judge's discretion under the court rules permitting a late challenge based upon the particular circumstances and equities of each case.[62]

Recently, in *Harrison Redevelopment Agency v. DeRose*,[63] the Appellate Division resolved this perceived conflict. The Court held that if a property owner did not receive personal notice at the time of the redevelopment designation that (1) a potential consequence of the designation could be the exercise of eminent domain to acquire his or her property and (2) that the designation must be challenged within forty-five days, than that property owner would not be precluded from challenging the redevelopment designation years later in a condemnation proceeding.[64] The court was also clear that, in any case, trial courts maintain their discretionary power to relax the time limitation under the general powers of the court rules.[65] Since neither the 1992 Redevelopment Law nor the Blighted Areas Act has ever required notice specifically referencing the potential use of eminent domain or a time limit to challenge a redevelopment designation, virtually no municipality has likely done so and none will likely be presently prepared to address such challenges if and when it seeks to acquire any private property through eminent domain.

There certainly is value to the decision moving forward, as it will essentially require property owners to speak now or forever hold their peace if proper notice is given at the outset, which will provide some measure of repose. On the other hand, it may inspire litigation early in the process that may never have been pursued absent the warning of potential eminent domain that may never have been used.[66] On balance, the rule applied prospectively is a good one for the property owner, municipality and redeveloper because it improves predictability and certainty.

While this decision tends to reconcile the balance of interests between significant public and private investment on one hand and due process on the other, its retroactive application of the new rule of law it established opened up every redevelopment designation, no matter how long ago, vulnerable to challenge by any property owner. This potential challenge and risk to redevelopment is present regardless of how much public and private investment has occurred in reliance upon the designation, often many years earlier, regardless of whether the property owner actually had knowledge of the redevelopment and potential for eminent domain, and regardless of what the property owner did over the years as he or she watched the redevelopment progress. We would suggest that any retroactive application should consider these factors and not be applied in a blanket fashion without respect to the level of investment, the impact upon the community should the redevelopment be quashed by a later challenge, and the knowledge and actions of the property owner.

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[62] Carteret Indus. Project v. Borough Council of the Borough of Carteret, Docket No. A-1893-05T1 (N.J. Super. Ct. App. Div. January 23, 2007).
[63] Harrison Redevelopment Agency v. DeRose, 942 A.2d 59 (N.J. Super. Ct. App. Div. 2008).
[64] *Id.* at 90.
[65] *Id.* at 90-91.
[66] Notably, the decision has generated subsequent litigation with respect to various unanswered questions, such as whether a property owner must wait for a condemnation proceeding and whether tenants are entitled to this enhanced notice and preserve the right to challenge a redevelopment designation in condemnation. *See, e.g.* Iron Mt. v. City of Newark, 962 A.2d 62 (N.J. Super. Ct. App. Div. 2009), *certif.. granted*, 972 A.2d 385 (N.J. 2009).

There has been a lot of change in a short amount of time that has raised much confusion and uncertainty. Redevelopment designations from many years ago are now subect to fresh challenges under new and higher standards. As will be explored later in this article, this has and will continue to have substantial detrimental effects on the future of redevelopment in New Jersey, as developers and municipalities remain uncertain as to the potential for challenge.

IV. Redevelopment in Context: Smart Growth and the Future of New Jersey

Historically, developers were able to acquire large parcels of land throughout the state (often farms removed forever from farming) and, depending upon market conditions, develop those properties, subdivide them and sell them to the public for various uses. This pattern of suburban development, the main course of development by which New Jersey has developed over the past sixty years since the post World II era, requires the installation of all new infrastructure, water, sewer, gas, electric, roads, etc. This creates greater overall costs to society by diminishing open space and farmland, reducing pervious surfaces and thereby increasing stormwater runoff pollution, increasing traffic, travel time, carbon emissions, and reliance on automobiles by creating neighborhoods not accessible to public transportation and far from where residents work.

Redevelopment of already disturbed lands in urban and older suburban areas allows the reuse of existing infrastructure without significantly eliminating more natural land, farmland and open spaces. This reduces or eliminates many of the issues inherent in greenfield developments, by creating opportunities to live and work in areas close to work or public transportation and reducing the need for reliance on automobiles. It is generally a more efficient use of space. In addition, such areas can sustain greater densities without destroying the character of the local communities or taking significant acres of pristine or desirable natural land, resources, and open spaces.

Policies in New Jersey over the last twenty years have limited or proscribed development in the Highlands,[67] Pinelands,[68] Wetlands,[69] Farmland,[70] and Coastal Wetlands.[71] These are sensible policies and, significantly, these policies have traction and significant enforcement power supporting them. Development in urban and suburban centers, on the other hand, has not received the same support or enforcement authority and has occurred in a more haphazard fashion. State policies support Smart Growth and indeed Governor McGreevey's Executive Order No. 4 was a focused effort to spur investment in older communities and support redevelopment.[72] However, that Executive Order is largely forgotten and New Jersey has failed to support, encourage, or facilitate the growth side of smart growth.

Most recently, the State has effectively, although perhaps unwittingly, hampered redevelopment by failing to recognize the necessity of eminent domain to implement

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[67] Highlands Water Protection and Planning Act, N.J. STAT. ANN. §§ 13:20-1 to -35 (2006).
[68] Pinelands Protection Act, N.J.S.A. 13:18A-1 to -58; Pinelands National Reserve, 16 U.S.C. § 471i (2006).
[69] New Jersey Freshwater Wetlands Protection Act, N.J. STAT. ANN. § 13:9B-1, Wetlands Reserve Program, 16 U.S.C. § 3837 (2006).
[70] Brief of Public Advocate for New Jersey as Amici Curiae Supporting Respondents, *Gallenthin*, No. 59,982 (N.J.); Brief of Petitioner-Appellant, *Gallenthin*, No. 59,982 (N.J. Dec. 21, 2006).
[71] Coastal Area Facility Review Act (CAFRA), N.J. STAT. ANN. 13:19-1; N.J. ADMIN. CODE. § 7.7.
[72] Governor James E. McGreevey, *Executive Order No. 4, Governor James E. McGreevey,* 2002 N.J. Laws 1171 (January 31, 2002).

redevelopment. Eminent Domain is, however, a vital tool necessary for redevelopment and thus a necessary power to exercise for the economic well being of New Jersey and New Jersey's future.[73]

A key factor critically needed to effectuate redevelopment is the ability to assemble properties. As noted, if one considers development patterns from the early post World War II era, through the 1950's, 1960's, 1970's and 1980's, one thinks of a developer, large or small, acquiring one or more parcels of farmland, negotiating with one, two or perhaps three property owners, obtaining hundreds or thousands of acres, and taking them out of farming in perpetuity. The developer then negotiates, or litigates, with the municipal planning or zoning board for a period of months or years and ultimately gets some number of homes in the range of about one to five homes per acre, or a single home on one or more acres.[74]

The scenario is far different in any urban center or town. If one thinks of a downtown block, at a minimum there are five or ten owners and possibly as many as thirty to fifty owners. Human experience tells us, and redevelopment experience supports the fact, that most people will be reasonable in negotiating property acquisition but someone will be obstinate.[75]

There has been an enormous backlash from the *Kelo* decision with many states enacting legislation limiting the use of eminent domain for redevelopment.[76] New Jersey has considered various bills that would have enormous consequences in terms of limiting the ability to effectuate redevelopment and assemble property.[77] While there has been a value in the *Kelo* decision bringing the issue of eminent domain to the public and highlighting that eminent domain is an awesome power that should be used as a last resort, such power must nevertheless be available.

Significantly, for the first time since the Second World War, suburban and urban centers, which are the focus of development under the State's Development and Redevelopment Plan (which expresses the public land use policies of this State) were seeing hundreds of millions of dollars in private economic investment. The Governor seeks to provide 100,000 units of affordable and workforce housing in the next ten years,[78] a laudable goal and a goal that cannot be achieved in the Highlands, Pinelands, wetlands and farmlands. It can only be achieved in urban and suburban areas where development is encouraged and where private capital was being invested in unprecedented amounts. Such investment, in turn, requires the assembly of property, which is crucial to effectuate large-scale redevelopment. However, the increased burden upon municipalities and redevelopers resulting from the line of cases discussed earlier, rendered even more difficult, time-consuming, and burdensome under pending legislation (endorsed by the Public Advocate) will seriously curtail redevelopment of urban and suburban centers. It is that clear and that simple.

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[73] Linda Greenhouse, *Justices Rule Cities Can Take Property for Private Development,* June 23, 2005, *available at* http://www.nytimes.com/2005/06/23/politics/23wire-scotus.html.
[74] Community Planning Toolbox, available at http://www.smartgrowthvermont.org/toolbox/casestudies/subregsfletcher/.
[75] *See* Dayton Gold & Silver Mining Co., v. Seawell, 11 Nev. 394 (1876).
[76] John Shirey, *Kelo Backlash Ignores Brenefits of Eminent Domain for Redevelopment,* available at http://www.planningreport.com/tpr/?module=displaystory&story_id=1128&format=html.
[77] *See, e.g.,* A. 3257, 212th Leg. (N.J. 2006); S. 559, 213th Leg. (N.J. 2008).
[78] *See, e.g.,* New Jersey Department of Community Affairs, *Governor's Housing and Community Development Conference Highlighted by Corzine's Keynote Address* (September 26, 2006), http://www.state.nj.us/dca/news/news/2006/approved/060926.html.

The current bills unduly burden and add substantial cost and delay to the implementation of redevelopment projects. This is exacerbated by the current context of residential development throughout the country and where in New Jersey it has been severely impacted by market conditions. Projections indicated that construction would begin on 12,000 homes in New Jersey in 2009, fewer than any year since 1946, and only half as many building permits were issued in the first half of 2009 as the first half of 2008.[79] The spillover economic effect of that reduction will be staggering. To add to this burden in New Jersey, where redevelopment is perhaps more necessary than any other state, would be simply devastating.

There is room for refinement in the existing legislation and some of the proposals warrant consideration. For example, giving people notice at the beginning of the redevelopment process that eminent domain could be a by-product of the process. This has already been effectively mandated by the *Harrison* decision, in which the Appellate Division required that notices of redevelopment designations explicitly state that eminent domain may be used to acquire the owner's property in order to trigger the forty-five day statute of limitations to challenge a redevelopment designation.[80] The Legislature need only codify and clarify this requirement.

Another area for refinement is enhanced compensation. The pending legislation adopts the Public Advocate's concept of providing highest and best use valuation to assure that property owners receive essentially the value that a redevelopment designation creates. This can lead to a scenario where no proposed development is economically feasible, as too much of the value goes to the existing property owner at the front end and land acquisition costs become simply too high to support the economics of the project. On the other hand, just compensation should certainly be just, and there can be an inequity in providing a homeowner fair market value that places him in a position unable to use the compensation received to put him in the same position he was before the taking, which is comparable replacement housing in a comparable area.

We suggest that equity should be a consideration in determining compensation to property owners, applied in a manner similar to consideration of aggravating and mitigating factors in the sentencing context. For example, a homeowner who has not significantly contributed to the demise of the area leading to the blight conditions and has made efforts within his or her means to reasonably maintain the property should be provided sufficient compensation to obtain comparable replacement housing. On the other hand, slumlords, absentee landlords, and brownfields owners who have permitted properties to deteriorate and have actually taken deliberate or neglectful actions that contributed to the blight conditions should receive no such extra consideration, but be compensated on a straight fair market approach that takes into account the neglect. This gives recognition to intrinsic and intangible value to a homeowner who has reasonably maintained his property and paid taxes but does not allow an obstinate property owner who has neglected his property to squeeze a municipality with unrealistic demands.

Finally, while we do not necessarily agree with the Public Advocate on every aspect of his position on relocation benefits, we do agree that there is a need to increase relocation benefits for residential tenants and homeowners (commercial tenants are fairly compensated under the existing structure). The maximum allowances for residential owner and tenant moving expenses, down

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[79] Evelyn Lee, *Housing demand is up, but remains constrained*, NJBIZ, Aug. 3 2009, http://www.njbiz.com/print_article.asp?aID=78795.

[80] *Harrison Redevelopment Agency*, 942 A.2d at 90.

payment assistance, and rental assistance should all be increased to reflect the current value of the dollar and the laws should provide for automatic adjustment to stay realistic with the changing value of the dollar.

The proposed change to the burden of proof advanced by the Public Advocate and included in some of the proposed legislation, however, would effect a monumental change in the process that has been in effect in this State since the 1948 Constitution. Indeed, as noted previously, the Appellate Division in *Long Branch* explicitly states that pursuant to the *Gallenthin* decision, the City must meet a "heightened standard" of review, despite the fact that the Court in *Gallenthin* never suggests the standard of review was changed by its decision and, in fact, rejected the Public Advocate's argument in favor of changing the existing standard of review.[81] Effectively, the historical precedent of a liberal standard of review would be converted to a scrutiny approaching judicial review of a criminal statute.

The proposed change in the burden of proof would automatically render every municipal redevelopment decision suspect, as in *Long Branch* where the Appellate Division made an in-depth search for flaws in the redevelopment process,[82] and would permit an obstinate individual to prevent or substantially delay or kill projects crucial to the economic well being of this State's cities and towns. Without the power of eminent domain, such an individual can obliterate a redevelopment project that would greatly benefit the entire community. If anything, given the judicial action under *Gallenthin* and post-*Gallenthin* decisions discussed herein, New Jersey needs to ensure that redevelopment remains a viable tool to protect and advance the economic stability and vitality of its urban and suburban centers. Redevelopment must be about the greater good, balanced with the need for fair treatment and just compensation.

In almost every context, the courts of New Jersey defer to the legislative judgment of the State, State agencies and municipal bodies.[83] That is to say, if the evidence is balanced, the municipality's action is presumed valid and will be upheld so long as it is, in essence, fair, reasonably-supported and not exercised in bad-faith.[84] If there is sufficient credible evidence supporting the legislative judgment, the courts will not second-guess that legislative decision-making. However, some of the current bills would remove the presumption of validity from municipal action solely within the context of the designation of a redevelopment area.[85] The effect is that the Legislature will be telling the Judiciary that (notwithstanding the judicial standard of sixty years, in reviewing the designation of a redevelopment area) the municipality receives no deference and its actions are almost presumed to be invalid, regardless of whether or not eminent domain will ever be used. As quoted earlier, Justice Francis stated that "the fact that the question is debatable does not justify substitution of the judicial judgment for that of the local legislators."[86] By removing the presumption of validity it is apparent that if the question is debatable, under the proposed legislation, the municipality's determination for self-improvement will be thwarted.

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[81] *Anzalone*, 2008 WL 3090052; *Brower*, 2006 WL 1746120.
[82] *Id.*
[83] *See, e.g.,* Nobrega v. Edison Glen Assoc., 772 A.2d 368, 376 (N.J. 2001)
[84] *Anzalone*, 2008 WL 3090052; *Brower*, 2006 WL 1746120.
[85] *See* New Jersey State Bar Association, *New Jersey State Bar Association Position Opposing Senate Bill 559/Assembly Bill 1492 Which Revises Certain Eminent Domain Procedures*, http://www.njsba.com/gov_relations/positionStatements/S559A1492POSTIONSTATEMENT.pdf.
[86] Lyons v. Camden, 243 A.2d 817, 821(N.J. 1968).

Furthermore, the power of eminent domain is needed in other contexts such as where recalcitrant slumlords or commercial property owners are sitting on brownfields or underutilized properties that are hurting a community. Other successes should also be recognized where blighted areas or brownfields were turned from wastelands to smart growth urban developments, such as Perth Amboy, South Bound Brook, Millville, Trenton, Jersey City, Atlantic City, Newark and the gold coast of Hudson County, among others. Ironically, the Star Ledger, whose recent articles and editorial policy has consistently opposed eminent domain to further redevelopment, was built on a redevelopment site in the 1970s which likely was acquired by eminent domain to assemble the site. The Society Hill site in Newark was also a redevelopment project, which required the taking of some properties.

As discussed above, many in the development and local government community feel that the trial courts and Appellate Division are over-reading the *Gallenthin* decision and improperly taking its clarification of redevelopment and eminent domain as a critique calling for strict and suspicious scrutiny of all redevelopment activities. Private property advocates, on the other hand, are no doubt pleased with the reaction of the trial and appellate courts and support their reading of *Gallenthin.* However one may philosophically view *Gallenthin* and subsequent decisions and the impact upon the current state of redevelopment, the practical consequences of these decisions and their chilling effect upon redevelopment are undeniable. The post-*Gallenthin* decisions further raise the concern of potential vulnerability to previously established redevelopment areas, regardless of how far along a particular municipality may be in its redevelopment process or how much capital has been invested.[87]

In this rapidly and ever-changing climate of redevelopment, it is unclear what the future of redevelopment holds and there is little guidance from the State as to how municipalities should proceed with efforts at redevelopment. Indeed, the various State agencies and departments themselves appear to have conflicting agendas. For example, the Governor is looking for 100,000 new affordable housing units over the next ten years, with newly-proposed rules by the Council on Affordable Housing calling for substantially more than 100,000 affordable units[88]However, the Department of Environmental Protection continues to propose and amend rules to implement policies of preservation of natural resources and open space, making development and redevelopment increasingly difficult, costly, and time-consuming.

While construction of a substantial number of affordable homes and protecting natural resources are laudable goals, they cannot be realized without redevelopment. With the shrinking availability of land intensified by development restrictions, it appears that the future of development in New Jersey lies heavily in its potential for redevelopment. The increasing limitations and restrictions being placed upon land and the State's smart growth policies make it less likely that developers could (due to development restrictions) or would (due to economics) buy large tracts of vacant land (likely within farmland, wetlands, open space, or some other preservation area) to construct affordable housing. Rather, the opportunities for affordable housing and the realization of the State's and the DEP's goals of natural resource and open space preservation and conservation will depend upon redevelopment.

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[87] *See Harrison Redevelopment Agency*, 398 A.2d 361.
[88] *Governor's Housing*, *supra* note 78.

Despite all of this, there is pending legislation designed to further limit redevelopment and eminent domain and the Public Advocate has taken on severe restrictions on the use of eminent domain for redevelopment as one of the Office's main objectives. The State needs to coordinate its various departments and agencies to adopt a consistent policy concerning redevelopment that recognizes the significance of redevelopment for New Jersey's future and the State's goals. Any proposals by the Legislature should be carefully balanced and should not ignore the significant impact of recent judicial activity (which has resolved substantial issues sought to be addressed by pending legislation) so that the law preserves the powers of redevelopment, including eminent domain, in its efforts to address perceived abuses.