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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – ESSEX COUNTY
DOCKET NUMBER L-6910-06

CAROLYN EVANS and RIVCO GROUP, LLC,

Civil Action

Plaintiffs,

v.

TOWNSHIP OF MAPLEWOOD, TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MAPLEWOOD and THE PLANNING BOARD OF THE TOWNSHIP OF MAPLEWOOD

OPINION

Defendants

_____

Decided: July 27, 2007

James M. Turtletaub, for Plaintiffs Carolyn Evans and Rivco Group, LLC (Carlin & Ward, attorneys), Mr. Turtletaub and Scott A. Heiart on the brief

James F. Keegan, for Defendants Township Committee and Township of Maplewood (Bendit Weinstock, attorneys), Mr. Keegan on the brief

Michael Edelson, for Defendant Planning Board of the Township of Maplewood (Hellring Lindeman Goldstein & Siegal, attorneys), Mr. Edelson on the brief

GOLDMAN, J.S.C.

In this action in lieu of prerogative writs, plaintiffs Carolyn Evans ("Evans") and Rivco Group, LLC ("Rivco") seek to set aside the inclusion of their properties in an "area in need of redevelopment" under the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 to -73 ("LRHL"). Evans and Rivco are the owners of Lots 5 and 6 in Block 49.14. They argue that the inclusion of Lots 5 and 6 of Block 49.14 was arbitrary and capricious because it was not based

on substantial evidence in the record. Maplewood and its Township Committee ("Maplewood") and the Planning Board of the Township of Maplewood ("Planning Board") respond that they relied on sworn testimony, observations made by the members of the Planning Board, and the questions and concerns expressed by officials during public meetings. They contend that the law not only permits, but in fact requires, consideration of all such material. They urge this Court not to send the "wrong message" to citizens who dedicated significant time and effort over a nine-year period to the planning process that resulted in the designation at issue.

After the May 4, 2007 trial of this matter, our Supreme Court decided Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344 (2007) ("Gallenthin"). Evans and Rivco argue that Gallenthin's limiting of the exercise of eminent domain under N.J.S.A. 40A:12A-5(e) ("subsection 5(e)") prevents the inclusion of their unblighted properties in the designated area in need of redevelopment.

Subsection 5(e) authorizes designation as an area in need of redevelopment if the following "condition" is found:

> 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.

Maplewood and its Planning Board try to distinguish Gallenthin, and argue that the inclusion is permissible under the newly-limited subsection 5(e). They further argue that, even if this court finds Gallenthin prevents inclusion under subsection 5(e), the Evans and Rivco properties nonetheless can be included under the terms of other subsections of the LRHL expressly relied upon by Maplewood and its Planning Board and not specifically addressed in Gallenthin.

Maplewood and its Planning Board also oppose this lawsuit on grounds of ripeness and standing. They argue that the case is not ripe for review because no development plan is yet in place. Evans and Rivco respond that the designation of an area in need of redevelopment is binding and permanent, and therefore can be challenged by anyone subject to its effects. This Court finds that Evans and Rivco have standing to challenge the designation. Gallenthin is itself evidence that a designation as an area in need of redevelopment is justiciable and that an attack on it is not premature. However, other relief sought by Evans and Rivco will be denied because such relief is premature. No attempt at taking their property is planned or suggested. Moreover, even an erroneous designation as being part of an area in need of redevelopment would not immunize the Evans and Rivco properties from being acquired for a truly public use.

I. PROCEDURAL HISTORY

On January 25, 2005, Maplewood passed a resolution asking the Planning Board to determine whether a two-block area containing 18 lots met the statutory requirements to be declared an "area in need of redevelopment" in accordance with the LRHL. A nineteenth lot was added to the request by separate resolution in June 2005.

The Planning Board retained Phillips Preiss Shapiro, Inc. ("Phillips Preiss Shapiro"), planning and real-estate consultants, who prepared a report, "Redevelopment Area Study No. 3," dated November 2005 ("Redevelopment Study"). The Planning Board provided notice, by publication and service upon the owners of properties in the designated study area, of a public hearing January 10, 2006. That hearing was continued during meetings February 14, March 14, April 14 and May 9, 2006. One owner testified on May 9 and one sent a letter dated May 4. The other owners, including Evans and Rivco, did not offer testimony or comment during the time spanned by the five meetings.

The Planning Board heard "testimony and advice" from Charles Starks ("Starks") of Phillips Preiss Shapiro; Steven Mairella, Esq., ("Mairella") special development counsel to Maplewood; N. David Mildner ("Mildner"), a consultant who had been commissioned by the Township to prepare an Economic Development Plan, dated December 2004; and Paul Phillips ("Phillips"), principal of Phillips Preiss Shapiro. The Planning Board then broke the study area into separate smaller areas and voted on the inclusion of each in the larger whole.

The Planning Board voted as follows:

1. Lots 7 and 10 in Block 49.14 did not meet the statutory criteria of an area in need of redevelopment and should not be included in the proposed redevelopment area because they were already being redeveloped in a style that was consistent with the likely development of the study area.

2. Lots 144, 145, 146, 147, 160, 162, 164, 165, and 166 in Block 47.04 and Lot 1 in Block 49.14 met the statutory requirements for a finding that they were in need of redevelopment; they should be included in the proposed redevelopment area.

3. Lots 16 and 20 in Block 49.14 did not meet the statutory requirements for a finding that they were in need of redevelopment. In addition, because they were in good condition and were located at the extreme westerly end of the study area, their inclusion would not be necessary to the success of the proposed redevelopment area.

4. Lots 12 and 14 in Block 49.14 did not meet the statutory requirements for a finding that they were in need of redevelopment, and they should not be included in the proposed redevelopment area.

5. Lots 3, 5 and 6 in Block 49.14 met the statutory requirements for a finding that they were in need of redevelopment; they should be included in the proposed redevelopment area.

Additionally, leaving these properties out of the area in need of redevelopment would introduce a discontinuity between that area and the new building on Lots 7 and 10. Lots 5 and 6 are the lots owned by Evans and Rivco. Notably, while all the other votes were unanimous, the Planning Board vote on these lots, which are the subject of this lawsuit, was only 6 to 2.

Despite expert testimony to the contrary, Maplewood accepted the Planning Board's finding that Lots 5 and 6 could be included in the area in need of redevelopment, both in their own right and because they were necessary to the successful redevelopment of the area. Maplewood ratified those findings and passed Resolution No. 148-06 on July 5, 2006. Evans and Rivco filed an action in lieu of prerogative writs on August 18, seeking the following relief:

1. A declaration that Resolution 148-06 is null and void as to Lots 5 and 6.

2. An injunction against the Maplewood's condemning Lots 5 and 6 or taking other actions pursuant to the contested findings of the Maplewood and its Planning Board.

3. Compensatory damages, attorney fees, costs and other appropriate relief.

Trial was held on May 4, 2007 based on the record below, and decision was reserved, in part to await the anticipated decision in Gallenthin. After Gallenthin was decided, the parties were invited to brief its applicability to this action. Supplemental briefs, opposition, and replies were submitted by all parties.

The standard of review for redevelopment designations is a demanding one. Such designations, which come about by municipal resolution after a process of thorough and exhaustive review by both a planning board and a governing body, possess a strong presumption of validity. Gallenthin, supra, 191 N.J. at 373; Levin v. Township Committee of Bridgewater, 57 N.J. 506, 537-39, app. dismissed, 404 U.S. 803, 92 S. Ct. 58, 30 L. Ed. 2d 35 (1971); Hirth v. City of Hoboken, 337 N.J. Super. 149, 154, 161 (App. Div. 2001). A court's function is merely

to make sure that the determination by the Planning Board and governing body is supported by substantial credible evidence. Gallenthin, supra, 191 N.J. at 373. This requires a heightened deference, which is also required by the text of the LHRL itself, which explains that an "area in need of redevelopment" designation "if supported by substantial evidence …, shall be binding and conclusive upon all persons affected by the determination." N.J.S.A. 40A:12A-6b (5). Courts should not "second guess" a resolution establishing an area in need of redevelopment because such a resolution "bears with it a presumption of regularity." Forbes v. Board of Trustees, 312 N.J. Super. 519, 532 (App. Div.) certif. denied, 156 N.J. 411 (1998).

Notwithstanding the required deference, for the reasons set forth below, this Court finds that designating the Evans and Rivco properties as in need of redevelopment is not permissible under the LRHL as limited by Gallenthin. Additionally, this Court cannot find substantial evidence in the record to support a conclusion that Evans and Rivco's non-blighted properties are necessary to the successful remediation of an area in need of redevelopment, a conclusion which might have allowed inclusion of their properties under N.J.S.A. 40A:12A-3 ("section 3"). Section 3 allows inclusion of a property in a redevelopment area even if it is not in need of redevelopment itself but its inclusion is necessary for the success of the entire redevelopment plan.

Furthermore, even if a sufficient quantum of evidence could be found for inclusion under section 3, the quality of that evidence would be insufficient because the designation of the entire area seems to have been based on an impermissible reading of the statutory criteria as to all of the properties included. In other words, the record does not contain substantial evidence in support of a finding that the successful redevelopment of the designated area necessitates inclusion of the Evans and Rivco properties, because the designation of the entire underlying

area, as a basis for including Lots 5 and 6, is itself suspect. The designation of the area in need of redevelopment is therefore vacated as to Lots 5 and 6 without prejudice to Maplewood's ability to seek to again include Lots 5 and 6 in an area in need of redevelopment at some future time.[1]

The parties argued at length, but this Court does not reach, the issue of whether comments, deliberations and "wrestling" with issues by the Planning Board or Committee, in the absence of expert opinion, sworn testimony or other substantial evidence that directly supported their decisions in this case, could have constituted substantial evidence in the record sufficient to validate the designation. The argument to the contrary appears to have some force. In the event Maplewood and its Planning Board seek to include the Evans or Rivco properties in a redevelopment area again, this Court urges them to spare themselves the frustration, and this Court the burden, of reasoning through this admittedly interesting issue, by taking care to firmly ground the deliberations in sworn testimony and other undeniably substantial evidence on the record.

II. FACTS

A. Description of the property

Maplewood asked its Planning Board to evaluate an area comprising 19 lots on two blocks along a commercial stretch of Springfield Avenue. The area extends from Burnet Avenue to Tuscan Street in the southeastern section of the Township, about half a mile west of Irvington Township and half a mile east of Union Township. The two blocks, Blocks 47.04 and 49.14, are

[1]While some of the conclusions of law in this opinion might apply to other parcels within the area designated as in need of redevelopment, only Evans and Rivco have sought review and the relief they seek is limited to their properties. The exclusion of their lots does not disturb the remaining lots designated as constituting the area in need of redevelopment, so there is no need to invalidate the entire designation. This is particularly true because Lots 5 and 6 are on the edge and the outmost boundary of the designated area and because these were lots that Phillips Preiss Shapiro opined were not necessary for redevelopment.

separated by Vermont Street. Each Block occupies about 2.3 acres. The study area occupies just over half of the 4.6-acre total, covering about 1.3 acres of Block 47.04 and about 1.1 acres of Block 49.14.

The properties under study on Block 47.04 were Lots 144, 145, 146, 147, 160, 162, 164, 165 and 166. All but two of these have direct frontage on Springfield Avenue. One of the two is a two-family house on Burnet Street and the other is a parking lot for a car dealership on Springfield Avenue. Aside from the two-family house on Burnet Street, and a row of commercial storefronts with upper-floor apartments on Lot 162, all the properties under study on this Block are dedicated to auto-related uses.

The properties under study on Block 49.14 were Lots 1, 3, 5, 6, 7, 10, 12, 14, 16, and 20. These sites combine commercial storefronts with upper-floor residences. The Evans and Rivco properties, Lots 5 and 6, are among them. Two properties, Lots 7 and 10, formerly housed the Orange Mattress Factory, now demolished. Construction of a new building on Lots 7 and 10 was underway at the time of the study, and those lots were left out of the redevelopment area because the new construction was deemed consistent with the redevelopment plan.

Evans owns Lot 5. Her building contains an office and her residence. Rivco owns Lot 6. The building on Lot 6 houses a storefront and a residence. The buildings share a driveway that leads to several detached garages the Planning Board describes as being in fair to poor condition. Each lot measures 25 by 100 feet, which is half the current required minimum lot size. Master plan recommendations call for “traditional zero-lot line building types with upper floor residential and offices and ground-floor retail,” and restrict ground-floor offices.

B. Testimony

JANUARY 10, 2006 HEARING

Starks is a Licensed New Jersey Professional Planner from Phillips Preiss Shapiro. He gave sworn testimony indicating, inter alia, that the Evans and Rivco properties did not affect the public health, safety and welfare in any way that would meet one or more of the redevelopment criteria set forth in N.J.S.A. 40A:12A-5 ("section 5"). He stated that the overall use of the properties at present was "consistent with the Master Plan objectives for the pedestrian retail business zone." He also stated that the Evans and Rivco properties were not necessary for the effective redevelopment of the redevelopment area.

FEBRUARY 14, 2006 HEARING

Mairella was the Township's special redevelopment counsel. He answered questions posed by Planning Board members. His statements were not under oath and were not testimony. The Planning Board asked Mairella how to proceed if it did not wish to accept Phillips Preiss Shapiro's findings. He advised the Board that it had to have substantial evidence sufficient to support a rejection of Phillips Preiss Shapiro's expert opinion and to justify a contrary finding.

> Mr. Mairella: I guess I would have to ask you … if you're not going to accept their recommendation, what do you have to rely on to make a different decision? **…**
>
> And the judicial inquiry will be, is there substantial evidence backing up the determination. … [I]t behooves you[,] I think, to create a record to support the position that you do wish to espouse so that there is something that a court could look at and say this question was given thorough consideration, the evidence was weighed.
>
> The Court doesn't have to agree with the way you weigh the evidence, but there does have to be some evidence. If it's simply a gut feeling or your gut reaction, that's almost the textbook definition of arbitrary and capricious.

Phillips, licensed planner and principal of Phillips Preiss Shapiro, who authored the Redevelopment Study, gave sworn testimony confirming that the Evans and Rivco properties did not satisfy any of the criteria to be designated in need of redevelopment. When asked whether the Evans and Rivco properties should be included within a redevelopment area, Phillips indicated that he could not justify such a finding at present, but would be willing to review additional information that might lead to a different conclusion.

MARCH 14, 2006 HEARING

The Planning Board heard from Mildner, a "specialist in economic development." Mildner testified about the Economic Development Action Plan, dated December 2004, that he had authored for the Township ("Mildner Report"). The Mildner Report did not address any of the criteria under the LRHL. Mildner left that determination to the Planning Board. Mildner was admittedly not an expert in the LRHL:

> Mr. Finn: Are you familiar with the redevelopment criteria under state law?
>
> Mr. Mildner: Yes, I am familiar with it, but I am not an expert on it, sir.
>
> Mr. Finn: Because I wanted to ask you if you could evaluate the site in the context of that redevelopment criteria. What you presented, as far as I could hear it, was more about how the site would be limited in terms of its redevelopment potential. But in terms of measuring or evaluating that site versus the redevelopment criteria, is there anything else you can add relative to that?
>
> Mr. Mildner: I pride myself on something that I read while I was in college, and that is Socrates' claim to be the smartest man in Greece for the reason that he acknowledged what he didn't know. I try to emulate him, and so I do not consider myself to have the expertise of a professional planner, so I really would like to defer offering any opinion as to those criteria.

The economic development referred to in the Mildner Report was viewed as an "important mechanism for maintaining and improving a community's quality of life. More charming storefronts, signage and streetscapes, for example, can enhance a community's attractiveness and be easily perceived by shoppers and residents."

APRIL 11, 2006 HEARING

Phillips gave further testimony about his opinion that the Evans and Rivco properties did not meet the redevelopment criteria. Phillips stated that he could not in "good faith" recommend that the Planning Board include these properties within a redevelopment area based on the information then available to him. He also echoed Mairella's previous admonition to the Planning Board that these properties should not be designated to be in need of redevelopment until the Planning Board had received supporting substantial evidence. Phillips indicated that he did not believe the record then before the Board contained evidence sufficient to support the designation of these properties as being in need of redevelopment.

MAY 9, 2006 HEARING

Planning Board Chairman Thomas Carlson gave an unsworn summary of what had transpired since the previous hearing. He then supplemented the record by stating he had had several communications with Peter Beronio ("Beronio") and Mildner, and that he was told they had given him all that they had to offer, and any further insight would require input from a developer, architect, or engineer. He also indicated that Township officials had conducted an inspection of the properties that was summarized in a memorandum from Beronio (the "Beronio Memorandum"). The Beronio Memorandum was submitted without any sworn testimony from its author and contained a recommendation that the Evan and Rivco properties be declared in need of redevelopment, but made no reference to the criteria under which the properties

qualified. The Beronio Memorandum indicated only that their inclusion was necessary to achieve "Mildner's vision of creating a pedestrian node across from the Library and Park." It did not indicate that these parcels were necessary to effectuate the redevelopment of other parcels or to ameliorate any conditions of blight.

In addition, Mayor Profeta gave an unsworn and allegedly inaccurate description of the Evans and Rivco properties and the economic activity taking place on these properties. Allison Ziefert, a member of the Planning Board, made comments, also unsworn, about obsolescence that she says she saw in the Evans and Rivco buildings.

III. SECTION 5 AFTER GALLENTHIN

After the trial and before this Court reached a decision, the Supreme Court, as noted above, decided Gallenthin, supra, 191 N.J. at 344. In Gallenthin, the Court held that the 1947 New Jersey Constitution permits the application of subsection 5(e) only to situations involving conditions reasonably interpreted as "blight" that were caused by "issues of title, diversity of ownership or other similar conditions of the same kind." Gallenthin, supra, 191 N.J. at 373.

Gallenthin reasoned that the 1947 New Jersey Constitution authorizes the exercise of eminent domain for redevelopment only in blighted areas.[2] Therefore, the State could not have delegated authority to a municipality to subject properties to the possibility of being taken via eminent domain for redevelopment unless those properties were in a blighted area or necessary to the redevelopment of a blighted area. Gallenthin recognized that the meaning ascribed to the

[2] N.J. Const., Art. VIII, § III, ¶ 1, known as the "Blighted Areas Clause," states in pertinent part 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. Municipal, public or private corporations may be authorized by law to undertake such clearance, replanning, development or redevelopment…."

term “blight” has evolved since 1947, but held that an area is not reasonably described as blighted simply because it is underutilized.

The record in this case, and the briefs and arguments presented to this Court, indicate that Maplewood’s determination that the Evans and Rivco properties met the statutory criteria for an area in need of redevelopment under section 5 of the LRHL was not based on the presence of any condition reasonably described as “blight.” “Although the meaning of ‘blight’ has evolved, the term retains its essential characteristic: deterioration or stagnation that negatively affects surrounding properties.” Gallenthin, supra, 191 N.J. at 363.

Gallenthin described the context in which the framers and ratifiers of the 1947 New Jersey Constitution empowered government to invoke eminent domain in support of redevelopment.

> [I]n adopting the Blighted Areas Clause, the framers were concerned with addressing a particular phenomenon, namely, the deterioration of "certain sections" of "older cities" that were causing an economic domino effect devastating surrounding properties. The Blighted Areas Clause enabled municipalities to intervene, stop further economic degradation, and provide incentives for private investment.

Gallenthin, supra, 191 N.J. at 361-362.

Case law expanded the definition of blight beyond the confines of what was then called “slum clearance” to include redevelopment of rural and suburban areas, on the basis that such areas “were not necessarily contemplated by the framers but were within the ‘true sense and meaning’ of the term.” Gallenthin, supra, 191 N.J. at 363, discussing Levin v. Twp. Comm. of Bridgewater, supra, 57 N.J. 506. However,

> “[B]light” still has a negative connotation. In Levin, supra, for example, we found that the parcels at issue were preventing the “proper development” of surrounding properties because they “had reached a stage of stagnation and unproductiveness.” 57 N.J. at

> 512, 538. In Wilson, supra, we noted that much of the designated area contained "dilapidated homes and other buildings, which were obviously beyond restoration," 27 N.J. at 394, and we observed that community redevelopment was a means of "removing the decadent effect . . . on neighboring property values," id. at 370.

Gallenthin, supra, 191 N.J. at 363, duplicate citations omitted.

Nothing in this record reasonably supports a conclusion that either the Evans or the Rivco properties are dilapidated or beyond restoration, or that they have a "decadent effect … on neighboring property values." Gallenthin does not define stagnation, but it specifies that the term "blight" refers to areas whose deterioration or stagnation "negatively affects surrounding properties." Gallenthin, supra, 191 N.J. at 363. Maplewood and its Planning Board have not argued that the Evans or Rivco properties have affected surrounding properties in any way at all. As to stagnation and property values, the private development underway at Lots 7 and 10, which Maplewood and its Planning Board acknowledge is consistent with their redevelopment goals, suggests that the prospects of the surrounding properties are healthy.

The record makes clear that the real problem with the Evans and Rivco properties is that their present use conflicts with the redevelopment vision contained in the Mildner Report. That vision is described as an "important mechanism for maintaining and improving a community's quality of life." However worthy that vision, and the goal of maintaining and improving quality of life, may be, Gallenthin makes clear that the 1947 New Jersey Constitution does not subject private property to eminent domain simply because a government redevelopment plan envisions an economically superior use of that land. Maplewood's goals of maintenance and improvement are laudable, but they do not carry that sense of exigency that allows government to curtail private property rights in favor of the general welfare:

> However, Paulsboro interprets subsection 5(e) to permit redevelopment of any property that is "stagnant or not fully

> productive" yet potentially valuable for "contributing to and serving" the general welfare. Under that approach, any property that is operated in a less than optimal manner is arguably "blighted." If such an all-encompassing definition of "blight" were adopted, most property in the State would be eligible for redevelopment.

Gallenthin, supra, 191 N.J. at 365.

Gallenthin concluded that an interpretation of subsection 5(e) that would equate "blighted areas" with areas that are not operated in an optimal manner "cannot be reconciled with the New Jersey Constitution." Gallenthin, supra, 191 N.J. at 365. Gallenthin therefore held that "the Legislature intended N.J.S.A. 40A:12A-5(e) to apply only to property that has become stagnant because of issues of title, diversity of ownership, or other similar conditions." Gallenthin, supra, 191 N.J. at 370.

Maplewood and its Planning Board, argue that other subsections of the LRHL could support the designation. The Planning Board's June 21, 2007 supplemental brief on Gallenthin provides an excerpt of a Planning Board meeting that it says distinguishes this case from Gallenthin. But a careful reading of the cited excerpt establishes that the Planning Board's analysis addressed zoning violations and sub-optimal uses of the Evans and Rivco properties, and did not identify any conditions that might reasonably be described as present blight. Mayor Profeta's statements, for example, noted that parking was "inadequate as required by the Ordinance," garages were small and in fair to poor condition, lot sizes were half the required size and exceeded coverage requirements of the zone, and the business facilities on some sites appeared to be underutilized and out of sync with the Planning Board's vision for the area. He concluded that "[t]hese economic conditions, it seems to me, very, very directly implicate Criteria E [subsection 5(e)] which talks about lack of proper utilization and not fully productive economically."

Planning Board Chairman Carlson made the point that "[l]ack of conforming to zoning all by itself is not good enough to include something in redevelopment, but it can contribute to the notion of underutilization or lack of proper utilization." Planning Board member Ziefert explained the basis of her disagreement with the expert opinion that the Evans and Rivco properties did not meet the statutory criteria under section 5. She said her opinion was based on her personal observation, and "what I saw was a lot of obsolete early 20th Century retail space that is insensitively renovated and has very marginal businesses in it, adding nothing to the quality of life of the residents in Maplewood or in the neighborhood." The simple fact is that these comments demonstrate that whatever other considerations were present, an impermissible definition of blight, contrary to that set forth in Gallenthin, thoroughly infected the entire decision making process.

Maplewood and its Planning Board assert that N.J.S.A. 40A:12A-5(d) ("subsection 5(d)") provides alternate support for the inclusion of Lots 5 and 6 in the redevelopment area. Not so. This subsection requires that the conditions listed be "detrimental to the safety, health, morals or welfare of the community" and defines the qualifying conditions as follows:

> 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.

While the observations and comments of the members of the Planning Board may suggest that the use of Lots 5 and 6 were obsolete, had faulty arrangements or designs, or had excessive lot coverage, there is no substantial evidence in the record that these conditions can be said to be "detrimental to the safety, health, morals or welfare of the community." Certainly, a decision based on these factors, without any showing of such detriment, cannot be consistent

with Gallenthin's restriction of the use of eminent domain for redevelopment to "blighted areas." Gallenthin, supra, 191 N.J. at 365.

Thus, the Planning Board's comments fail to distinguish this case from Gallenthin. That case did not purport to nail down every definition relevant to redevelopment designations. "We need not examine every shade of gray coloring a concept as elusive as 'blight' to conclude that the term's meaning cannot extend as far as Paulsboro contends." Gallenthin, supra, 191 N.J. at 365. But Gallenthin does make clear that a perception, however accurate, that a property is underutilized is not a sufficient basis under the 1947 New Jersey Constitution for subjecting property to taking by eminent domain. "Paulsboro's interpretation of N.J.S.A. 40A:12A-5(e), which would equate "blighted areas" to areas that are not operated in an optimal manner, cannot be reconciled with the New Jersey Constitution." Gallenthin, supra, 191 N.J. at 365.

Planning Board members' own statements, cited in defense of the designation in the Board's reply brief on Gallenthin, make it clear that the Board did in fact equate blight with underutilization. Mayor Profeta and Chairman Carlson expressly argue precisely in terms of underutilization, and Ms. Ziefert complains that the current uses of the properties *add* nothing to the community's quality of life.

The Blighted Areas Clause does not authorize the exercise of eminent domain for the sole public purpose of adding to the well-being of the community. Such an authorization would be permissible under the United States Constitution, according to the line of cases culminating in Kelo v. City of New London, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005) ("Kelo"), because states are permitted to equate public use with public purpose.

> The disposition of this case … turns on the question whether the City's development plan serves a 'public purpose.' Without exception, our cases have defined that concept broadly, reflecting

> our longstanding policy of deference to legislative judgments in this field.

Kelo, supra, 545 U.S. at 480, 125 S. Ct. at 2663, 162 L. Ed. 2d at 452.

But the 1947 New Jersey Constitution does not go so far. It does not empower a municipality to invoke eminent domain for redevelopment unless that redevelopment is also a remedy for a current condition reasonably described as blight. Therefore, Maplewood's reliance on subsections 5(d) and 5(e) in the absence of blight is an impermissible application of the statute.

Another way of describing the deficiency in the Planning Board's findings is to do so as a function of time. Simply put, the Blighted Areas Clause does not appear to recognize future blight. A finding of blight must be based on present conditions, such as a decline in safety that is already underway, and to some extent on past conditions, such as a flood that occurred in the past and caused damages that are either complete or underway. If an area is found to be obsolescent, its decline must already have begun to occur and must have a connection to the safety, health, morals, and welfare of the community. While this temporal connection is not stated expressly in Gallenthin, the opinion's language, particularly its choice of verb tenses, suggests that the principle informs its reasoning:

> In Levin, supra, for example, we found that the parcels at issue were preventing the "proper development" of surrounding properties because they "had reached a stage of stagnation and unproductiveness." In Wilson, supra, we noted that much of the designated area contained "dilapidated homes and other buildings, which were obviously beyond restoration," and we observed that community redevelopment was a means of "removing the decadent effect … on neighboring property values," Although the meaning of "blight" has evolved, the term retains its essential characteristic: deterioration or stagnation that negatively affects surrounding properties.

Gallenthin, supra, 191 N.J. at 363, emphasis added, citations omitted.

Mindful of the limitations of grammatical analysis, this Court nonetheless infers that it is inconsistent with the Blighted Areas Clause as explained in Gallenthin to base a redevelopment designation on what amounts to a finding of "future blight." Maplewood and its Planning Board, presumably with the best of intentions, have done just that. However, perceived obsolescence of design or incompatibility with development plans, without a present detriment to the community, is simply not enough under the 1947 New Jersey Constitution. See City of Norwood v. Horney, 853 N.E. 2d 1115 (Ohio Sup. Ct. 2006), discussing a similar limitation under the Ohio Constitution:

> Government does not have the authority to appropriate private property based on mere belief, supposition or speculation that the property may pose such a threat in the future. … To hold otherwise would permit the derogation of a cherished and venerable individual right based on nothing more than "a plank of hypothesis flung across an abyss of uncertainty." Edith Wharton, The Descent of Man, 35 Scribner's Magazine (Mar.1904) 313, 321, reprinted in 1 The Selected Short Stories of Edith Wharton (1991) 49, 62. To permit a taking of private property based solely on a finding that the property is deteriorating or in danger of deteriorating would grant an impermissible, unfettered power to the government to appropriate.

City of Norwood v. Horney, supra, 853 N.E. 2d at 1145-46.

The error made by Maplewood and its Planning Board is entirely understandable. The standard they applied to the Evans and Rivco properties seems to fall well within the limits that apply under the United States Constitution as explained by Kelo. States, of course, can set more restrictive limits.

> We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline.

Kelo, supra, 545 U.S. at 489, 125 S. Ct. at 2668, 162 L. Ed. 2d at 457.

Thus, the text and judicial history of the Blighted Areas Clause of the 1947 New Jersey Constitution, which expressly links redevelopment and "blight," restrict New Jersey's definition of "public use" to a smaller ambit than that allowed under Kelo. Under the Blighted Areas Clause, "public use" simply is not as broad as "public purpose." In New Jersey, then, eminent domain may be invoked for the public use of economic redevelopment only when that redevelopment is also a remedy for present blight. Here, Maplewood has argued, perhaps correctly, that blight may occur in the future unless the Township designates the area in need of development. But they have not shown, and in fact seem not to have properly considered, whether the conditions that now exist can reasonably be described as blight.

IV. SUBSTANTIAL EVIDENCE ISSUE

Given that Lots 5 and 6 are not reasonably described as being blighted, they are not subject to inclusion in the redevelopment area under Section 5(d) or 5(e). But non-blighted properties can be included under the provisions of section 3:

> A redevelopment area may include lands, buildings, or improvements which of themselves are not detrimental to the public health, safety or welfare, but the inclusion of which is found necessary, with or without change in their condition, for the effective redevelopment of the area of which they are a part.

N.J.S.A. 40A:12A-3.

To be included under section 3, however, a property must be necessary to the successful redevelopment of an area of which it is a part. There would therefore have to be substantial evidence in the record that Lots 5 and 6 are a necessary part of the redevelopment area. Such substantial evidence is not in this record.

Even if the substantial evidence standard was met and the underlying designation of the redevelopment area was consistent with Gallenthin, the question whether the phrase "of which

they are a part" applies to the Evans and Rivco properties would remain. Their properties are outside the designated area, and are arguably necessary to the redevelopment, not of the designated area in isolation, but of that area in relation to a larger area that includes Lot 7, 10, 12, 14, 16, and 20. It is conceded that Lots 7, 10, 12, 14, 16, and 20 are not themselves in need of redevelopment, either independently or as part of a larger area. Maplewood and its Planning Board thus ask this Court to accept an apparently novel interpretation of the phrase "of which they are a part."

Maplewood and its Planning Board did not present substantial evidence in the record to demonstrate how the non-blighted properties owned by Evans and Rivco could be considered to be part of the redevelopment area. There was no evidence presented to show that non-blighted properties at the edge of this particular area in need of development can be included in it without their consent in order to assure the success of a redevelopment plan for a second, larger area that includes properties not designated as part of the redevelopment area. Beyond the fact that the Planning Board decided not to include Lots 7, 10, 12, 14, 16, and 20 in the redevelopment area, at oral argument, counsel for the Planning Board admitted that there was no evidence, much less substantial evidence, that could have justified their inclusion.

In the event Maplewood and its Planning Board try to produce substantial evidence on which to attempt to include Lots 5 and 6 in the redevelopment area under section 3, they will have some explaining to do. How can Lots 7 and 10, 12, 14, 16, or 20 be the boundary for a "super-sized" area in need of redevelopment for the purpose of including Lots 5 and 6, when those lots are concededly not in need of redevelopment themselves? Except for their alleged underutilization, how can Lots 5 and 6 be distinguished from Lots 7, 10, 12, 14, 16, or 20? This is not a typical "hole-in-the-donut" application of section 3. Maplewood and its Planning Board

have not demonstrated that section 3's support for systematic planning of a discrete area can be extended so far as to apply to an area larger than the designated area itself. What reasonable interpretation would support such an extension, and at what cost to the rights of private owners of non-blighted properties? This Court does not suggest that case cannot be made, but such a case would differ significantly from the case made in the more typical "hole-in-the-donut" application of section 3 and, more importantly, was not the case made in the designation of Lots 5 and 6 here.

As noted above, there is an aspect of the substantial evidence issue, argued extensively by the parties, which this Court does not reach. Evans and Rivco claim that Maplewood and its Planning Board acted "in direct contravention to the substantial evidence provided by [their] own expert … to arbitrarily and capriciously conclude these properties qualified as properties in need of development." They assert that Maplewood and its Planning Board considered the only substantial evidence in the case, which did not find the properties were in need of development, discussed that evidence, rejected it, and decided to include the properties anyway, without further process, and not based on substantial evidence. Evans and Rivco argue that expert testimony, under oath, is necessary to support a finding that a given tract should be included within a redevelopment area. They cite at least one recent unreported opinion in support of this argument.

As explained earlier, this Court does not reach this issue because it holds that the designation of the area in need of redevelopment was based upon a misinterpretation of section 5 as limited by the holding in Gallenthin. Whatever the merits of the argument about expert testimony and Maplewood's "wrestling" with issues, the likelihood that other properties were improperly included in the redevelopment area is significant. As discussed earlier, any argument

for including the Evans and Rivco non-blighted properties under section 3, in order to ensure the success of the development plan for the purportedly blighted properties, is fatally flawed.

Although not reaching the substantial-evidence issue as briefed by the parties, this Court cautions Maplewood that the arguments about the lack of an adequate record have merit. The process followed in this case is uncomfortably close to what Gallenthin warned against:

> Although issues of law are subject to de novo review, municipal redevelopment designations are entitled to deference provided that they are supported by substantial evidence on the record. The substantial evidence standard is not met if a municipality's decision is supported by only the net opinion of an expert….
>
> In general, a municipality must establish a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met. Because a redevelopment designation carries serious implications for property owners, the net opinion of an expert is simply too slender a reed on which to rest that determination.

Gallenthin, supra, 191 N.J. at 372-73.

As noted above, the application of the substantial evidence standard to this case presents a number of interesting issues. Maplewood and its Planning Board are urged to avoid the expenditure of time and money involved in resolving those issues, by making sure future decisions are expressly based on substantial evidence that is undeniably in the record, sworn, and supported by expert opinion not susceptible to characterization either as net opinion (for example, unelaborated references to properties as "moribund" or lacking in "charm"), or as observations made outside the record.

Finally, even if there were a basis to legitimately characterize the Evans and Rivco properties as "in need of redevelopment" under something other than subsection 5(e), it is apparent that the reliance by Maplewood and its Planning Board on that subsection, which reliance has been thoroughly undermined by Gallenthin, cannot be extracted from the

determination as a whole. This Court can have no confidence that if Maplewood and its Planning Board knew about and understood the decision in Gallenthin, it would have included the Evans and Rivco properties within the redevelopment area. This is particularly true in light of the non-unanimous Planning Board vote on these properties when compared to the unanimous vote on other properties. Further, if the issue of blight, as explained in Gallenthin, had been properly considered, the shape of the area purportedly in need of rehabilitation might have been different, and might have led Maplewood and its Planning Board to a different conclusion about the appropriateness of including Lots 5 and 6 under the provisions of section 3.

Maplewood, its Planning Board and their counsel worked very hard to do what they thought was best for their community and to follow the law as they best understood it. Their efforts and dedication are appreciated by this Court, and are not rendered less admirable by this Court's rejection of their findings. The advice that their counsel provided is not being criticized here. The simple fact is that Gallenthin settled an aspect of redevelopment and takings law that was previously debatable. Now that the law is settled, however, it must be upheld.

V. CONCLUSION

For the reasons discussed above, this Court grants Evans and Rivco judgment on their complaint and vacates Resolution 148-06 but only as applied to Lots 5 and 6. No relief is sought as to any other Lots, and no other relief as to Lots 5 and 6 is appropriate or necessary. No damages were sought at trial, and as to counsel fees, there is no fee shifting in an action in lieu of prerogative writs. R. 4:42-9.

Counsel for Evans and Rivco should submit a form of judgment consented to as to form by all counsel or, in the absence of such consent, all counsel should submit their competing forms of judgment within ten (10) days.