

**A “BLIGHTED AREA” OF THE LAW:  
WHY EMINENT DOMAIN LEGISLATION IS STILL  
NECESSARY IN NEW JERSEY AFTER *GALLENTHIN***

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I. INTRODUCTION

Allen Vrabel owns the Economy Auto salvage yard in Sayreville, New Jersey.<sup>1</sup> The family business, which Vrabel’s father started nearly fifty years ago, is thriving.<sup>2</sup> The salvage yard sits on a parcel of land adjacent to the 400-acre National Lead factory site, which the borough claimed through eminent domain in 2005.<sup>3</sup> In May 2007, acting pursuant to a recommendation from its planning board, the borough council decided to add fifty-six acres to the National Lead redevelopment area, including properties that house an abandoned movie theater, an exotic dance club, a scrap metal recycling company, and Economy Auto.<sup>4</sup> To Vrabel and the other owners, the council’s decision serves as a clear indication that the borough plans to invoke its eminent domain power to acquire the properties.<sup>5</sup> Con-

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<sup>1</sup> Allison Steele, *Sayreville Firm Sues to Stop Redevelopment*, STAR-LEDGER (Newark, N.J.), Oct. 4, 2007, at 37.

<sup>2</sup> *Id.*; see also Maura McDermott, *Blight Is in the Eye of the Beholder*, STAR-LEDGER (Newark, N.J.), Feb. 24, 2008, at 21.

<sup>3</sup> *Id.* Generally speaking, “eminent domain” is the term used to describe the government’s power to take private property for a public use. 2A-7 NICHOLS ON EMINENT DOMAIN § 7.01 (Julius L. Sackman ed., 3d ed. 1998). This power is vested in the federal government by the Fifth Amendment to the U.S. Constitution, which provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. The eminent domain power is also afforded to state governments as an “inherent attribute of sovereignty,” subject only to those limitations found in each state’s constitution or statutory law. See NICHOLS, *supra*.

<sup>4</sup> See Steele, *supra* note 1, at 37.

<sup>5</sup> *Id.*

sequently, Vrabel has filed suit, asserting that his tract does not meet the criteria required for designation as “in need of redevelopment” under New Jersey law.<sup>6</sup> However, Sayreville officials planning to replace the existing businesses with newly constructed stores, restaurants, and apartments believe that Vrabel’s land is “an essential component in making the National Lead site a success.”<sup>7</sup>

Vrabel’s dilemma seems dreadfully common in recent years, particularly since the Supreme Court of the United States decided *Kelo v. City of New London*<sup>8</sup> in June 2005. In *Kelo*, the nation’s highest court expanded the government’s eminent domain power, holding that a municipality is permitted to use eminent domain to condemn private property for the sole purpose of “economic rejuvenation.”<sup>9</sup> While the Court had previously upheld takings to restore a blighted area in Washington, D.C.,<sup>10</sup> and to remedy a land oligopoly in Hawaii,<sup>11</sup> it had never before sanctioned the transfer of unblighted property from one private owner to another for purely economic reasons.

Both *Berman v. Parker*<sup>12</sup> and *Hawaii Housing Authority v. Midkiff*<sup>13</sup> produced somewhat narrower holdings. In *Berman*, the Supreme Court held that the proposed redevelopment of “substandard housing and blighted areas”<sup>14</sup> constituted a valid “public purpose” under the Fifth Amendment of the U.S. Constitution.<sup>15</sup> Nearly thirty years

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<sup>6</sup> *Id.*; see generally Local Redevelopment Housing Law (LRHL), N.J. STAT. ANN. § 40A:12A-1 to -49 (West 1992).

<sup>7</sup> Steele, *supra* note 1, at 37.

<sup>8</sup> 545 U.S. 469 (2005).

<sup>9</sup> *Id.* at 483–84. While the majority gave great weight to the fact that the City proposed a “carefully considered,” comprehensive plan, it remains to be seen whether this factor is truly a prerequisite for *Kelo*-style takings.

<sup>10</sup> See generally *Berman v. Parker*, 348 U.S. 26 (1954). “Blight” has been defined as “an area in which deteriorating forces have obviously reduced economic and social values to such a degree that widespread rehabilitation is necessary to forestall the development of an actual slum condition.” MABEL L. WALKER, URBAN BLIGHT AND SLUMS 5 (1938), quoted in *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 457 (N.J. 2007). More recently, blight has been described as “an area, usually in a city, that is in transition from a state of relative civic health to the state of being a slum, a breeding ground for crime, disease, and unhealthful living conditions.” Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389, 393 (2000), quoted in *Gallenthin*, 924 A.2d at 457.

<sup>11</sup> See generally *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

<sup>12</sup> 348 U.S. 26 (1954).

<sup>13</sup> 467 U.S. 229 (1984).

<sup>14</sup> *Berman*, 348 U.S. at 28.

<sup>15</sup> *Id.* at 35–36. Note that the *Berman* Court strengthened the government’s power to exercise eminent domain by broadly reading “public use” as found in the Fifth Amendment to mean “public purpose.” See *id.* at 32. In addition, the Court conceded that “[t]he public end may be as well or better served through an agency

later, the *Midkiff* Court held that Hawaii's desire to eliminate "certain perceived evils of concentrated property ownership" was a legitimate public purpose, which similarly satisfied the Fifth Amendment Takings Clause.<sup>16</sup> The Court in *Midkiff* noted in its conclusion, however, that "[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."<sup>17</sup>

According to Justice O'Connor, the type of purely private taking described in *Midkiff* was exactly what the City of New London had planned in *Kelo*.<sup>18</sup> Dissenting from the majority opinion written by Justice Stevens, Justice O'Connor argued that the Court's determination effectively eliminated the "public use" requirement from the Constitution by allowing the government to take any property and transfer it to a private owner so long as it might be used "in a way that the legislature deems more beneficial to the public."<sup>19</sup> Under the Court's ruling, Justice O'Connor opined, "Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."<sup>20</sup>

As evidenced by Justice O'Connor's dissent, one can interpret *Kelo* as opening the door for municipalities nationwide to seize private property for economic redevelopment purposes, even if the property itself is not blighted. Justice Stevens made clear, however, that states are free to adopt their own restrictions on the use of eminent domain.<sup>21</sup> Justice Stevens further noted that, at the time *Kelo* was decided, many states had already chosen to impose "public use" requirements stricter than those imposed by the federal government.<sup>22</sup> New Jersey adopted such requirements in 1947, when a State Constitutional Convention incorporated "blight" into the New Jersey

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of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects." *Id.* at 33–34.

<sup>16</sup> *Midkiff*, 467 U.S. at 245. In *Midkiff*, the Court reaffirmed the "public purpose" standard, as well as the legislature's broad discretion to determine what constitutes a valid "public purpose." *Id.* at 240. For a more thorough discussion concerning the development of the "public use test," see Jonathan Michels, Comment, *Kelo v. City of New London: Is the Response to Curb the Effect of the Supreme Court Decision Going Too Far?*, 37 SETON HALL L. REV. 527, 528–35 (2007).

<sup>17</sup> *Midkiff*, 467 U.S. at 245.

<sup>18</sup> See Edward J. Trawinski, *Kelo Ruling: Destroying the American Dream*, N.J. LAW., July 4, 2005, at 7.

<sup>19</sup> *Kelo v. City of New London*, 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting).

<sup>20</sup> *Id.* at 503.

<sup>21</sup> *Id.* at 489 (majority opinion).

<sup>22</sup> *Id.*

Constitution.<sup>23</sup> The so-called “blighted areas clause,” which provides that “redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired,”<sup>24</sup> has been interpreted to limit the use of eminent domain for redevelopment to only those areas that can properly be described as “blighted.”<sup>25</sup> For this reason, it is clear that the takings upheld in *Kelo* would not have been permitted in New Jersey.<sup>26</sup>

Despite the blight requirement, however, New Jersey municipalities have historically experienced little difficulty in exercising eminent domain for redevelopment. For decades leading up to *Kelo*, New Jersey courts showed such great deference to the broad definitions of “blight” prescribed by the legislature that municipalities and other entities possessing eminent domain powers were permitted to seize property for redevelopment purposes with relative ease.<sup>27</sup> Nevertheless, it took the Supreme Court’s well-publicized decision in *Kelo* to bring the various issues surrounding eminent domain to the attention of New Jersey residents.

After *Kelo*, New Jerseyans began to take a closer look at the way and extent to which eminent domain was being used throughout the state. One source reported that nearly one thousand redevelopment projects, including thirty in Jersey City alone, were ongoing in New Jersey when the Supreme Court decided *Kelo* in 2005.<sup>28</sup> Another reported that since 2003 nearly seventy New Jersey towns had established redevelopment areas.<sup>29</sup> The public outcry that resulted from

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<sup>23</sup> See N.J. CONST. art. VIII, § 3, ¶ 1 (1947).

<sup>24</sup> *Id.*

<sup>25</sup> See Howard Geneslaw & Susanne Peticolas, *Dealing with Kelo: New Jersey Legislature Considers Redevelopment Reforms*, NJPA REAL EST. J., Oct. 27, 2006, at 1; Elisa Ung, *Ruling Tightens N.J. Land Seizure*, PHILA. INQUIRER, June 14, 2007, at B9.

<sup>26</sup> N.J. DEP’T OF THE PUB. ADVOCATE, REFORMING THE USE OF EMINENT DOMAIN FOR PRIVATE REDEVELOPMENT IN NEW JERSEY 5 (2006), available at <http://www.state.nj.us/publicadvocate/home/reports/pdfs/PARReportOnEminentDomainForPrivateRedevelopment.pdf> [hereinafter REFORMING THE USE OF EMINENT DOMAIN]. The Court in *Kelo* specifically found that “[t]hose who govern the City were not confronted with the need to remove blight.” *Kelo*, 545 U.S. at 483.

<sup>27</sup> See Richard Buck, *Thou Art Condemned: How New Jersey Courts Are Sacrificing Private Landowners on the Altar of Eminent Domain*, 2 RUTGERS J.L. & URB. POL’Y 330, 341 (2005); Hon. Peter G. Sheridan, *Kelo v. City of New London: New Jersey’s Take on Takings*, 37 SETON HALL L. REV. 307, 325–26 (2007).

<sup>28</sup> See Dana E. Sullivan, *Lawyers: Halt Anti-Kelo Stampede*, N.J. LAW., Nov. 14, 2005, at 3.

<sup>29</sup> Elisa Ung, *N.J. Seizes Initiative on Eminent Domain*, PHILA. INQUIRER, Mar. 20, 2006, at B1. For a discussion of several recent cases involving the use of eminent domain in New Jersey, see N.J. DEP’T OF THE PUB. ADVOCATE, IN NEED OF REDEVELOPMENT: REPAIRING NEW JERSEY’S EMINENT DOMAIN LAWS (2007), available at

*Kelo* encouraged political debate and stimulated bipartisan support for eminent domain reform.<sup>30</sup> Like those in many other states, New Jersey legislators and judges were called upon to reevaluate the state's position on takings. Legislators responded by introducing reform bills, while trial courts simultaneously began to limit their previously broad authorization of eminent domain use.<sup>31</sup>

Finally, in June 2007, the Supreme Court of New Jersey decided *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*,<sup>32</sup> marking the first time since *Kelo* that the state's highest court ruled on a case involving eminent domain.<sup>33</sup> In *Gallenthin*, the court held that the "New Jersey Constitution does not permit government redevelopment of private property solely because the property is not used in an optimal manner."<sup>34</sup> Rather, the court concluded, the property must be truly blighted before it can be designated as "in need of redevelopment."<sup>35</sup> In this way, *Gallenthin* restored some vigor to the blighted areas clause and strengthened the growing trend within the state judiciary towards narrowing New Jersey's historically broad allowance of eminent domain.

While the court's decision in *Gallenthin* was a laudable step for New Jersey in its treatment of eminent domain issues, this Comment focuses on why reform legislation remains necessary even after *Gallenthin*. Part II provides a brief history of takings in New Jersey prior to the *Kelo* decision, focusing on the use of eminent domain in the redevelopment context. Part III explores *Kelo*'s impact within the state, including both the public reaction and the governmental response. Part IV describes the facts that gave rise to the dispute in *Gallenthin*, and then discusses what the New Jersey Supreme Court ultimately held. Part V examines various state trial and appellate court cases decided after *Gallenthin* in which the judiciary has continued to constrict the power of municipalities to invoke eminent domain, as well as the State Legislature's failure to pass any meaningful reform legis-

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<http://www.state.nj.us/publicadvocate/home/reports/pdfs/Eminent%20Domain-Color.pdf> [hereinafter IN NEED OF REDEVELOPMENT].

<sup>30</sup> See Robert G. Seidenstein, *Eminent Domain: Trenton Tackling This Thorny Issue*, N.J. LAW., Mar. 6, 2006, at 1, 31; Sullivan, *supra* note 28, at 3; Ung, *supra* note 29, at B1; see also *infra* Part III.B.

<sup>31</sup> See *infra* Part III.B.

<sup>32</sup> 924 A.2d 447 (N.J. 2007).

<sup>33</sup> See Ung, *supra* note 25, at B9. *Gallenthin* was also the first eminent domain case decided by the New Jersey Supreme Court since the State Legislature passed the Local Redevelopment Housing Law in 1992. Jeffrey S. Beenstock, *New Jersey Supreme Court Limits Scope of Redevelopment Law*, N.J. REAL EST. ALERT, June 27, 2007, at 1.

<sup>34</sup> *Gallenthin*, 924 A.2d at 465.

<sup>35</sup> See *id.*

lation since *Gallenthin* was decided. Finally, Part VI attempts to predict the future of jurisprudence in this realm and provides recommendations for immediate legislative action, including the adoption of alternative measures of “just compensation,” a more exacting designation process, and stricter ethical limitations.

## II. EMINENT DOMAIN IN NEW JERSEY PRIOR TO *KELO*

Like its federal counterpart, the New Jersey Constitution provides that “[p]rivate property shall not be taken for public use without just compensation.”<sup>36</sup> This provision imposes two primary limitations on the State’s power to take private property.<sup>37</sup> First, the State may use its eminent domain power to take private property only for a “public use.”<sup>38</sup> Second, the State is required to pay “just compensation” for all property taken through eminent domain.<sup>39</sup>

In New Jersey, the “public use” requirement has been relatively well-settled since the early 1900s. In *Mansfield & Swelt Inc. v. Town of West Orange*,<sup>40</sup> Justice Heher declared:

The state possesses the inherent authority—it antedates the Constitution—to resort, in the building and expansion of its community life, to such measures as may be necessary to secure the essential common material and moral needs. The public welfare is of prime importance; and the correlative restrictions upon individual rights—either of person or of property—are incidents of the social order, considered a negligible loss compared with the resultant advantages to the community as a whole.<sup>41</sup>

While *Mansfield & Swelt* involved a municipality’s exercise of the police power rather than eminent domain,<sup>42</sup> New Jersey courts have since adopted a broad view of the “public use” requirement in accordance with the state supreme court’s declaration in that case.<sup>43</sup>

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<sup>36</sup> Compare N.J. CONST. art. I, ¶ 20 (providing that “[p]rivate property shall not be taken for public use without just compensation”), with U.S. CONST. amend. V (providing that “private property” shall not “be taken for public use, without just compensation”).

<sup>37</sup> See N.J. CONST. art. I, ¶ 20; ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION 47–48, 71 (1997).

<sup>38</sup> See N.J. CONST. art. I, ¶ 20; *Twp. of W. Orange v. 769 Assocs.*, 800 A.2d 86, 90–91 (N.J. 2002) (citing *State v. Heppenheimer*, 23 A. 664 (N.J. 1892)).

<sup>39</sup> See N.J. CONST. art. I, ¶ 20.

<sup>40</sup> 198 A. 225 (N.J. 1938).

<sup>41</sup> *Id.* at 229.

<sup>42</sup> *Id.* at 229–30.

<sup>43</sup> See Sheridan, *supra* note 27, at 326.

The true authority to determine what constitutes a valid public use, however, lies with the legislature. In fact, the authority to provide for the exercise of eminent domain has “been allotted to the legislative branch of the government since the Magna Carta.”<sup>44</sup> Courts have routinely held that “constitutions do not give, but merely place limitations upon, the power of eminent domain which otherwise would be without limitation.”<sup>45</sup> The legislature’s authority to pass enabling legislation is therefore limited “only by the pertinent clauses of [the] Constitution,”<sup>46</sup> and state courts are obliged to defer to all such legislative determinations.

In New Jersey, the Legislature has delegated the eminent domain power to numerous state agencies as well as the state’s various political subdivisions.<sup>47</sup> In the mid-1940s, the Legislature began using its authority to provide for the exercise of eminent domain directed at “slum clearance.”<sup>48</sup> The 1944 Redevelopment Companies Law (RCL), for example, sought to promote redevelopment of areas plagued by substandard and unsanitary living conditions “owing to obsolescence, deterioration and dilapidation of buildings, or excessive land coverage, lack of planning, of public facilities, of sufficient light, air and space, and improper design and arrangement of living quarters.”<sup>49</sup> Similarly, the 1946 Urban Redevelopment Law (URL) was designed to remedy “congested, dilapidated, substandard, unsanitary and dangerous housing conditions.”<sup>50</sup> However, neither the RCL nor the URL was successful in securing private investment because builders feared that the statutes would be declared unconstitutional under the “public use” requirement.<sup>51</sup>

To alleviate the private investors’ concerns, the 1947 Constitutional Convention decided to incorporate “blight” into the New Jer-

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<sup>44</sup> *Abbott v. Beth Israel Cemetery Ass’n*, 100 A.2d 532, 540 (N.J. 1953) (citations omitted).

<sup>45</sup> *Id.*; see also *City of Cincinnati v. Louisville & Nashville R.R. Co.*, 223 U.S. 390, 404–07 (1912).

<sup>46</sup> *Abbott*, 100 A.2d at 540.

<sup>47</sup> *Id.* at 541; see also *Sheridan*, *supra* note 27, at 329–30 (noting that, in addition to municipalities, county improvement authorities and various other agencies in New Jersey possess condemnation powers, including the Port Authority of New York and New Jersey, the Delaware River Port Authority, the New Jersey Economic Development Authority, and the New Jersey Educational Facility Authority).

<sup>48</sup> *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 458 (N.J. 2007).

<sup>49</sup> *Id.* (citing L. 1944, c. 169, § 2).

<sup>50</sup> *Id.* (citing L. 1946, c. 52, § 2).

<sup>51</sup> *Id.* (citing 1 *Proceedings of the New Jersey Constitutional Convention of 1947*, at 744 [hereinafter *Proceedings*]).

sey Constitution.<sup>52</sup> The blighted areas clause, which is unlike any provision in the U.S. Constitution, expressly authorizes the government to seize *blighted property* for redevelopment purposes.<sup>53</sup> Specifically, the provision provides that “[t]he clearance, replanning, development, or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired.”<sup>54</sup>

The Framers of the blighted areas clause intended the provision to enable rehabilitation of the state’s older cities.<sup>55</sup> In particular, the Framers sought to address deterioration in “certain sections” of those cities, which had been causing an “economic domino effect” to the detriment of surrounding properties.<sup>56</sup> Since the provision was ratified, however, New Jersey courts have “liberally authorized the use of eminent domain,”<sup>57</sup> effectively expanding the definition of blight beyond the Framers’ original intent.

*Wilson v. City of Long Branch*<sup>58</sup> illustrates this point. In *Wilson*, the New Jersey Supreme Court upheld an extremely broad definition of “blight” that the Legislature prescribed when it enacted the Blighted Areas Act (BAA).<sup>59</sup> Under the BAA, property could be considered blighted if it met the following criteria: “[a] growing or total lack of proper utilization of areas caused by the condition of title, diverse ownership of real property therein and other conditions, resulting in stagnant and unproductive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.”<sup>60</sup> The court, emphasizing the importance of community redevelopment, found that this definition was acceptable under the New Jersey Constitution.<sup>61</sup> In *Levin v. Township Committee of Bridgewater*,<sup>62</sup> the court expanded the meaning of blight even further, hold-

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<sup>52</sup> *Id.*; see also *McClintock v. City of Trenton*, 219 A.2d 510, 511 (N.J. 1966) (noting that the blighted areas clause “was adopted to remove any doubts with regard to earlier pertinent legislation”).

<sup>53</sup> N.J. CONST. art. VIII, §3, ¶ 1 (1947).

<sup>54</sup> *Id.*

<sup>55</sup> *Gallenthin*, 924 A.2d at 458 (citing *Proceedings*, *supra* note 51, at 744).

<sup>56</sup> *Id.*

<sup>57</sup> See *Sheridan*, *supra* note 27, at 325. But see *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 110–11 (N.J. Super. Ct. Law Div. 1998) (holding that the proposed taking was improper because it primarily served a private developer rather than the public interest).

<sup>58</sup> 142 A.2d 837 (N.J. 1958), *cert. denied*, 358 U.S. 873 (1958).

<sup>59</sup> See *Gallenthin*, 924 A.2d at 458 (citing *Wilson*, 142 A.2d at 842–49).

<sup>60</sup> N.J. STAT. ANN. § 40:55-21.1(e) (repealed 1992).

<sup>61</sup> See *Wilson*, 142 A.2d at 842–49.

<sup>62</sup> 274 A.2d 1, 4 (N.J. 1971).

ing that “the BAA applied to more than just ‘slum clearance.’”<sup>63</sup> More precisely, the *Levin* court held that the Act authorized public agencies to undertake “urban, suburban and rural redevelopment, to acquire land for that purpose and to make it available for redevelopment by private enterprise or by public agencies in accordance with approved redevelopment plans.”<sup>64</sup>

Over the years, the State Legislature has also done its part to expand the definition of “blight.”<sup>65</sup> The most obvious occurrence was when the Legislature repealed the already expansive BAA and replaced it with the Local Redevelopment Housing Law (LRHL) in 1992.<sup>66</sup> Under the LRHL, the governing body of any municipality in the state may designate an area as “in need of redevelopment if, after investigation, notice and hearing,” it concludes, by resolution, that one of eight conditions exist.<sup>67</sup> The designation of an area as “in

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<sup>63</sup> *Gallenthin*, 924 A.2d at 459 (citing *Levin*, 274 A.2d at 4).

<sup>64</sup> *Levin*, 274 A.2d at 4.

<sup>65</sup> See IN NEED OF REDEVELOPMENT, *supra* note 29, at 4.

<sup>66</sup> N.J. STAT. ANN. § 40A:12A-1 to -49 (West 1992).

<sup>67</sup> N.J. STAT. ANN. § 40A:12A-5 provides the eight criteria for redevelopment designations:

- a. The generality of buildings are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living or working conditions.
- b. The discontinuance of the use of the buildings previously used for commercial, manufacturing, or industrial purposes; the abandonment of such buildings; or the same being allowed to fall into so great a state of disrepair as to be untenable.
- c. Land that is owned by the municipality, the county, a local housing authority, redevelopment agency or redevelopment entity, or unimproved vacant land that has remained so for a period of ten years prior to adoption of the resolution, and that by reason of its location, remoteness, lack of means of access to developed sections or portions of the municipality, or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital.
- d. Areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.
- e. A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in 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

need of redevelopment” under any of the eight criteria is equivalent to a “blight” designation under the New Jersey Constitution.<sup>68</sup>

The LRHL’s broad criteria seemingly provide only a slight limitation on the taking of private property for redevelopment purposes.<sup>69</sup> Moreover, once a municipality has determined that certain property is “in need of redevelopment,” that determination carries with it a presumption of validity.<sup>70</sup> A property owner may overcome the presumption of validity by demonstrating that the municipality’s determination was not supported by substantial evidence.<sup>71</sup> Under the weight of this heavy burden, however, property owners have rarely been successful and courts have routinely upheld redevelopment designations.<sup>72</sup>

In the late 1990s, the New Jersey Supreme Court decided two cases that signaled a potential shift in favor of property owners. In *City of Atlantic City v. Cynwyd Investments*,<sup>73</sup> the court “suggested that condemnations resulting in a substantial benefit to private parties demanded heightened scrutiny because ‘the condemnation process involves one of the most awesome powers of government.’”<sup>74</sup> The fol-

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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.) the execution of the actions prescribed in that act for the adoption by the municipality and approval by the New Jersey Urban Enterprise Zone Authority of the zone development plan for the area of the enterprise zone shall be considered sufficient for the determination that the area is in need of redevelopment . . . .
- h. The designation of the delineated area is consistent with smart growth planning principles adopted pursuant to law or legislation.

*Id.*

<sup>68</sup> See *Concerned Citizens of Princeton, Inc. v. Mayor of Princeton*, 851 A.2d 685, 689 (N.J. Super. Ct. App. Div. 2004); *Forbes v. Bd. of Trustees*, 712 A.2d 255, 257–60 (N.J. Super. Ct. App. Div. 1998).

<sup>69</sup> REFORMING THE USE OF EMINENT DOMAIN, *supra* note 26, at 15.

<sup>70</sup> See *Levin v. Twp. Comm. of Bridgewater*, 274 A.2d 1, 18 (N.J. 1971).

<sup>71</sup> *Id.* at 18 (citing *Wilson v. Long Branch*, 142 A.2d 837, 854 (N.J. 1958)).

<sup>72</sup> See *Concerned Citizens of Princeton*, 851 A.2d at 689 (upholding the borough council’s redevelopment designation, finding that there was “substantial credible evidence in the record” supporting the determination that plaintiffs’ properties constituted an area “in need of redevelopment” under the LRHL); *Forbes*, 712 A.2d at 257 (holding that the record provided substantial evidence to support the municipality’s decision to create a “central business district redevelopment area” and to adopt a redevelopment plan for that area).

<sup>73</sup> 689 A.2d 712 (N.J. 1997).

<sup>74</sup> See *Buck*, *supra* note 27, at 347–48 (citing *Cynwyd*, 689 A.2d at 721).

lowing year, in *Casino Reinvestment Development Authority v. Banin*,<sup>75</sup> a state superior court held that, despite the usual deference afforded redevelopment designations, a proposal by Donald Trump to build a parking lot for a new hotel and casino in Atlantic City did not satisfy the “public use” requirement.<sup>76</sup> The purpose of the taking, the court found, was not clear at the time the State sought to condemn the property.<sup>77</sup> Perhaps more importantly, the court emphasized that the proposed taking was invalid because the private benefit clearly overwhelmed the public benefit.<sup>78</sup>

Unfortunately, however, the property owners’ success in *Cynwyd* and *Banin* did not translate into more protective rulings for future plaintiffs. In fact, in upholding the property owners’ challenge in *Banin*, the court rejected the proposition that the *Cynwyd* court established “a new ‘heightened scrutiny’ standard of review.”<sup>79</sup> In 2002, the New Jersey Supreme Court reaffirmed this denial of a heightened standard in *Township of West Orange v. 769 Associates*.<sup>80</sup> The court in *769 Associates* reverted back to a broad interpretation of the “public use” requirement and suggested that it would not interfere with decisions to use eminent domain in the absence of “fraud, bad faith or manifest abuse.”<sup>81</sup>

### III. FROM *KELO* TO *GALLENTHIN*

Part II of this Comment suggests that New Jersey “liberally authorized the use of eminent domain”<sup>82</sup> for a wide range of public uses and benefits even prior to *Kelo*. The Supreme Court’s decision in *Kelo*, therefore, should not have come as a surprise to New Jersey residents.<sup>83</sup> But “[d]espite hundreds of similar takings in New Jersey

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<sup>75</sup> 727 A.2d 102 (N.J. Super. Ct. Law Div. 1998).

<sup>76</sup> *Id.* at 103–11.

<sup>77</sup> *Id.* at 111.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 104.

<sup>80</sup> 800 A.2d 86 (N.J. 2002). Specifically, the court stated, “Notwithstanding that the ‘heightened scrutiny’ language in *Cynwyd* . . . is dicta, . . . we have never held that the standard is other than the manifest abuse of discretion test.” *Id.* at 94.

<sup>81</sup> *Id.* at 90 (citing *City of Trenton v. Lezner*, 109 A.2d 409, 413 (N.J. 1954)).

<sup>82</sup> Sheridan, *supra* note 27, at 325; see also Edward D. McKirdy, *The New Eminent Domain: Public Use Defense Vanishing in Wake of Growing Privatization of Power*, 155 N.J. L.J. 1145, 1145 (1999) (noting the evolution of “public use” from a narrow definition to a broad definition allowing governments to transfer land from one private owner to another for use in profit-making projects).

<sup>83</sup> See Sullivan, *supra* note 28, at 3 (noting redevelopment lawyers’ recognition that the *Kelo* decision was “in line with previous rulings” and reflected what has “been happening for decades—without much fuss”); Edward McManimon, *Local Govern-*

over the years,”<sup>84</sup> the *Kelo* decision served as the catalyst that finally brought eminent domain issues to the attention of New Jersey residents. The Court’s ruling prompted a significant public outcry both in New Jersey and throughout the nation,<sup>85</sup> as well as an immediate response from various state courts and legislatures.<sup>86</sup> In New Jersey, the judiciary was quick to respond to *Kelo*’s potentially sweeping mandate. Legislators, on the other hand, failed to pass any new legislation dealing with eminent domain issues, notwithstanding the apparent bipartisan support for reform.

A. *Public Reaction to Kelo*

Justice O’Connor’s dissent had a particularly significant impact on the public reaction to *Kelo*. According to Justice O’Connor, the Court’s decision eliminated a fundamental limitation on the government’s power to use eminent domain.<sup>87</sup> In the past, Justice O’Connor asserted, the Court upheld takings for subsequent transfer to private persons only in limited circumstances.<sup>88</sup> In her view, however, the majority ruling in this case gave the government authority to seize any private property for transfer to another private owner based solely on “predicted” and “incidental” benefits to the public—that is, so long as the property *might* be used “in a way the legislature deems more beneficial to the public.”<sup>89</sup> Justice O’Connor concluded that if such a broad justification would suffice, “then the words ‘for public

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*ments Need the Power of Eminent Domain*, N.J. MUNICIPALITIES, Oct. 2005, at 68–70, available at [http://www.njslom.org/magart1005\\_page68.html](http://www.njslom.org/magart1005_page68.html) (stating that the adverse reaction to *Kelo* was surprising “in light of the long and clear history of the use of both redevelopment and eminent domain in revitalizing . . . blighted properties”).

<sup>84</sup> Dana E. Sullivan, *Eminent Domain: Milgram Joins Chorus for Reform*, N.J. LAW., Aug. 13, 2007, at 3.

<sup>85</sup> See *infra* Part II.A.

<sup>86</sup> See *infra* Part II.B.

<sup>87</sup> *Kelo v. City of New London*, 545 U.S. 469, 494 (2005) (O’Connor, J., dissenting).

<sup>88</sup> *Id.* at 497–98. More specifically, Justice O’Connor argued that private property rights ought to prevail over eminent domain unless the condemnation fits within one of three categories. *Id.* First, the government can condemn private property for public ownership, such as for building a road or a public school. *Id.* Second, the government can transfer property from one private party to another, so long as the property is actually used by the public. *Id.* A condemnation in which property is transferred to a common carrier (such as a railroad), or to a public utility (such as a water, gas, or electricity provider) would satisfy the actual public use test. *Id.* Finally, the government is permitted to condemn private property if “the extraordinary, pre-condemnation use of the targeted property inflicts affirmative harm on society.” *Id.* at 500. According to Justice O’Connor, New London’s redevelopment plan failed to fit into any of these categories. *Id.*

<sup>89</sup> *Id.* at 494, 501.

use' do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power."<sup>90</sup> Under the majority's decision, she declared, "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."<sup>91</sup>

In *Kelo*'s wake, property owners throughout the United States began to echo the concerns articulated in Justice O'Connor's dissent.<sup>92</sup> In New Jersey, residents and business owners expressed concerns about the frequency in which private property was "being grabbed . . . at a low cost and turned over to a developer."<sup>93</sup> The Castle Coalition, which monitors government takings throughout the nation, ranked New Jersey among the worst eminent domain abusers based on its finding that nearly seventy towns had established redevelopment areas between 2003 and 2006.<sup>94</sup> According to another source, nearly one thousand redevelopment projects were ongoing in New Jersey when *Kelo* was decided in 2005.<sup>95</sup> With the State quickly earning a reputation for what some called "redevelopment abuse,"<sup>96</sup> the New Jersey Coalition Against Eminent Domain Abuse called for a moratorium on eminent domain use for economic redevelopment.<sup>97</sup>

#### B. Governmental Response to *Kelo*

Legislators, judges, and politicians clearly heard the public outcry, which resulted in bipartisan support for eminent domain reform both at the state level and at the federal level.<sup>98</sup> After *Kelo*, Republi-

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<sup>90</sup> *Id.* at 501.

<sup>91</sup> *Id.* at 503.

<sup>92</sup> See, e.g., Kenton Robinson, *Protesters from New Jersey to Maine Voice Displeasure*, THE DAY.COM, July 6, 2005, available at [http://www.housegop.state.ct.us/eminentdomain/day\\_article\\_07062005\\_002.htm](http://www.housegop.state.ct.us/eminentdomain/day_article_07062005_002.htm) (last visited Aug. 12, 2008). In the weeks following the *Kelo* decision, protestors from various states gathered outside New London's City Hall to voice their disapproval of the Supreme Court's decision. *Id.* Property owner Steve Pudlow expressed his fear that "no property owner is safe. If a Hooters can pay more taxes, then you can be tossed out to make room for Hooters." *Id.* Kathleen Maroney, a New York City resident, stated that "[t]he American Dream is now shattered." *Id.*

<sup>93</sup> Seidenstein, *supra* note 30, at 1.

<sup>94</sup> Ung, *supra* note 29, at B1.

<sup>95</sup> See Sullivan, *supra* note 28, at 3.

<sup>96</sup> See Seidenstein, *supra* note 30, at 31; Ung, *supra* note 29, at B1; see also IN NEED OF REDEVELOPMENT, *supra* note 29, at 4 (identifying "recurring abuses" in eminent domain cases).

<sup>97</sup> Seidenstein, *supra* note 30, at 31.

<sup>98</sup> See Seidenstein, *supra* note 30, at 31 (asserting that the eminent domain issue is "one that unites elements of the right and the left"); Sullivan, *supra* note 28, at 3 (noting that *Kelo* "triggered a public outcry that was definitely heard by politicians")

cans championed stricter eminent domain criteria based on “the sanctity of private property” rights.<sup>99</sup> At the same time, Democrats supported restrictions as a means to protect the poor and the elderly, who happen to own a significant portion of the property taken by the government for redevelopment.<sup>100</sup> Due to the overwhelming sentiment in favor of reform, it took Congress less than six months to enact the first piece of legislation designed to limit the effects of the Supreme Court’s decision in *Kelo*.<sup>101</sup>

Some state legislatures similarly responded to *Kelo* by imposing restraints on the use of eminent domain for private redevelopment.<sup>102</sup> Others opted for an outright ban on takings for this purpose.<sup>103</sup> In New Jersey, legislators were not so quick to act. While both the Assembly and the Senate considered several bills introduced in direct

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and that the House of Representatives passed a bill disallowing federal funds for direct or indirect use for projects using eminent domain for private redevelopment by an overwhelming 376-38 vote); Duncan Currie, *Life After Kelo*, AMERICAN, June 8, 2007, available at <http://www.american.com/archive/2007/june-0607/life-after-kelo> (stating that the eminent domain debate “defies polarization and party line bickering”); Kenneth Harney, *House Bill Would Limit Taking of Private Land*, BALTIMORE SUN, Nov. 6, 2005, at 1L; Greg Simmons, *Bipartisan Support for Eminent Domain Reform*, FOX NEWS, Sept. 20, 2007, available at <http://www.foxnews.com/story/0,2933,169926,00.html>; Ung, *supra* note 29, at B1.

<sup>99</sup> See Seidenstein, *supra* note 30, at 31. But see Currie, *supra* note 98 (noting that “not all Republicans have joined the pro-reform chorus” as the “big business wing tends to prefer broad eminent domain powers for municipalities,” which allow “lucrative redevelopment schemes” to move forward).

<sup>100</sup> See Seidenstein, *supra* note 30, at 31; see also Clarence Page, *Eminent Domain Land Grabs Hit the Poor, Minorities Hardest*, BALTIMORE SUN, Oct. 5, 2007, at 15A (referencing an Institute for Justice study finding that displacement by “eminent domain tends to hit the poor, less well-educated and nonwhite”).

<sup>101</sup> See Michels, *supra* note 16, at 544–45. An amendment to the Transportation, Treasury, Housing and Urban Development, The Judiciary, The District of Columbia, and Independent Agencies Appropriations Act, Pub. L. No. 109-115, 119 Stat. 2396 (2005), signed into law by President Bush on November 30, 2005, disallows the use of federal transportation funds for projects that involve taking private property for economic redevelopment and that primarily benefit private entities. *Id.* (citing Pub. L. No. 109-115, § 726, 119 Stat. 2396, 2494–2495).

<sup>102</sup> See, e.g., TEX. GOV’T CODE ANN. § 2206.0001 (Vernon 2005) (prohibiting parties entrusted with the eminent domain power from taking private property for the benefit of a particular private party).

<sup>103</sup> See, e.g., Currie, *supra* note 98. After *Kelo*, Florida outlawed the use of eminent domain for any kind of private development and South Carolina residents voted for a constitutional amendment that banned private-to-private transfers and tightened criteria for designating property as blighted. *Id.* New Hampshire voters similarly agreed that “no part of a person’s property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property.” *Id.* In addition, South Dakota outlawed the use of eminent domain for private redevelopment under any circumstances. REFORMING THE USE OF EMINENT DOMAIN, *supra* note 26, at 4.

response to *Kelo*,<sup>104</sup> none of the proposed statutes gained enough support to be enacted.

To the contrary, New Jersey trial courts immediately began to limit the judiciary's previously broad authorization of eminent domain use. Shortly after the Supreme Court decided *Kelo*, the state judiciary began to shift from a long line of cases ruling in favor of the government's power<sup>105</sup> to a narrower view of public use and blight—one more protective of New Jersey property owners.<sup>106</sup> In April 2007, the New Jersey Supreme Court was finally called upon to examine a case involving eminent domain.

#### IV. THE *GALLENTHIN* DECISION

The New Jersey Supreme Court's June 2007 decision in *Gallenthin* marked the first time since *Kelo*, as well as the first time since the State Legislature passed the LRHL in 1992, that the state's highest court ruled on an eminent domain issue.<sup>107</sup> Observers wondered whether the court would continue the new superior court trend favoring property owners or revert back to the judiciary's pre-*Kelo* laissez-faire approach. As discussed below, the former approach would prevail.

##### A. *The Facts*

Plaintiffs Gallenthin Realty Development, Inc., George A. Gallenthin III, and Cindy Gallenthin owned a sixty-three-acre parcel in the Borough of Paulsboro with clear, quieted title.<sup>108</sup> The land, which was comprised mostly of undeveloped open space, had histori-

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<sup>104</sup> See *infra* Part V.B.; Geneslaw & Peticolas, *supra* note 25, at 1; Ung, *supra* note 29, at B1.

<sup>105</sup> See Sheridan, *supra* note 27, at 331; *supra* text accompanying notes 57–81.

<sup>106</sup> See, e.g., ERETC v. City of Perth Amboy, 885 A.2d 512, 520 (N.J. Super. Ct. App. Div. 2005) (reversing redevelopment designation because the planning board's decision was not supported by substantial evidence); LBK Assocs. v. Borough of Lodi, Docket No. BER-8766-03 (N.J. Super. Ct. Law Div. 2005) (invalidating redevelopment designation because there existed "a complete lack of detailed specific proofs as to why [the] property should be designated as in need of redevelopment"); Twp. of Bloomfield v. 110 Washington St. Assocs., Docket No. ESX-L-2318-05, at 6 (N.J. Super. Ct. App. Div. 2005) (dismissing the township's redevelopment designation in part because the record "is devoid of any finding that the property is detrimental to the public health, safety or welfare").

<sup>107</sup> See Beenstock, *supra* note 33, at 1; Ung, *supra* note 25, at B9.

<sup>108</sup> Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447, 449–50 (N.J. 2007).

cally been used as a deposit site for dredging materials.<sup>109</sup> Besides using the property sporadically as a dredging depot, plaintiffs leased portions of the property in 1997 and 1998 to an environmental clean-up organization that used the property for river access and storage, as well as an employee parking lot.<sup>110</sup> In addition, plaintiffs harvested a wild-growing reed, used as cattle feed and recognized by the Environmental Protection Agency as actively neutralizing soil pollutants, from the property three times a year beginning in 1997.<sup>111</sup>

Despite the fact that the property was being used in this way, Paulsboro officials sought to designate the Gallenthin property as “in need of redevelopment.” In April 2003, the Borough’s Planning Board held a public hearing pursuant to the LRHL to determine whether such a designation would be proper.<sup>112</sup> While the Board’s professional planner and the plaintiffs’ planning expert provided conflicting testimony, the Board ultimately concluded that the property should be included in the previously established BP/Dow Redevelopment Area.<sup>113</sup> Paulsboro’s Governing Board adopted the Planning Board’s recommendation in May 2003, officially designating the Gallenthin property as part of an area “in need of redevelopment” and thereby subjecting it to the Borough’s eminent domain power.<sup>114</sup>

Plaintiffs timely filed a complaint in lieu of prerogative writs, challenging the redevelopment designation.<sup>115</sup> The Law Division dismissed the complaint, however, finding that Paulsboro “meticulously adhered” to the LRHL’s procedural requirements and that the inclusion of the Gallenthin property in the redevelopment plan “was supported by substantial evidence.”<sup>116</sup> The Appellate Division affirmed, prompting plaintiffs to petition the New Jersey Supreme Court for certification.<sup>117</sup> Upon the court’s grant of certification,<sup>118</sup>

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<sup>109</sup> *Id.* at 450. Beginning in 1902, the U.S. Army Corps of Engineers made various dredging deposits on the Gallenthin property. *Id.* While the last deposit was made in 1963, plaintiffs contended that they could still use the property for dredging, a periodic activity that typically “occurs every thirty-five years or so as the need arises.” *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 452.

<sup>113</sup> *Id.* The BP/Dow Redevelopment Area consisted of a British Petroleum storage facility bordering the Gallenthin property as well as an adjacent property owned by Dow/Essex Chemical. *Id.*

<sup>114</sup> *Gallenthin*, 924 A.2d at 453.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 453–54.

<sup>118</sup> *Id.* at 454 (citing *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 909 A.2d 727, 727 (N.J. 2006)).

plaintiffs challenged the constitutionality of New Jersey Statutes Annotated section 40A:12A-5(e) as applied to their property and further maintained that their property could not be included as part of the larger BP/Dow Redevelopment Area “under the guise that the parcel is necessary for the overall redevelopment initiative.”<sup>119</sup> Moreover, plaintiffs claimed that both lower courts incorrectly applied the substantial evidence standard of review.<sup>120</sup>

*B. The New Jersey High Court’s Decision*

The New Jersey Supreme Court first considered whether Paulsboro’s interpretation of section 40A:12A-5(e) violated the New Jersey Constitution.<sup>121</sup> Plaintiffs argued that the designation of their property as “in need of redevelopment” under subsection (e) was untenable because the constitutional requirement of “blight” was not satisfied.<sup>122</sup> According to the plaintiffs, “blight” carries negative connotations that their property did not possess.<sup>123</sup> To the contrary, Paulsboro argued that “the [c]onstitution delegates responsibility for defining the term ‘blighted area’ to the Legislature, which provided clear guidance by enacting the Local Redevelopment and Housing Law.”<sup>124</sup> The town asserted that, under the plain language of subsection (e), its Planning Board had the authority to designate property as “in need of redevelopment” so long as it was “stagnant or not fully productive.”<sup>125</sup>

At the outset, the court recognized that the New Jersey Constitution’s blighted areas clause authorized the Legislature to enact the LRHL.<sup>126</sup> The LRHL, in turn, delegates to municipalities the power to designate property as “in need of redevelopment.”<sup>127</sup> In designating the Gallenthin property in this case, Paulsboro relied on section 40A:12A-5(e) of the LRHL, which permits a municipality to classify land as “in need of redevelopment” if it finds

a growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein *or other conditions*, resulting in a stagnant *or* not fully

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<sup>119</sup> *Id.*

<sup>120</sup> *Gallenthin*, 924 A.2d at 454.

<sup>121</sup> *Id.* at 456.

<sup>122</sup> *Id.* at 454.

<sup>123</sup> *Id.* at 454.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Gallenthin*, 924 A.2d at 455.

<sup>127</sup> *Id.* The municipality can then use eminent domain to acquire property designated as “in need of redevelopment.” See *supra* text accompanying notes 66–72.

productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.<sup>128</sup>

In support of its position, Paulsboro argued that the phrase “other conditions” in the statute refers to any possible condition and that the “stagnant *or* not fully productive” language creates two alternative criteria, each sufficient to warrant a redevelopment designation.<sup>129</sup>

Writing for a unanimous court, Chief Justice Zazzali observed that the blighted areas clause “operates as both a grant and limit on the State’s redevelopment authority.”<sup>130</sup> After a long discussion regarding the meaning of “blight,” Chief Justice Zazzali concluded that while its meaning has evolved, the term “still has a negative connotation” and “retains its essential characteristic: deterioration or stagnation that negatively affects surrounding property.”<sup>131</sup> This articulation, he stated, is consistent with other states’ statutory definitions of blight.<sup>132</sup> Specifically, Chief Justice Zazzali noted that only eight states “permit local governments to classify property as ‘blighted’ based on economic evaluation of the property’s use,”<sup>133</sup> and even the courts within those jurisdictions generally hold that a lack of “fully productive” use, without more, is insufficient to condemn the property as blighted.<sup>134</sup>

The court found that Paulsboro’s interpretation of section 40A:12A-5(e) would equate “blighted areas” to areas that are not operated in an optimal manner.<sup>135</sup> Under such an “all-encompassing definition,” the court observed, most property in the state would be eligible for redevelopment.<sup>136</sup> Chief Justice Zazzali concluded, therefore, that the term’s meaning obviously could not extend so far and that Paulsboro’s interpretation of section 40A:12A-5(e) was unconstitutional.<sup>137</sup>

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<sup>128</sup> *Gallenthin*, 924 A.2d at 455.

<sup>129</sup> *Id.* at 454.

<sup>130</sup> *Id.* at 456.

<sup>131</sup> *Id.* at 459.

<sup>132</sup> *Id.* (citing Luce, *supra* note 10, at 394).

<sup>133</sup> *Id.* at 459–60 (citing Luce, *supra* note 10, at 401, 403).

<sup>134</sup> *Gallenthin*, 924 A.2d at 460 (citing Luce, *supra* note 10, at 464); *see, e.g.*, Sweetwater Valley Civic Ass’n. v. Nat’l City, 555 P.2d 1099, 1103 (Cal. 1976) (holding that “it is not sufficient to merely show that the area is not being put to its optimum use, or that the land is more valuable for other uses”).

<sup>135</sup> *Gallenthin*, 924 A.2d at 460.

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

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

Having found the Borough's interpretation of the provision unconstitutional, the court next sought to determine whether the section 40A:12A-5(e) is "reasonably susceptible" to any interpretation that complies with the New Jersey Constitution. The Legislature provided eight criteria for declaring property "in need of redevelopment" under section 40A:12A-5.<sup>138</sup> While recognizing that there is "some degree of overlap between those criteria," the court found that each subsection "provides, at least to a degree, an independent basis for designating the property as 'in need of redevelopment.'"<sup>139</sup> Under Paulsboro's interpretation of subsection (e), however, the court found that subsections (b) and (c) would be entirely subsumed, as land that qualifies for redevelopment under (b) or (c) would also qualify as "not fully productive" under subsection (e).<sup>140</sup> The court, seeking to avoid rendering any part of the statute meaningless,<sup>141</sup> identified yet another reason to reject the Borough's interpretation of the statute.<sup>142</sup>

Consequently, Chief Justice Zazzali asserted that the phrase "or other conditions" should be interpreted in accordance with the principle of statutory construction known as *ejusdem generis*: "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."<sup>143</sup> Under that principle, the chief justice found that the phrase, as used in section 40A:12A-5(e), "refers to circumstances of the same or like piece as conditions of title or diverse ownership."<sup>144</sup> The phrase is not, the chief justice proclaimed, "a universal catch-all that refers to any eventuality."<sup>145</sup>

Moreover, the court asserted that the phrase "stagnant or not fully productive" does not create two alternative criteria for making a redevelopment designation as the Borough suggested.<sup>146</sup> Rather, the term "not fully productive" elaborates on "the operative criterion,

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<sup>138</sup> *Id.* (citing *Concerned Citizens of Princeton, Inc. v. Mayor of Princeton*, 851 A.2d 685, 685 (N.J. Super. Ct. App. Div. 2004)). For a list of the eight criteria, see *supra* note 67.

<sup>139</sup> *Gallenthin*, 924 A.2d at 461.

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

<sup>141</sup> *Id.* (citing *State v. Reynolds*, 592 A.2d 194, 196 (N.J. 1991)).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 461–62 (citing 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:17 (6th ed. 2000)).

<sup>144</sup> *Id.* at 462.

<sup>145</sup> *Gallenthin*, 924 A.2d at 462.

<sup>146</sup> *Id.*

that is, ‘stagnant.’”<sup>147</sup> Thus, the court held that the New Jersey Constitution “does not permit government redevelopment of private property solely because the property is not used in an optimal manner,” and subsection (e) applies “only to property that has become stagnant and unproductive because of issues of title, diversity of ownership, or other conditions of the same kind.”<sup>148</sup>

Because Paulsboro designated the Gallenthin property as “in need of redevelopment” based solely on its belief that plaintiffs were not utilizing the property in a fully productive manner, the court invalidated the designation as beyond the scope of subsection (e).<sup>149</sup> The court further noted that the record lacked evidence that the Gallenthin property was an integral part of the larger BP/Dow Redevelopment Area.<sup>150</sup> Chief Justice Zazzali suggested that if such evidence were present, however, the result in this case may have been different.<sup>151</sup>

#### V. AFTER *GALLENTHIN*

The LRHL relaxed the “blighted” standard established by the New Jersey Constitution by providing broad criteria that warrant designation of an area as “in need of redevelopment.”<sup>152</sup> In *Gallenthin*, however, the New Jersey Supreme Court continued the state judiciary’s recent trend toward restricting eminent domain use and pronounced that the LRHL provisions must be interpreted in a way that is consistent with the constitution’s mandate. According to the court, property is not blighted—and therefore cannot be taken for redevelop-

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 465.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Gallenthin*, 924 A.2d at 464. The court also responded in dicta to the parties’ concerns about the appropriate standard of review for municipal redevelopment designations. *See id.* at 465. While the plaintiffs argued that the designation in this case was not supported by substantial evidence because it was based on the net opinion of the Borough’s expert, Paulsboro asserted that the lower courts correctly applied the substantial evidence standard. *Id.* at 464. Recognizing that it need not address the sufficiency of the evidence on the record, the court offered “brief comments regarding the appropriate standard of review for the future guidance of planning boards and courts.” *Id.* at 465. Specifically, the court noted that while municipal redevelopment designations are entitled to judicial deference so long as they are supported by substantial evidence, the standard is not satisfied if a challenged designation is supported only by the net opinion of the municipality’s expert. *Id.* (citing N.J. STAT. ANN. § 40A:12A-6(b)(5)). Generally, the court declared, a municipality must establish a record containing “more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met.” *Id.*

<sup>152</sup> *See* N.J. STAT. ANN. § 40A:12A-5 (West 1992).

opment purposes—unless there is “deterioration or stagnation that has a decadent effect on surrounding property.”<sup>153</sup>

While the eminent domain power is limited somewhat by *Gallenthin*'s interpretation of the “blight” requirement, the government still maintains a great deal of flexibility in making redevelopment determinations. Ronald S. Goldsmith, who filed an amicus brief in *Gallenthin* for the New Jersey State League of Municipalities, recognized as much, stating that the court's holding “does not significantly hamper redevelopment as long as municipalities base their designations on appropriate sections of the Local Redevelopment and Housing Law.”<sup>154</sup> To be sure, the *Gallenthin* decision did not invalidate the LRHL as a whole. Nor did it invalidate any of its provisions. The *Gallenthin* court, in fact, addressed only one subsection of the statute—namely, the “unproductive use” criteria set forth in section 40A:12A-5(e).<sup>155</sup> In announcing the court's decision, Chief Justice Zazzali also confirmed that a municipality will still be permitted to designate unblighted property as “in need of redevelopment” when there is evidence that it is necessary for the redevelopment of a larger blighted area.<sup>156</sup> As such, *Gallenthin* left several issues undecided. The following sections examine how New Jersey courts and legislators have reacted to *Gallenthin* in light of these unanswered questions.

#### A. *The Judiciary's Reaction to Gallenthin*

Since the New Jersey Supreme Court decided *Gallenthin* in June 2007, several lower courts have issued opinions following the high court's lead. The trend in both trial and appellate courts has been to limit municipalities' power to invoke eminent domain.

##### 1. Freedman's Bakery

In *HJB Associates, Inc. v. Council of Belmar*,<sup>157</sup> an Appellate Division court set out to determine whether Belmar's designation of Freedman's Bakery as “in need of redevelopment” was supported by substantial, credible evidence.<sup>158</sup> With regard to the plaintiff's property,

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<sup>153</sup> *Gallenthin*, 924 A.2d at 460.

<sup>154</sup> Robert G. Seidenstein, *Eminent Domain: 'Blight' Loses its Bite*, N.J. LAW., June 18, 2007, at 43.

<sup>155</sup> See Beenstock, *supra* note 33, at 2.

<sup>156</sup> *Gallenthin*, 924 A.2d at 464 (“Paulsboro does not present a situation where the subject property is in any way connected to a larger redevelopment plan. If that were the case, the result may have been different.”).

<sup>157</sup> No. A-6510-05T5, 2007 WL 2005173 (N.J. Super. Ct. App. Div. July 11, 2007) (per curiam).

<sup>158</sup> *Id.* at \*1–2.

the Borough's consultant found a "faulty and obsolete layout" that purportedly satisfied the criteria set forth in section 40A:12A-5(d).<sup>159</sup> The consultant also reported that contaminated soil on the property satisfied subsection (e) under the "other conditions" classification.<sup>160</sup> The Borough's Planning Board ultimately adopted these findings and designated several properties, including the plaintiff's bakery, as "in need of redevelopment."<sup>161</sup>

While the trial court dismissed the property owner's complaint challenging the Borough's designation, the Appellate Division reversed.<sup>162</sup> Quoting *Gallenthin*, the court noted that the New Jersey Constitution "does not permit government redevelopment of private property solely because the property is not used in an optimal manner,"<sup>163</sup> but rather limits government redevelopment to "blighted areas" only.<sup>164</sup> The appellate panel held, in light of the *Gallenthin* decision, that the Borough failed to establish the criteria required under section 40A:12A-5(d) or (e).<sup>165</sup> On claims that the plaintiff's property satisfied subsection (d), the court found that the Borough failed to provide proof that conditions on the property were "detrimental to the safety, health, morals or welfare of the community."<sup>166</sup> Similarly, the panel concluded that the presence of soil contamination was insufficient to warrant a redevelopment designation as an "other condition" under subsection (e).<sup>167</sup> Therefore, the court reversed the Law

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<sup>159</sup> *Id.* at \*1. Recall that subsections (d) and (e) allow a municipality to declare property in need of redevelopment if the following criteria are met:

- 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.

N.J. STAT. ANN. § 40A:12A-5(d)-(e) (West 1992).

<sup>160</sup> *HJB Assocs.*, 2007 WL 2005173, at \*1.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at \*2.

<sup>163</sup> *Id.* at \*3 (citation omitted).

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

<sup>165</sup> *Id.*

<sup>166</sup> *HJB Assocs.*, 2007 WL 2005173, at \*3.

<sup>167</sup> *Id.* at \*4.

Division's dismissal and invalidated the Borough's resolution designating the plaintiff's property as "in need of redevelopment."<sup>168</sup>

## 2. The *Mulberry Street* Decision

In *Mulberry St. Area Property Owner's Group v. City of Newark*,<sup>169</sup> a group of residents challenged Newark's declaration that nine blocks—including 166 lots located along Mulberry Street—constituted an area "in need of redevelopment" under the LRHL.<sup>170</sup> After an extensive recitation of the material facts, Judge Marie P. Simonelli opined that the City of Newark "should be entitled to utilize the tools of redevelopment to allow it to once again take its place as the State's most important and prominent City."<sup>171</sup> However, she continued, the City was not permitted to do so in the way it had attempted to in this case.<sup>172</sup>

Relying heavily on *Gallenthin*, Judge Simonelli noted that "the constitutional requirement of blight is not met where the sole basis for the redevelopment is that the property is 'not fully productive.'"<sup>173</sup> Here, the court found that Newark had declared the entire Mulberry Street area in need of redevelopment under section 40A:12A-5(e) based solely on its belief that most properties in the area were "not properly utilized" and could be "put to better use."<sup>174</sup> Furthermore, the court asserted that issues of "title, diversity of ownership or other conditions of the same kind" did not apply to the Mulberry Street area, nor was there any evidence that the area was connected to or necessary for rehabilitation of any larger blighted area.<sup>175</sup> The court concluded that, under such circumstances, Newark's designation did

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

<sup>169</sup> No. ESX-L-9916-04 (N.J. Super. Ct. Law Div. July 19, 2007).

<sup>170</sup> *Id.* at 1–2. Controversy regarding the Mulberry Street area began even before the United States Supreme Court decided *Kelo*. By declaring the neighborhood in need of redevelopment in November 2004, the Newark City Council cleared the way for a \$550 million project, which originally included 2,000 condominium units and 180,000 square feet of retail space near the recently opened Prudential Center. See Marc Ferris, *Redevelopment: A Heated Dispute in Newark*, N.Y. TIMES, Sept. 5, 2004, § 14NJ, at 6; Jeffrey C. Mays, *Newark Targeting Mulberry St. for Condominium Mega-Project*, STAR-LEDGER (Newark, N.J.), Nov. 4, 2004, at 28.

<sup>171</sup> *Mulberry St.*, No. ESX-L-9916-04, at 59.

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

<sup>173</sup> *Id.* (citation omitted).

<sup>174</sup> *Id.* at 60.

<sup>175</sup> *Id.* at 61–62.

“not meet the constitutional requirement of blight” and must therefore be invalidated.<sup>176</sup>

### 3. Evans and Rivco Group

Similarly, in *Evans v. Township of Maplewood*,<sup>177</sup> plaintiffs Carolyn Evans and Rivco Group, LLC, sought to set aside the inclusion of their properties in an area previously designated as “in need of redevelopment.”<sup>178</sup> Specifically, the plaintiffs argued that the inclusion of their lots was “arbitrary and capricious” because the Township’s determination was not based on substantial evidence in the record.<sup>179</sup> Evans and Rivco further argued that limits on the exercise of eminent domain established in *Gallenthin*, which was decided after the trial in their case, ought to prevent Maplewood from including their unblighted properties in its redevelopment area under section 40A:12A-5(e).<sup>180</sup> Maplewood and its Planning Board attempted to distinguish *Gallenthin* and asserted that, even if *Gallenthin* prevented inclusion under subsection (e), the plaintiffs’ properties could be included under other subsections of the LRHL that the *Gallenthin* court failed to address.<sup>181</sup>

Notwithstanding the deference given to a municipality’s redevelopment designation, the Law Division held that “designating the Evans and Rivco properties as in need of redevelopment [was] not permissible under the LRHL as limited by *Gallenthin*.”<sup>182</sup> In Part III of the decision, Judge Donald Goldman attempted to parse out the meaning of “Section 5 after *Gallenthin*.”<sup>183</sup> Because the New Jersey Constitution authorizes the exercise of eminent domain for redevelopment only in blighted areas, Judge Goldman noted, the Legislature could not have authorized municipalities to take properties that are not blighted themselves and are not necessary for redevelopment of a

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<sup>176</sup> *Id.* at 61. For reactions to Judge Simonelli’s decision in *Mulberry Street*, see Andrew Jacobs, *Judge Stops Newark Redevelopment Project*, N.Y. TIMES, July 20, 2007, at B3. See also Katie Wang, *Setback for Newark Condo Project*, STAR-LEDGER (Newark, N.J.), July 20, 2007, at 19 [hereinafter *Setback for Newark*]; Katie Wang, *In Newark, a Question of Blight or Wrong*, STAR-LEDGER (Newark, N.J.), Aug. 5, 2007, at 29 [hereinafter *Question of Blight*].

<sup>177</sup> No. L-6910-06 (N.J. Super. Ct. Law Div. July 27, 2007).

<sup>178</sup> *Id.* at 1.

<sup>179</sup> *Id.* at 1–2.

<sup>180</sup> *Id.* at 2.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 5–6; see also Reginald Roberts, *Property Owners Prevail in Lawsuit*, STAR-LEDGER (Newark, N.J.), July 31, 2007, at 31.

<sup>183</sup> *Evans*, No. L-6910-06, at 12.

larger blighted area.<sup>184</sup> The court held that, in this case, Maplewood's determination that the plaintiffs' properties met the statutory criteria for redevelopment under section 5 "was not based on the presence of any condition reasonably described as 'blight.'"<sup>185</sup> Finding no evidence indicating that the properties were dilapidated or beyond repair, or that they had a detrimental effect on surrounding properties, Judge Goldman invalidated the Township's redevelopment designation.<sup>186</sup>

#### 4. The *LBK* Case

In *LBK Associates, LLC v. Borough of Lodi*,<sup>187</sup> the Appellate Division affirmed yet another trial court decision invalidating a redevelopment designation. A resolution passed by the Borough of Lodi Planning Board recommended that certain properties owned by the plaintiffs, including two trailer parks and several small businesses, be designated for redevelopment.<sup>188</sup> The Mayor and Council adopted the board's recommendations, which prompted the plaintiffs to file complaints in lieu of prerogative writs.<sup>189</sup> The trial judge invalidated the Borough's redevelopment designation, finding that it was unsupported by substantial evidence in the record and therefore constituted "arbitrary, capricious and unreasonable" action by the board.<sup>190</sup>

The Appellate Division affirmed, finding no error in the trial judge's determinations.<sup>191</sup> Citing *Gallenthin*, a three-judge panel found that after the plaintiffs had demonstrated a lack of substantial evidence in support of the designation, the Borough's actions were "no longer entitled to the deference normatively afforded."<sup>192</sup> The court left open the possibility, however, that the Borough would be

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 13.

<sup>186</sup> *Id.* Interestingly, the court in *Evans* also seemed to expand the *Gallenthin* holding beyond subsection (e). The court rejected Maplewood's argument that section 40A:12A-5(d) was satisfied in this case, finding that nothing the Township alleged showed that the conditions were "detrimental to the safety, health, morals or welfare of the community." *Id.* at 16. Without such a showing, the court concluded, a redevelopment determination under subsection (d) would not "be consistent with *Gallenthin*'s restriction of the use of eminent domain for redevelopment to 'blighted areas.'" *Id.* at 16-17 (citing *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 460 (N.J. 2007)).

<sup>187</sup> No. A-1829-05T2, 2007 WL 2089275 (N.J. Super. Ct. App. Div. July 24, 2007) (per curiam).

<sup>188</sup> *Id.* at \*1.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

permitted to begin the process anew, evaluating the properties in light of *Gallenthin*, *Kelo*, and other recent cases involving eminent domain.<sup>193</sup>

#### 5. *Harrison Redevelopment*

In one of the few reported eminent domain decisions since *Gallenthin*, the Appellate Division focused on the validity of the LRHL's notice requirements set forth in New Jersey Statutes Annotated section 40A:12A-6. Specifically, the court in *Harrison Redevelopment Agency v. Derose*<sup>194</sup> dealt with the issue of whether a property owner who fails to challenge a designation affecting his or her property within forty-five days of its adoption by a municipal governing body (as required by the LRHL) may still challenge, in full or in part, the public purpose of the taking.<sup>195</sup> The three-judge panel held that

unless a municipality provides the property owner with contemporaneous written notice that fairly alerts the owner that (1) his or her property has been designated for redevelopment, (2) the designation operates as a finding of public purpose and authorizes the municipality to acquire the property against the owner's will, and (3) informs the owner of the time limits within which the owner may take legal action to challenge that designation, an owner constitutionally preserves the right to contest the designation, by way of affirmative defense to an ensuing condemnation action.<sup>196</sup>

Absent this type of adequate notice, the court proclaimed, the owner's right to raise affirmative defenses is preserved, even beyond the statutorily prescribed forty-five days.<sup>197</sup>

Conversely, the court noted that if the municipality's notice does contain the "constitutionally-essential" due process components, the owner may challenge the designation only by bringing an action in lieu of prerogative writs within forty-five days of the adoption of the designation.<sup>198</sup> The court further observed, however, that while an owner provided with adequate notice cannot ordinarily wait to raise objections as a defense in future condemnation actions, "trial judges retain the residual power . . . to extend the time for the assertion of all claims of invalidity, where necessary to serve the interests of jus-

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<sup>193</sup> *LBK Assocs.*, 2007 WL 2089275, at \*1.

<sup>194</sup> 942 A.2d 59 (N.J. Super. Ct. App. Div. 2008).

<sup>195</sup> *See id.* at 62.

<sup>196</sup> *Id.* at 62-63.

<sup>197</sup> *Id.* at 63.

<sup>198</sup> *Id.*

tice.”<sup>199</sup> Applying these principles to the facts, the court found that the notice afforded to the plaintiff property owners was constitutionally inadequate and, therefore, the Law Division erred in concluding that the property owners’ challenges were time-barred under the LRHL.<sup>200</sup>

*B. Legislative Reaction to Gallenthin*

While New Jersey courts have been extremely active, the State Legislature has failed to pass any meaningful eminent domain legislation since *Gallenthin*. In fact, at the time this Comment was written, no new legislation had even been introduced, as Assembly and Senate members continued to consider reform bills introduced in response to *Kelo*.

1. Assembly Bill 3257

In June 2006, Assemblymen John J. Burzichelli (D-Gloucester),<sup>201</sup> Robert M. Gordon (D-Bergen), and Christopher “Kip” Bateman (R-Somerset) introduced perhaps the most sweeping reform bill to date. Assembly Bill 3257<sup>202</sup> was designed “to ensure that the use of eminent domain for redevelopment is an absolute last resort.”<sup>203</sup> While the bill declares that “redevelopment remains a valid and important public purpose,” it also recognizes that “changes to the existing law are necessary.”<sup>204</sup>

As such, the bill proposes to amend New Jersey Statutes Annotated section 40A:12A-3 by defining various significant terms, including “comparable replacement housing” and “detrimental to the safety, health, or welfare of the community.”<sup>205</sup> The latter phrase, which played a major role in the *Gallenthin* decision, would be defined as follows:

“Detrimental to the safety, health, or welfare of the community” means objective evidence of detriment, including, but not limited

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<sup>199</sup> *Id.*

<sup>200</sup> *Harrison Redevelopment*, 942 A.2d at 63; see also Michael Booth, *Condemnation Law’s Notice to Owners Falls Short of Due Process, Court Says*, N.J. L.J., Mar. 3, 2008, at 1, 6; Bill DeSantis, *Municipalities Need to Go Above and Beyond the Provisions: Owners Can Challenge Development Designation in a Condemnation Action*, N.J. L.J., June 23, 2008, at 39.

<sup>201</sup> Notably, Burzichelli also serves as Paulsboro’s mayor. See Seidenstein, *supra* note 30, at 31; Dana Sullivan, *Eminent Domain in Trenton*, N.J. LAW., July 3, 2006, at 1.

<sup>202</sup> N.J. Assem. 3257, 212th Leg., 2006–2007 Sess. (N.J. 2006).

<sup>203</sup> See Sheridan, *supra* note 27, at 331 (quoting N.J. Assem. 3257, at 1).

<sup>204</sup> N.J. Assem. 3257, at 3.

<sup>205</sup> See *id.* at 4.

to, substantial building or health code violations, excessive police activity, a lack of structural integrity, or a continuing exterior appearance that degrades the surrounding properties. For commercial properties, the objective evidence of detriment also may include a lack of proper utilization of the land or structures that leads to stagnant or not fully productive condition of the land.<sup>206</sup>

Thus, to designate a residential property for redevelopment under the new definition, a municipality would be required to present “objective evidence” that a detriment exists, such as “substantial” code violations or a degrading exterior appearance.<sup>207</sup> The standard would be less stringent for commercial properties, however, as evidence of “underutilization” would suffice.<sup>208</sup>

In addition to defining important terminology, the proposed statute would require a municipality to designate an area as “in need of redevelopment” by ordinance rather than by a mere resolution.<sup>209</sup> It would also alter the criteria set forth in sections 40A:12A-5(d) and (e).<sup>210</sup> Moreover, the bill would provide that a developer or redeveloper is precluded from conducting or funding any part of the investigation to determine whether an area meets the criteria set forth in section 40A:12A-5.<sup>211</sup>

The New Jersey Assembly passed Bill 3257 by a 51-18 vote on June 22, 2006.<sup>212</sup> The Senate, however, has yet to pass any version of the bill.<sup>213</sup> In fact, Senator Ronald Rice (D-Essex), who sponsored the Senate bill, was recently unable to garner enough votes in the Senate Community and Urban Affairs Committee to even send the bill for a floor vote.<sup>214</sup> New Jersey Public Advocate Ronald Chen,<sup>215</sup> a major

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<sup>206</sup> *Id.*

<sup>207</sup> *See id.*

<sup>208</sup> *See id.*; Sheridan, *supra* note 27, at 332.

<sup>209</sup> N.J. Assem. 3257, at 8; *see also* Sullivan, *supra* note 201, at 39.

<sup>210</sup> *Id.* at 8–9; *see infra* text accompanying note 220.

<sup>211</sup> *See* N.J. Assem. 3257, at 10.

<sup>212</sup> *See* Dana E. Sullivan, *Eminent Domain Not So Imminent*, N.J. LAW., June 4, 2007, at 7; William J. Ward, *Defining Blight: Step One in New Jersey's Redevelopment Process*, N.J. L.J., June 25, 2007, at S-4.

<sup>213</sup> *See* S. 1975, 212th Leg., 2006–2007 Sess. (N.J. 2006); Sullivan, *supra* note 84, at 3 (noting that New Jersey Attorney General Anne Milgram and Governor Jon Corzine have put pressure on the Senate to pass the bill); Kate Coscarelli, *Court Limits Towns' Power to Seize Land*, STAR-LEDGER (Newark, N.J.), June 14, 2007, at 1.

<sup>214</sup> Michael Booth, *Eminent Domain Compromise Bill, Pleasing No One, Stalls in Senate*, N.J. L.J., Dec. 3, 2007, at 23.

<sup>215</sup> Since 2006, Chen has been active in advocating for eminent domain reform. IN NEED OF REDEVELOPMENT, *supra* note 29, at 3. Chen's first report on eminent domain, released in May 2006, offered several noteworthy recommendations for legislative reform. *Id.*; *see also infra* Part VI. A follow-up report highlights particular cases

proponent of the Assembly bill, announced that the Senate version is too vague,<sup>216</sup> and homeowners and small business groups have expressed their concern that the bill provides inadequate protections for property owners.<sup>217</sup> Some mayors, on the other hand, argue that the Assembly's version is too restrictive and would hinder their ability to rebuild cities.<sup>218</sup> Still, some uncertainty remains about how much the Assembly bill would actually accomplish.<sup>219</sup>

One problem with the bill is that its proposed definition of “detrimental to the safety, health, or welfare of the community” does little more than the present LRHL to protect private property owners from government seizures. The alterations made to subsections (d) and (e) would similarly fail to create redevelopment criteria that are adequately concrete. The revised subsections would allow a municipality to designate an area as “in need of redevelopment” if the following conditions are found:

- d. Areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, or any combination of these or similar conditions are determined to be detrimental to the safety, health, or welfare of the community.
- e. A lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions which, by virtue of these factors are determined to be detrimental to the safety, health, or welfare of the community.<sup>220</sup>

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that evidence “misuse of the redevelopment process.” IN NEED OF REDEVELOPMENT, *supra*, at 2. In large part due to his efforts to prevent abuse and misuse of the eminent domain power, Chen was recently named “Lawyer of the Year” for 2007 by the New Jersey Law Journal. See Mary Pat Gallagher, *Pundit for Eminent Domain Reform: New Jersey’s Public Advocate is the Draftsman of the State’s New Hard Line Against Arbitrary Takings for Redevelopment*, N.J. L.J., Dec. 31, 2007, at 1, 4.

<sup>216</sup> Booth, *supra* note 214, at 23.

<sup>217</sup> *Id.*

<sup>218</sup> Sullivan, *supra* note 212, at 7.

<sup>219</sup> See Geneslaw & Peticolas, *supra* note 25, at 1; Sheridan, *supra* note 27, at 332; Sullivan, *supra* note 201, at 39.

<sup>220</sup> N.J. Assem. 3257, at 8–9. The proposed language can be compared to the current statute, which provides:

- 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

By removing the “stagnant or not fully productive” language from subsection (e), the bill would merely codify what the New Jersey Supreme Court already held in *Gallenthin*. Moreover, even under the revised subsections, the redevelopment criteria remain too broad.

A second problem with the bill is that it would allow redevelopment even when twenty percent of the designated area fails to meet the proposed “objective” tests.<sup>221</sup> Under this exception, most of the plaintiffs in *Kelo* still would have been subject to the eminent domain takings.<sup>222</sup> As part of the larger BP/Dow Redevelopment Area, the plaintiffs in *Gallenthin* also may have fallen under the twenty-percent exception. The bill’s final paragraph further states that the legislation would “grandfather existing redevelopment activities to the extent such activities are matured.”<sup>223</sup> This language indicates that any redevelopment designation or plan conceived before the proposed statute is enacted would be immune from the legislative changes.

Finally, Assembly Bill 3257 could have an adverse effect on industrial property owners because it allows municipalities to designate as “in need of redevelopment” any property left “vacant or substantially underutilized” for twenty-four months due to environmental contamination.<sup>224</sup> One scholar predicts that because remediation efforts often take longer than two years to complete, the proposal would discourage investment in contaminated land.<sup>225</sup>

## 2. Assembly Bills 2423 and 3178

In February 2006, Assemblywoman Charlotte Vandervalk (R-Bergen) and Assemblyman Upendra J. Chivukula (D-Somerset) introduced Assembly Bill 2423.<sup>226</sup> The bill proposed a four-year moratorium on the use of eminent domain “when the primary purpose for the taking is economic development that will ultimately result in ownership of that property being vested in another private person.”<sup>227</sup>

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productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

N.J. STAT. ANN. § 40A:12A-5(d)–(e) (West 1992).

<sup>221</sup> N.J. Assem. 3257, at 9–10; *see also* Sheridan, *supra* note 27, at 332.

<sup>222</sup> Sheridan, *supra* note 27, at 332.

<sup>223</sup> *See* N.J. Assem. 3257, at 33.

<sup>224</sup> N.J. Assem. 3257, at 9.

<sup>225</sup> Geneslaw & Peticolas, *supra* note 25, at 1.

<sup>226</sup> N.J. Assem. 2423, 212th Leg., 2006–2007 Sess. (N.J. 2006).

<sup>227</sup> *Id.* at 4. Like Assembly Bill No. 3143, the bill would also establish the Eminent Domain Study Commission, charged with examining “the use, procedure and application of eminent domain in the State” and recommending legislation to discourage eminent domain abuse. *Id.*

Assembly Bill 3178, introduced by Assemblyman Michael J. Panter (D-Monmouth), proposed a similar two-year moratorium.<sup>228</sup> While neither moratorium bill gained adequate legislative support, some local attorneys and scholars encouraged the idea.<sup>229</sup> A moratorium seems unnecessary at this juncture, however, because the New Jersey Legislature has proven that it will seriously consider the complicated issues involved in reform, rather than enacting “knee-jerk” legislation as seen in various other states.<sup>230</sup>

### 3. Assembly Bill 3143

In May 2006, Assemblyman Steve Corodemus (R-Monmouth) introduced Assembly Bill 3143, which would establish a permanent commission to hold annual hearings throughout the state.<sup>231</sup> The aptly named Eminent Domain Study Commission would also report on eminent domain issues and offer recommendations to the governor and legislature for changes to the law.<sup>232</sup> In addition to creating and empowering the commission, the bill would require a declaratory judgment from the superior court whenever an area is determined to be “in need of redevelopment” and whenever a redevelopment plan is adopted.<sup>233</sup> The latter requirement has considerable merit. In theory, at least, it would cut costs for both property owners and redevelopment entities as redevelopment designations almost inevitably lead to litigation.<sup>234</sup>

Assembly Bill 3143 would also require that “just compensation” for a condemned property include a payment representing compensation for certain intangible benefits of the property, such as ocean, river, or mountain views, or other similar quality-of-life factors.<sup>235</sup> There may be a valuation problem with such a measure as the significance of these factors is inherently subjective. It is likely for this rea-

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<sup>228</sup> N.J. Assem. 3178, 212th Leg., 2006–2007 Sess. (N.J. 2006).

<sup>229</sup> See Seidenstein, *supra* note 30, at 31 (reporting that the New Jersey Coalition Against Eminent Domain Abuse supported the moratorium); Michels, *supra* note 16, at 528 (suggesting that a moratorium would “allow time for the federal and state legislatures to address the true impact of the *Kelo* decision . . . as opposed to . . . hastily enact[ing] legislation that may prove too restrictive on the eminent domain power in the future”).

<sup>230</sup> See, e.g., Seidenstein, *supra* note 30, at 31 (noting one attorney’s belief that New Jersey’s “nuanced” approach to eminent domain problems compares favorably to other states’ “knee-jerk” reactions to *Kelo*).

<sup>231</sup> N.J. Assem. 3143, 212th Leg., 2006–2007 Sess. (N.J. 2006).

<sup>232</sup> *Id.* at 11.

<sup>233</sup> See *id.* at 9.

<sup>234</sup> See *infra* Part VI.C.

<sup>235</sup> Assem. 3143, at 11.

son that courts have rejected deviations from the fair market value approach, which is typically accepted as sufficient to meet the “just compensation” requirement.<sup>236</sup> As discussed in Part VI, however, increased compensation may be the key to effective eminent domain reform.

#### VI. THE FUTURE OF EMINENT DOMAIN IN NEW JERSEY AND REFORM RECOMMENDATIONS

In *Gallenthin*, the New Jersey Supreme Court expressly recognized that the power to use eminent domain for redevelopment is a “valuable tool for municipalities faced with economic deterioration in their communities.”<sup>237</sup> Eminent domain is particularly important in New Jersey, which has a quickly growing population, a shrinking amount of land available for new housing and commercial development, and various cities and municipalities clearly in need of redevelopment.<sup>238</sup> Moreover, even when municipalities refrain from exercising eminent domain, the mere existence of the takings power facilitates productive negotiations between property owners and private developers.<sup>239</sup>

Municipalities and other entities, however, should use eminent domain only as a last resort. The New Jersey judiciary has done its part to facilitate this goal by beginning to curtail the use of eminent domain in the redevelopment context,<sup>240</sup> and will likely continue this trend as new cases arise. The onus is now on the Legislature to take action. Reform legislation should be aimed at protecting New Jersey property owners and ensuring that the government invokes its eminent domain power only when property is absolutely necessary for a

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<sup>236</sup> See *infra* Part VI.A.

<sup>237</sup> *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 460 (N.J. 2007). Ronald Chen similarly recognizes that the “redevelopment of truly blighted areas is a legitimate public purpose that serves the greater good by helping revitalize communities and create more opportunities for residents.” REFORMING THE USE OF EMINENT DOMAIN, *supra* note 26, at 4.

<sup>238</sup> See REFORMING THE USE OF EMINENT DOMAIN, *supra* note 26, at 4 (noting that New Jersey is already “the most densely populated state in America”); see also Reader Forum, STAR-LEDGER (Newark, N.J.), July 11, 2007, at 14. Diane Brake, president of the Regional Planning Partnership, believes that “New Jersey is on track to become the first completely built-out state” and that a good way to prevent urban sprawl is to “revitalize struggling cities and towns.” *Id.*

<sup>239</sup> Sullivan, *supra* note 28, at 3.

<sup>240</sup> See *supra* Part V.A. Note also that some New Jersey municipalities, such as Union Township, have taken the initiative to limit eminent domain use on their own. *Union Center Won't Use Eminent Domain*, STAR-LEDGER (Newark, N.J.), Dec. 7, 2007, at 52.

public good and cannot be acquired through other reasonable means. The following recommendations are offered with those objectives in mind.

A. *Increase “Just Compensation”*

Perhaps the most significant factor underlying the eminent domain controversy is money. Under both the New Jersey and U.S. Constitutions, the government must pay “just compensation” to property owners whose land is taken through eminent domain.<sup>241</sup> Typically, “fair market value” has been found to satisfy the just compensation requirement.<sup>242</sup> The crux of the problem, however, is that “fair market value” fails to take into account the subjective value that home and business owners often attach to their property.<sup>243</sup> In addition, compensation calculated using this standard often amounts to so little that displaced owners are unable to relocate within the same town or community.<sup>244</sup> For these reasons, legislative reform efforts must focus on ensuring that those affected by eminent domain are afforded increased compensation for their losses.

One way to accomplish this goal is to require payment based on “replacement value.”<sup>245</sup> Under this alternative to the fair market value approach, municipalities would be required to pay a displaced property owner’s cost of relocation—that is, the cost to place the property owner in a structure of “similar size and quality under comparable conditions” and within the same community.<sup>246</sup> The level of compensation could also be adjusted to cover attorneys’ fees, loss or damage to personal property, and other consequential damages that

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<sup>241</sup> See U.S. CONST. amend. V; N.J. CONST. art. I, ¶ 20.

<sup>242</sup> See, e.g., *Olson v. United States*, 292 U.S. 246, 254–55 (1934); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 81 (1913); see also Mark D. Mako & Maulik Shah, *Kelo and the States of (and on) Development*, N.J. LAW., Apr. 3, 2006, at A16.

<sup>243</sup> See Brief for American Planning Association et al. as Amici Curiae Supporting Respondents at 27, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108) [hereinafter Brief for American Planning Association] (describing subjective value that individual owners attach to their properties as “the most obvious shortfall” of the fair market value test).

<sup>244</sup> The majority in *Kelo* recognized this problem and suggested during oral argument that the appropriate measure for just compensation might not be market value. See Mako & Shah, *supra* note 242, at A16.

<sup>245</sup> REFORMING THE USE OF EMINENT DOMAIN, *supra* note 26, at 20.

<sup>246</sup> See Mako & Shah, *supra* note 242, at A16. Ronald Chen identifies “adequate relocation assistance” as a key element of legislative reform. IN NEED OF REDEVELOPMENT, *supra* note 29, at 16, 23–25.

often result from eminent domain takings.<sup>247</sup> For a displaced business, compensation might also include loss of good will.<sup>248</sup>

Another alternative, which New Jersey legislators have already proposed,<sup>249</sup> is to require municipalities to pay fair market value plus the additional value of certain intangible benefits, “such as an ocean, river, or mountain view . . . and other similar quality of life factors.”<sup>250</sup> This measure might also include sentimental value for owners who can prove, for example, that they were born in their home or that their ancestors built the home. Concededly, compensation based on such subjective factors would involve certain valuation issues. On balance, however, any difficulty regarding valuation would be outweighed by the fact that the compensation award would be much closer to the actual value of the property to its owner. Nonetheless, the valuation issues have thus far been enough to prevent both the state judiciary and the state legislature from deviating from the fair market value approach.<sup>251</sup>

A final way to ensure increased compensation for property owners would be to specify the valuation date for condemned property. In New Jersey, this issue was most recently raised in *Mt. Laurel v. Stanley*,<sup>252</sup> which focused on whether and when a governmental condemnation action begins to “substantially affect[] the use and enjoyment of . . . property.”<sup>253</sup> In *Stanley*, the Township used December 3, 1997—the date on which the “judgment of repose” was entered—for the purpose of valuing the plaintiffs’ property.<sup>254</sup> On that date, the property was appraised at \$833,000, which Mt. Laurel deposited into

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<sup>247</sup> See Brief for American Planning Association, *supra* note 243, at 5.

<sup>248</sup> *Id.*

<sup>249</sup> See N.J. Assem. 3143, 212th Leg., 2006–2007 Sess., at 11 (N.J. 2006).

<sup>250</sup> *Id.* The American Planning Association has suggested that subjective value may be derived from various sources, including modifications that owners have made to property to suit their personal needs and preferences, friendships that owners have formed in a particular neighborhood, and the feeling of security that accompanies being in familiar surroundings. See Brief for American Planning Association, *supra* note 243, at 27. The Missouri Eminent Domain Task Force similarly recommended legislation that would allow courts to take several factors, including “heritage value,” into account when determining just compensation. See MISSOURI EMINENT DOMAIN TASK FORCE, FINAL REPORT AND RECOMMENDATIONS 16 (2005), available at <http://www.mo.gov/mo/eminentdomain/finalrpt.pdf>.

<sup>251</sup> Note, however, that the New Jersey Senate has considered substituting “prevailing market rates” for “fair market value” because the latter is often viewed as insufficient. Booth, *supra* note 214, at 23.

<sup>252</sup> 885 A.2d 440 (N.J. 2005); see also Robert G. Seidenstein, *Eminent Domain: Little Guys Win One*, N.J. LAW., Nov. 28, 2005, at 1.

<sup>253</sup> *Stanley*, 885 A.2d at 441 (quoting N.J. STAT. ANN. § 20:3-30(c) (West 1992)).

<sup>254</sup> *Id.* at 442.

an account to be used for the taking.<sup>255</sup> The Appellate Division found, however, that the proper date for valuation purposes was May 8, 2002—the date on which Mount Laurel filed its condemnation complaint after negotiations with the Stanleys failed.<sup>256</sup> By the later date, the property was valued at \$1.5 million, resulting in a victory worth several hundred thousand dollars for the property owners.<sup>257</sup>

Requiring increased compensation would undoubtedly make certain redevelopment projects financially imprudent for private redevelopers.<sup>258</sup> Such a requirement, however, would be immeasurably beneficial for property owners whose houses and businesses become the subject of eminent domain takings. In addition, an increased compensation scheme would likely reduce litigation by encouraging municipalities and other redevelopment entities to negotiate with property owners to reach a fair compensation package prior to initiating eminent domain proceedings.<sup>259</sup> As the eminent domain power would be invoked only when property owners acted unreasonably in holding out in such negotiations, the increased compensation scheme would also further the goal of maintaining eminent domain as a last resort.

#### B. *Implement a More Exacting Designation Process*

Under the current version of the LRHL, it is relatively easy for municipalities to designate private property as “in need of redevelopment.”<sup>260</sup> According to New Jersey Public Advocate Ronald Chen’s May 2006 report, the statutory criteria set forth in section 40A:12A-5 provides “virtually no limitation on taking private property for redevelopment.”<sup>261</sup> In the same report, Chen made the following statement mirroring Justice O’Connor’s dissent in *Kelo*:

Drumthwacket, the Governor’s official residence, is a “stately home” that is “one of the most fabled and elegant of America’s

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<sup>255</sup> Seidenstein, *supra* note 252, at 12.

<sup>256</sup> *Stanley*, 885 A.2d at 443.

<sup>257</sup> Seidenstein, *supra* note 252, at 12. New Jersey Assembly Bill 3143 would change the date of valuation from the earliest of several events specified in the LRHL to the latest to ensure that property owners get maximum value for their property in situations where valuation is an issue. N.J. Assem. 3143, 212th Leg., 2006–2007 Sess., at 4 (N.J. 2006).

<sup>258</sup> REFORMING THE USE OF EMINENT DOMAIN, *supra* note 26, at 19.

<sup>259</sup> The Missouri Eminent Domain Task Force goes as far as to recommend that private buyers should be required to negotiate in good faith prior to the entry of an order for condemnation and should be penalized if bad faith is shown. MISSOURI EMINENT DOMAIN TASK FORCE, *supra* note 250, at 18.

<sup>260</sup> See *supra* text accompanying notes 57–81.

<sup>261</sup> REFORMING THE USE OF EMINENT DOMAIN, *supra* note 26, at 13.

executive residences," . . . yet the property could also be considered "not fully productive" because a hotel or apartment house catering to hundreds, for instance, would be a more productive use of the property.<sup>262</sup>

While the *Gallenthin* decision seems to eliminate the possibility that Drumthwacket could actually be seized solely because it is "not fully productive," Chen's observation is still persuasive. Reform legislation should create a more rigorous designation process, which would provide various benefits for both property owners and condemnation entities.

First, the text of the LRHL should be amended to reflect the court's decision in *Gallenthin* and to ensure that appropriate limits are placed on the power of municipalities to designate private property as "in need of redevelopment." The "not fully productive" and "lack of proper utilization" language found in section 40A:12A-5(e) ought to be removed because it is both too broad and too vague. Among other changes, New Jersey Assembly Bill 3257 proposes to eliminate the "not fully productive" criterion.<sup>263</sup> At the same time, however, the bill would abolish the need to show a "growing" or "total" lack of proper utilization and would, instead, require a municipality to show a mere "lack of proper utilization . . . caused by the condition of the title, diverse ownership of the real property therein or other condition."<sup>264</sup> Ideally, reform legislation should make the redevelopment designation criteria both less ambiguous and more stringent.

Second, the provisions requiring notice to property owners affected by redevelopment designations should be altered, as they are currently inadequate.<sup>265</sup> Ronald Chen suggests that reform legislation should require notice to property owners and tenants written in plain language and delivered via certified or regular mail at least sixty days prior to the first designation hearing.<sup>266</sup> Another way to effectively ensure that residents receive adequate notice would be to require municipalities to adopt redevelopment plans by ordinance rather

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<sup>262</sup> *Id.* at xi.

<sup>263</sup> See N.J. Assem. 3257, 212th Leg., 2006–2007 Sess. (N.J. 2006); see also *supra* Part V.B.1.

<sup>264</sup> See N.J. Assem. 3257, at 8–9.

<sup>265</sup> Ronald Chen, N.J. Dep't of the Public Advocate, *Summary of Public Advocate Legal Actions*, <http://www.state.nj.us/publicadvocate/public/pdf/PaulsboroDecisionSummary0507.pdf> (last visited Sept. 16, 2008). For individuals who rent the property on which they reside, no notice is required at all. *Id.*

<sup>266</sup> See REFORMING THE USE OF EMINENT DOMAIN, *supra* note 26, at 15; IN NEED OF REDEVELOPMENT, *supra* note 29, at 24.

than by resolution.<sup>267</sup> Such a requirement would entail further public hearings to determine whether an area is blighted at which affected residents would have the opportunity to question the experts presenting on behalf of the municipality.<sup>268</sup> Property owners should also be permitted to present their own evidence to show that an area is not, in fact, blighted.<sup>269</sup> Allowing property owners to challenge a designation during the initial stages of the redevelopment process would not only promote justice and fairness but would also reduce litigation costs. Both property owners and municipalities would likely prefer to avoid long legal battles over redevelopment designations, which sometimes continue even after the redevelopment project has begun.<sup>270</sup>

As the New Jersey Supreme Court recognized in *Cynwyd*, the government's authority to exercise eminent domain is one of its "most awesome powers."<sup>271</sup> Property owners need to be protected against abuses of this power starting from the first step of the redevelopment process—the blight designation. Reform legislation should therefore seek to modify the statutory criteria for designating an area as "in need of redevelopment" to make them as concrete as possible. Legislators must also work to ensure that property owners are both fully informed of their rights and responsibilities from an early stage in the process and afforded a fair opportunity to challenge blight designations without lengthy and expensive litigation.

### C. *Shift the Burden*

Under New Jersey's current statutory scheme, the standard of proof necessary to sustain a municipality's blight designation is extremely low—it must be supported only by "substantial evidence."<sup>272</sup> Perhaps more importantly, property owners who challenge a municipi-

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<sup>267</sup> For an example of this type of proposal, see N.J. Assem. 3257, at 8.

<sup>268</sup> Chen, *supra* note 265.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* Note that the court's decision in the *Harrison Redevelopment* case clarifies the notice provisions set forth in section 6 of the LRHL, N.J. STAT. ANN. § 40A:12A-6 (West 1992), imposing a more stringent burden on municipalities and enhancing the right of property owners to challenge redevelopment designations if the notice they receive is inadequate. See *supra* Part V.A.5. Specifically, the court's ruling relieves property owners from the "burdens of engaging in premature litigation" and from forcing them to litigate issues before receiving fair and adequate notice of a municipality's adverse redevelopment designation determination. *Harrison Redevelopment Agency v. Derose*, 942 A.2d 59, 63 (N.J. Super. Ct. App. Div. 2008).

<sup>271</sup> *City of Atlantic City v. Cynwyd Investments*, 689 A.2d 712, 721 (N.J. 1997).

<sup>272</sup> N.J. STAT. ANN. § 40A:12A-6(b)(5) (West 1992); see also IN NEED OF REDEVELOPMENT, *supra* note 29, at 15; *supra* text accompanying notes 69–72.

pality's redevelopment designation are faced with the burden of proving that the designation was not supported by such evidence.<sup>273</sup> Described another way, redevelopment designations are entitled to a presumption of validity.<sup>274</sup> To counteract this "overwhelming presumption in the case law which favors the validity of municipal action,"<sup>275</sup> the burden of persuasion should be shifted to municipalities to justify designation of an area as "in need of redevelopment."

New Jersey Senate Majority Leader Bernard Kenny, Jr., claims that "[c]hanging the burden of proof will paralyze the state and municipalities in being able to develop their properties in accordance with the economic conditions at the time."<sup>276</sup> According to the Public Advocate, however, if an area is truly blighted, the municipality should not have very much trouble satisfying the burden.<sup>277</sup> Current New Jersey law makes it easy for municipalities and other entities to designate private property as part of a redevelopment area and then protects those designations from being reversed by the trial court. In this way, the law fails to protect the most vulnerable parties involved in the process—the property owners. Reform legislation should remedy this problem by shifting the burden to the prospective condemnor to prove that the property in question satisfies the relevant statutory criteria.

#### D. *Impose Stricter "Pay-to-Play" Restrictions*

As it currently stands, New Jersey law permits a private corporation to foot the bill for a municipality's blight investigations.<sup>278</sup> In addition, these redevelopment corporations may provide campaign contributions to local governmental officials and subsequently receive lucrative redevelopment contracts.<sup>279</sup> While the Local Government Ethics Law<sup>280</sup> prohibits some of the potential conflicts that may arise

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<sup>273</sup> See *Levin v. Twp. Comm. of Bridgewater*, 274 A.2d 1, 18 (N.J. 1971) (citing *Wilson v. Long Branch*, 142 A.2d 837, 854 (N.J. 1958)); IN NEED OF REDEVELOPMENT, *supra* note 29, at 16.

<sup>274</sup> *Levin*, 274 A.2d at 18.

<sup>275</sup> William J. Ward, *N.J. Public Advocate's Role Essential to Eminent Domain Reform*, New Jersey Eminent Domain Law Blog, <http://www.njeminentdomain.com/state-of-new-jersey-nj-public-advocates-role-essential-to-eminent-domain-reform.html> (last visited Sept. 16, 2008) (citing *Concerned Citizens of Princeton, Inc. v. Mayor of Princeton*, 851 A.2d 685, 685 (N.J. Super. Ct. App. Div. 2004)).

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> Chen, *supra* note 265.

<sup>279</sup> *Id.*

<sup>280</sup> N.J. STAT. ANN. §§ 40A:9-22.1 to -22.25 (West 1992).

in the redevelopment context,<sup>281</sup> official misconduct, or at least the appearance of such impropriety, still raises concerns among many New Jersey property owners. Near the end of the *Mulberry Street* decision,<sup>282</sup> Judge Simonelli addressed this issue, commenting, in dicta, that there was evidence that the Mulberry Street Redevelopment Project and the Newark Redevelopment Corporation's role as developer was "a done deal," a *fait accompli*, before the required statutory redevelopment process began."<sup>283</sup>

As various arguably unethical practices are currently permitted—or, at least, not expressly prohibited—by state law, legislators should craft legislation designed to prevent "the actuality or appearance of corruption which may result when property is purchased or acquired for development or redevelopment" through eminent domain.<sup>284</sup> Assembly Bill 2812, introduced by Assemblyman (now Senator) Bill Baroni (R-Mercer) in March 2006, would effectively prohibit individuals, businesses, and other organizations that have made campaign contributions from purchasing or otherwise acquiring rights to develop or redevelop property through condemnation proceedings.<sup>285</sup> However, reform legislation should go even further, prohibiting commercial redevelopers from paying for blight determination reports, imposing stricter "pay-to-play" restrictions on all local redevelopment projects, and preventing government officials from receiving direct financial benefits from redevelopment projects with which they are involved.<sup>286</sup> Enacting and enforcing these types of reform will help alleviate property owners' concerns about corruption and eradicate New Jersey's reputation for unabashed eminent domain abuse.

## VII. CONCLUSION

Eminent domain is a powerful governmental tool that has been broadly permitted in New Jersey for decades. The New Jersey Su-

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<sup>281</sup> See IN NEED OF REDEVELOPMENT, *supra* note 29, at 18–19.

<sup>282</sup> See *supra* Part V.A.2.

<sup>283</sup> *Mulberry St. Area Property Owner's Group v. City of Newark*, No. ESX-L-9916-04, at 69 (N.J. Super. Ct. Law Div. July 19, 2007); see also Wang, *Setback for Newark*, *supra* note 176, at 19 (referring to Judge Simonelli's comments as "stinging criticism at the snug relationship between developers and officials in the city"). In his most recent report, Ronald Chen also highlights various cases that potentially raise concerns "about whether public officials had an impermissible special interest in the outcome." IN NEED OF REDEVELOPMENT, *supra* note 29, at 18–20.

<sup>284</sup> N.J. Assem. 2812, 212th Leg., 2006–2007 Sess., at 4 (N.J. 2006).

<sup>285</sup> *Id.* The bill also forbids an individual who, or a business or organization that, has purchased or acquired property through eminent domain proceedings from making any campaign contribution for three years thereafter. *Id.*

<sup>286</sup> REFORMING THE USE OF EMINENT DOMAIN, *supra* note 26, at 3, 22.

preme Court's decision in *Gallenthin*, however, is indicative of the modern trend away from this historically broad authorization of eminent domain use. It is undoubtedly a step in the right direction for property owners. Nonetheless, the New Jersey Legislature still must enact reform legislation designed to protect property owners' rights and to ensure that the eminent domain power is used only as a last resort. At minimum, reform legislation should include (1) "just compensation" measures that are more favorable to New Jersey property owners; (2) a more exacting designation process that protects private property rights and makes it more difficult for municipalities and redevelopment agencies to designate property as "in need of redevelopment"; (3) a burden shift requiring municipalities and other redevelopment agencies to prove that designated property actually satisfies the relevant statutory criteria; and (4) stricter ethical limitations designed to prevent corruption and other forms of eminent domain abuse. In the interim, the state judiciary should continue the trend towards narrowing the definition of "blight" and should closely examine all redevelopment designations to make certain that municipalities and other condemnation agencies do not transgress their proper authority.