GALLENTHIN REALTY DEVELOPMENT, INC., a New Jersey Corporation, and/or GEORGE A. GALLENTHIN, III and CINDY GALLENTHIN, husband/wife, both jointly and severally, Plaintiffs - Appellants, v. THE BOROUGH OF PAULSBORO, PLANNING BOARD OF THE BOROUGH OF PAULSBORO, and THE PAULSBORO REDEVELOPMENT AGENCY, Defendants - Respondents.	)	SUPREME COURT OF NEW JERSEY DOCKET NO. 59,982 Civil Action On Appeal from a Final Judgment of the Superior Court of New Jersey, Appellate Division Docket No. A-6941-03T1 and Docket No. A-0222-04T1 Sat Below: Hon. Robert A. Fall Hon. Clarkson F. Fisher, Jr. Hon. Richard Newman

PLAINTIFFS-APPELLANTS' BRIEF

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December 21, 2006

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I. PRELIMINARY STATEMENT

This is the first case this Court has reviewed under the 1992 Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq. ("LRHL"). There are significant unanswered questions raised by the increasing use – and perceived abuse – of the LRHL to take land that does not meet any reasonable test of what constitutes a "blighted area" under N.J. Const. art. VIII, §3, ¶1, and transfer it to private developers. If the lower court opinions stand, then there will be virtually no check or limits on what kinds of property may be designated an "area in need of redevelopment," and no meaningful judicial review of whether such designations are supported by "substantial evidence."

The property in question here is a 63 acre plot with substantial freshwater wetlands near the Delaware River in Paulsboro, Gloucester County. It was designated an "area in need of redevelopment" solely because it was "vacant," and for that reason alone "not fully productive," and virtually no evidence supported this assertion except the bare fact that it was vacant. If property can be deemed to be "in need of redevelopment" merely because it is vacant or not fully productive, then it is no exaggeration to say that almost any property in the state is vulnerable to being taken on the most minimal of evidence, and the Constitutional requirement that such property must be "blighted" will have been abrogated.

The "evidence" on which the designation was made consisted of an expert's statement that would be a "net opinion" if offered in court, and nothing more. Both lower courts in this case held that

this nonetheless met the requirement that a designation be based upon "substantial evidence." Other reported and unreported decisions in the Law Division and Appellate Division show that there is disagreement or confusion over the quantum of study and evidence necessary to fulfill the "substantial evidence" test, with some courts including those in this case adopting an extremely deferential test and others requiring much more. With increasing unhappiness over the use and perceived abuse of eminent domain powers for economic development, it is important for this Court to ensure that a municipality that uses the LRHL for redevelopment purposes must do so on the basis of substantial evidence and not mere speculation and net opinions, and that judicial review be meaningful.

II. STATEMENT OF THE MATTER INVOLVED

This is a challenge by an action in lieu of prerogative writs of the decision of the Council of the Borough of Paulsboro, Gloucester County, to designate the plaintiffs' 63 acre parcel as one of a number of non-contiguous parcels scattered throughout the Borough as an area or areas "in need of redevelopment." The Superior Court, Law Division, upheld the Borough's actions and the Appellate Division affirmed.

III. STATEMENT OF PROCEDURAL HISTORY

On December 17, 2002, the Borough Council of Paulsboro adopted a resolution directing the Planning Board of the Borough of Paulsboro to conduct a preliminary investigation to determine whether plaintiffs' property was "in need of redevelopment." IPa59.[1]

On April 7, 2003, the Planning Board conducted a public hearing. On May 5, 2003 the Planning Board voted a final recommendation to the Mayor and Council by resolution dated May 6, 2003, that plaintiffs' property be designated "in need of redevelopment." IIPa529.

The Borough Council of Paulsboro approved Resolution 96.03 which designated plaintiffs' property as an area in need of redevelopment on May 6, 2003. IIPa1103. An ordinance was subsequently adopted on May 20, 2003. IPa79.

Plaintiffs filed their complaint in lieu of prerogative writs on June 18, 2003, in the Superior Court, Law Division, in Gloucester County. IPa1. The Law Division dismissed the plaintiffs' complaint on June 25, 2004, in an oral decision read into the record. On July 7, 2004, the Law Division issued a

[1] In Appellate Division docket A-6941-03T1 the appellant is Gallenthin Realty Development, Inc., a closely held corporation of which the principals are George A. Gallenthin III and Cynthia Gallenthin. References to the appendix in A-6941-03T1 are to "IPa#." In Appellate Division docket A-222-04T1 the appellants are George A. Gallenthin III and Cynthia Gallenthin. References to the appendix in A-0222-04T1 are to "IIPa#."

written order of dismissal. IPa22.

On August 18, 2004, plaintiffs filed a Notice of Appeal in the Appellate Division. The Appellate Division issued its decision on July 14, 2006, affirming the trial court. (The unreported decision of the Appellate Division is appended to our Petition for Certification and will be referred to in this brief as "App. Div. Op.") Plaintiffs filed their Notice of Petition for Certification on August 2, 2006, and their Petition For Certification on August 14, 2006. Defendants filed their brief in opposition on August 30, 2006. The Court granted the petition by order filed October 19, 2006. On unopposed motion of the plaintiffs, by order filed December 7, 2006, the Court permitted the filing of further briefs provided that the issues so briefed were confined to those raised in the Petition for Certification.

IV. STATEMENT OF FACTS

Plaintiff Gallenthin Realty Development, Inc. (GRD) owns a 63 acre site (Block 1, Lot 3) in the Borough of Paulsboro, Gloucester County. The company is owned by plaintiffs George and Cynthia Gallenthin. Various efforts at development have been undertaken in recent years, and the property has been used for agricultural purposes and as a dredging deposit site, although these activities have not produced much income. The plaintiffs have pursued plans to develop those portions of the property that can be developed.

A substantial portion of the property appears to consist of freshwater wetlands, as is evidenced by the fact that a common

reed, Phragmites australis, covers much of the parcel.[2] In the Freshwater Wetlands Protection Act in 1988, the Legislature declared wetlands to be very valuable in their natural state:

> The Legislature therefore determines that in this State, where pressures for commercial and residential development define the pace and pattern of land use, it is in the public interest to establish a program for the systematic review of activities in and around freshwater wetland areas designed to provide predictability in the protection of freshwater wetlands; that it shall be the policy of the State to preserve the purity and integrity of freshwater wetlands from random, unnecessary or undesirable alteration or disturbance; and that to achieve these goals it is important that the State expeditiously assume the freshwater wetlands permit jurisdiction currently exercised by the United States Army Corps of Engineers pursuant to the Federal Act [1] and implementing regulations.

N.J.S.A. 13:9B-2 (emphasis added). Accordingly, these wetlands are subject to stringent controls on development. The Appellate Division was thus in error in stating that "the sixty-three acres constituted usable property for development purposes." App. Div. Op. 43.

GRD and the Gallenthins have been faithful and diligent stewards of the property. There is not and has never been any claim that the site is unsafe, unhealthy, unsanitary, unsightly, a locus of crime or a source of tax delinquencies.

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[2] According to the United States Department of Agriculture, Phragmites "grows on level ground in freshwater marshes, oxbow lakes, swales, and backwater areas of river and streams. It also grows around springs and along pond and lake margins, streambanks, and irrigation ditches." http://www.fs.fed.us/database/feis/plants/graminoid/phraus/botanical_and_ecological_characteristics.html (citations omitted). The word "phragmites" is apparently derived from the Greek "phragma" or "fence." The American Heritage Dictionary of the English Language (Fourth Edition 2004).

Paulsboro is a small, older borough of about 6,500 residents in Gloucester County, and according to the Borough's Master Plan, has declining population and income. IIPa1162, 1164. It is distinctly divided into a mostly built-out residential area to the west of Mantua Avenue and a rail line, and several large industrial sites, some housing and the Gallenthin property to the east of that road and line. The westside residential area is commonly referred to as Paulsboro and the industrial area as Billingsport. Residential areas apparently comprise about half the borough and the largest land use in the borough is "undevelopable land consisting mostly of wetlands and water." IIPa476.

Beginning sometime around 1998, the Borough began a process of designating a series of contiguous and non-contiguous properties in the northern and eastern part of the Borough as an "area [or areas] in need of redevelopment" pursuant to the LRHL. The redevelopment contemplated by these actions would be accomplished by private developers, perhaps only one; the Master Plan calls for the Borough "to identify a redeveloper" for this section of the municipality. IIPa1161. The Master Plan also identified several areas as deserving of study for designation as areas in need of redevelopment or rehabilitation, but none of them included the Gallenthin property. IIPa1140-1141.

While the LHRL permits (but does not necessarily require) the "redevelopment plan" to be accomplished after the designation of an area as in need of redevelopment, the record of this case discloses two redevelopment studies in the pertinent time frame, referred to

as "URS Phase I," IIPa469, and "URS Phase II," IIPa556. These studies show that from the start, the process has very much focused on redeveloping two large adjoining industrial sites in Billingsport that have ceased active operations (and presumably now generate fewer property tax revenues as a result). These sites are owned by BP and Essex Chemical (Dow Chemical), and it appears that among the redevelopment options studied are either a port or a large commercial/industrial park. There are cryptic references to a third phase of the URS study, but if it was ever completed, it is not in the record. IIPa567, 604.

In the hundreds of pages of consultants' reports and municipal and planning board resolutions and ordinances, only one possible public use of the Gallenthin property is identified. In the URS Phase II Study, this property is identified as the third alternative situs for an access road to the other properties under study. So far as we are aware, there isn't even a proposed route for this alternative access road other than an arrow drawn on a simple unscaled map. IIPa607. The URS Phase II report acknowledges that the Gallenthin property is "wetlands." IIPa565, 607. The principal outcome of the planning process to date is the realization that the redevelopment properties could not feasibly be used as a large port area to compete with such ports as New York and Baltimore. Thus, the preferred plan has become a more mixed use plan, as tentatively agreed upon at the end of the second phase of planning, with greater emphasis on industrial and commercial use, and port facilities being largely dedicated to the onsite

activities. IIPa602-603. No part of these preferred plan activities makes any use of the Gallenthin property. The access road in the preferred plan is considerably to the north of the Gallenthin property. IIPa607. The map of the preferred plan identifies the Gallenthin property only as "wetlands." This very ambitious plan remains largely unsettled and nowhere near any concrete redevelopment activity.

Although it is not part of the record, it is our current understanding that the preferred access road, which crosses Mantua Creek considerably north of the Gallenthin property, has been selected as the only feasible route, and that funding to complete final planning for that preferred route has been obtained.

The Appellate Division opinion more or less accurately portrays the steps by which Paulsboro's redevelopment endeavors went forward. After several Council resolutions identifying properties to be investigated by the Planning Board, Remington & Vernick submitted a report in June 2000, recommending that all of the studied properties, which included the BP and Essex Chemical properties but did not include the Gallenthin property, be designated as an area in need of redevelopment. IIPa611. There is no question that if offered in court, this report would be a "net opinion." It examines approximately 184 acres and contains a brief description of the properties and then a brief description of what was clearly only a cursory exterior examination of the properties. The "findings," if they can properly be called that, are less than one page (if quotations from the statute are deleted) and summary

and conclusory, with no analysis at all. The Planning Board adopted a resolution recommending the designation, IIPa633.

Three additional properties totaling 6.8 acres west of the BP property on the waterfront (and also owned by BP) were the subject of another net opinion, IIPa622, and a Planning Board resolution recommending designation. IIPa629. Foreshadowing the action that was to be taken on the Gallenthin property, the net opinion noted that two lots totaling a little over 5 acres were "unimproved" and for that reason alone were "in need of redevelopment."[3]

On December 3, the Council by ordinance formally made the "area in need of redevelopment" designation for all of the studied properties and also approved an October 2002 "Summarization Of Redevelopment Plan" prepared by Remington & Vernick, which consists almost exclusively in substance of references to the URS studies. IIPa1105. So far as we are aware, this designation was not challenged.

Against this backdrop, the decision to add the Gallenthin property seems to have been at best an afterthought. The Council set the process in motion by a resolution dated December 17, 2002, requesting that the Planning Board study several additional properties, the largest by far of which is the Gallenthin property. In fact it is impossible to understand from the record why Paulsboro decided to include the Gallenthin property in any "area in need of redevelopment" years after planning had begun for the

[3] One riverfront lot of 4.8 acres was described as "having a natural stand of trees, shrubs and grasses." IIPa 624.

subject areas of the redevelopment site. As we discussed above, the URS II report only identifies a third alternative route for an access road as a possible use of the Gallenthin property. The record does not disclose any attempt to delineate the wetlands portions of the property in order to ascertain if such a road would even be feasible. In the study for the "area in need of redevelopment" designation and the resolutions making the designation, no mention is made of what the possible uses of the land might be. The "redevelopment plan" completed as part of the designation of the Gallenthin property is devoid of any useful facts or details, and is almost entirely a recitation of the various requirements of the LRHL. IPa54. There is a cross-reference to the URS I study. Nowhere in the two URS studies or any of the LRHL "redevelopment plans" is there any claim, or any evidence to support any claim, that the Borough's ambitious redevelopment plans cannot go forward without the Gallenthin property. There is simply no rational reason in the record for the Borough to have shown any real interest in the property.

The "investigation" for the designation of the Gallenthin property is thin, to say the least. The Planning Board again retained Remington & Vernick for the "investigation," which consisted of nothing more than a simple walk around the property and the taking of four photographs. The consultant made no effort to map out the property and its wetlands – indeed, the consultant seems to have been unaware that the Legislature considers wetlands and open space to be valuable. The decision relied entirely upon

N.J.S.A. 40A:12A-5e, which provides that a property can be declared "in need of redevelopment" if there is:

> 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 and unproductive or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

(Emphasis added.) There was no testimony or evidence that there was a "growing lack ... of proper utilization," or any problems of "condition of title" or "diverse ownership of the real property," or that the land was "stagnant" in any sense other than its lack of development, or that it was "unproductive." Thus, in relying upon this section, Paulsboro was finding "a total lack of proper utilization" based solely on the finding that it was not "fully productive."[4]

In January 2003, Remington & Vernick presented to the Planning Board a document entitled "Redevelopment Area Study and Plan Comprised of Lands East of Mantua Avenue and Situate to Riverside Area." We quote the entire "discussion" or "findings" of this study as to why the Gallenthin property should be designated "in need of redevelopment:"

> Conditions Rising to the Level of the Requisite Criteria for a Redevelopment Declaration Noted from Field Observation Conducted January 2003 include: a not fully productive condition of land as evidenced by the expanse

[4] That is essentially how the Borough's counsel argued to the Law Division "[t]he issue here is whether or not there's a fully productive use of the land." IIPa259.

> of vacant unimproved parcels which otherwise could be beneficial and contributing to the public health, safety, and welfare of the community resulting from aggregation of the positive features of development such as the introduction of new business, job creation, and enhanced tax base; and as further evidenced by the underutilization of the existing rail line (criteria e.)

(Emphasis added.) This discussion simply paraphrases a part of the subsection e criteria without any meaningful analysis, and finds that the property is "not fully productive."

We next quote in full the substance of the "Conclusion" of this "study:"

> Owing principally to the instances of a stagnant and not fully productive condition of land and circumstance of rail line under utilization [sic], this report concludes that existing conditions, as described herein, satisfy the statutory criteria necessary to deem the study area an area in need of redevelopment. The inclusion of the parcel upon which is situated Paulsboro Packaging, Inc., Lot 18, Block 1 within the redevelopment zone is recommended albeit the statutory criteria is not [sic] exhibited as inclusion of same may be necessary to fully insure the effectuation fo [sic] the goals of the redevelopment plan. Accordingly, it is recommended that the Mayor and Borough Council of the Borough of Paulsboro, and Planning Board, take the action necessary, as prescribed by law, to declare the area comprised of [Plaintiffs' property and others] an area in need of redevelopment.

This discussion repeats the earlier assertion that the property is "not fully productive," but now adds that it is "stagnant." No explanation appears anywhere as to why this land is "stagnant" in any sense that would not apply to any wetlands or open space.[5]

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[5] The word "stagnant" is defined as:
1. Not moving or flowing; motionless.
2. Foul or stale from standing: stagnant ponds.
3. a. Showing little or no sign of activity or advancement; not developing or progressing; inactive: a stagnant economy.

The Planning Board held a public hearing on April 7, 2003. (The Gallenthins appeared pro se and presented their own expert.) Mr. George Stevenson, one of the authors of the Remington & Varney study, testified. We quote in full his testimony on this property

> What you see out here is these four pictures right here, I personally took those pictures. I personally walked a good portion of that property. It's 63 acres. I can't tell you I walked every single square foot of it.
>
> BOARD: Mr. Stevenson, forgive me. For purposes of the record, though, could you identify what those pictures depict?
>
> MR. STEVENSON: I sure can. These four pictures here are part of Block 1, Lot 3. These are – I hope I pronounce this right, but Gallenthin, a sign here, and one of the pictures Gallenthin Meadowlands. So I'll refer to them as Gallenthin Meadowlands, but here we have four pictures. Each of these pictures indicate trees, a lack of improvement of any type, indications of what they call fragmites [sic], which is like cat of nine tails that you generally see, that type of plan. But what I really wanted to demonstrate with these photographs is that there are no physical improvements that I came upon when I was walking that site. All I could see was trees. I could see what appeared to be expanses of fragmites or the cat of nine tails, no development on that site, and I'm indicating these pictures here.

(P. 7, LL23-25 through P. 9, L1-6) IPa70-72 (emphasis added).

> MR. STEVENSON: Gallenthin Meadowlands. I did make my way out to Mantua Creek which bounds it to the east, and it just so happens that there was a kayaker going by and I could envision – I particularly on purpose took that guy's picture because I wanted to see if this is just the type of activity that development out there may actually perpetuate.

> b. Lacking vitality or briskness; sluggish or dull: a stagnant mind

The American Heritage Dictionary of the English Language (Fourth Edition 2004).

(p.9, LL18-25, to p. 10, L4) IPa72-73.[6]

> It appears to me at both sites is that here with respect to every site other than the Paulsboro Packaging, Incorporated, site, we find condition that lends itself to economic deterioration. That is, you have no improvement; you have vacant unimproved conditions. There's just no activity, and I would suggest to the board that if there would be improvement upon those parcels, particularly if there would be improvement in conjunction with the plan that's been previously approved, the aggregate that would be beneficial to the municipality in that there would be commerce occurring, there would be job creation resulting from that commerce occurring and the bottom line it would certainly enhance the tax base for the municipality, and so I am able to state to the board that because we have vacant, unimproved conditions, because there's bits of land that could otherwise be more beneficial to use for the overall welfare of this municipality, that these lands are considered to be an area in need or redevelopment.

(p.10, LL17-25, to p. 11, LL1-12) IPa73-74 (emphasis added).

To say that land is "not fully productive" because it is "vacant" is simply redundant. To say that "vacant" land is "stagnant" without any evidence of decline, decay or other unsafe or undesirable conditions is simply not accurate. Thus, in sum, the decision to declare the Gallenthin property to be "in need of redevelopment" was based solely on the bare assertion that the land was merely "vacant." No other reasons were ever offered or even suggested. There has never been any claim that the property is unsafe, unhealthy, unsanitary, a locus of crime or a source of tax delinquencies. There was no evidence offered to support any

[6] It is absurd to conclude that a recreational "kayaker" would prefer to travel alongside an industrial park or a port as opposed to undeveloped freshwater wetlands.

conclusion that there was a "growing lack of proper utilization." Nor was there any demonstrated awareness, let alone discussion, of the contradiction that this supposedly “blighted” property includes a substantial amount of freshwater wetlands which the Legislature has declared to be valuable in their undeveloped state.

Freshwater wetlands are as a matter of law not considered to be “stagnant” even if they remain undeveloped. In the Freshwater Wetlands Protection Act in 1988, the Legislature described wetlands as performing these numerous important and dynamic functions:

> The Legislature finds and declares that freshwater wetlands protect and preserve drinking water supplies by serving to purify surface water and groundwater resources; that freshwater wetlands provide a natural means of flood and storm damage protection, and thereby prevent the loss of life and property through the absorption and storage of water during high runoff periods and the reduction of flood crests; that freshwater wetlands serve as a transition zone between dry land and water courses, thereby retarding soil erosion; that freshwater wetlands provide essential breeding, spawning, nesting, and wintering habitats for a major portion of the State's fish and wildlife, including migrating birds, endangered species, and commercially and recreationally important wildlife; and that freshwater wetlands maintain a critical baseflow to surface waters through the gradual release of stored flood waters and groundwater, particularly during drought periods.

N.J.S.A. 13:9B-2. The Legislature also noted that these are public benefits that may outweigh any benefits that derive from development:

> The Legislature further finds and declares that ... the public benefits arising from the natural functions of freshwater wetlands, and the public harm from freshwater wetland losses, are distinct from and may exceed the private value of wetland areas.

Id.

Finally, there is no mention or claim that the larger redevelopment plans for the BP and Essex Chemical sites cannot go forward without this property. The lower courts nonetheless held that this study and testimony constituted "substantial evidence."

V. ARGUMENT

Attitudes in New Jersey about property and development have changed considerably since the 1947 Constitution approved the use of eminent domain to take "blighted" areas for economic development. Where once the state had numerous undesirable "swamps and marshes," and the law encouraged that they be filled or that structures be erected to prevent tidal overflow, see, e.g., Ward Sand and Materials Co. v. Palmer, 51 N.J. 51 (1968); N.J.S.A. 15:5-1 et seq., we now have vigorously protected "freshwater wetlands." Where eminent domain was once used for "removing the decadent effect of slums and blight on neighboring property values, [for] opening up new areas for residence and industry," Wilson v. Long Branch, 27 N.J. 360, 370 (1958), we now have eminent domain being deployed to stop development, as most recently exemplified by this Court's opinion in Mount Laurel Township v. MiPro Homes, L.L.C., _ N.J. ___, slip op. (December 7, 2006). We also know that many of the well-intentioned redevelopment projects that made extensive use of the Blighted Area Act resulted in conditions as deleterious as or worse than the conditions they replaced. There is also a growing amount of discontent about current uses and perceived abuses of eminent domain, and much of the discontent is focused on the use of eminent domain for private economic development purposes, which under our Constitution can only happen in "blighted" areas.

This issue was recently brought into sharper focus by the decision of the United States Supreme Court in Kelo v. City of New

London, 545 U.S. 469, 125 S.Ct. 2655 (2005), in which a divided Court declined to find a violation of the Fourteenth Amendment to the United States Constitution in taking private property for economic development purposes. The Court also invited states to interpret their own state constitutions in a different light, Id. at 2668, and some have now accepted that invitation. In City of Norwood v. Horney, 110 Ohio St. 3d 353, 853 N.E.2d 1115(2006), the Supreme Court of Ohio held that Ohio courts should apply heightened scrutiny in reviewing statutes that regulate the use of eminent domain powers, and further held that the Ohio Constitution does not permit the use of eminent domain powers to take private property for private economic development. In Wayne County v. Hathcock, 471 Mich. 445, 684 N.W. 2d 765 (2004), the Michigan Supreme Court overruled its decision in Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981) and held that Michigan would no longer permit the use of eminent domain for purely private economic development purposes.[7] Even if neither of these decisions could directly apply in New Jersey because of the provisions of our Constitution, they do serve to illustrate the way in which courts are re-thinking the once tolerant attitude they held towards the exercise of the immense eminent domain power for economic development purposes.

A. An "Area In Need Of Redevelopment" Must Still Meet The Constitutional Requirement of "Blight" And Its Negative

[7] Poletown is generally viewed as the first modern decision permitting the use of eminent domain for purely private economic development purposes.

Connotations

Our Constitution prohibits the taking of any property for private redevelopment unless it is in a "blighted area." N.J. Const. art. VIII, §3, ¶1 provides in relevant 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. ... private corporations may be authorized by law to undertake such clearance, replanning, development or redevelopment... ."

This authority has been implemented in three successive acts: the Blighted Area Act of 1949, the 1951 amendments to the Blighted Area Act, and the 1992 LRHL at issue here.

The Constitution did not define what was meant by the term "blighted," but there can be no doubt as to what the term was intended to mean. In the 1949 Blighted Area Act, the Legislature in part defined "blighted" as:

> an area in a municipality wherein there exists to a large extent:
>
> a) Buildings and structures on the property are unfit, unsanitary and unsafe for human use and habitation by reason of age, physical deterioration, dilapidation or obsolescence;
>
> * * *
>
> c) Buildings and structures which have economically deteriorated and where there is a disproportion between the cost of municipal services rendered to the area as compared with the tax revenue derived therefrom; or
>
> d) A prevalence of factors conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, crime and poverty.

N.J.S.A. 40:55-21.1 (repealed; emphasis added.) These definitions all have strongly negative connotations of decay and decline, consistent with the common understanding of "blight. (Needless to say, the Gallenthin property cannot be said to meet any of these standards.)

In the 1951 amendments to the Blighted Area Act, the Legislature amended the definitions:

> As used in this act, the term "blighted area" shall mean an area in any municipality wherein there exists any of the conditions hereinafter enumerated:
>
> (a) The generality of buildings used as dwellings or the dwelling accommodations therein 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;
>
> (b) The discontinuance of the use of buildings previously used for manufacturing or industrial purposes, the abandonment of such buildings or the same being allowed to fall into so great a state of disrepair as to be untenantable;
>
> © Unimproved vacant land, which has remained so for a period of ten years prior to the determination hereinafter referred to, and which land by reason of its location, or remoteness from developed sections or portions of such municipality, or lack of means of access to such other parts thereof, or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital;
>
> (d) Areas (including slum areas), with buildings or improvements which by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of

> ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community;
>
> (e) A growing or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein and other conditions, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

L. 1951, *c.* 248, § 1. Notwithstanding the expansion of the definition of what constituted a "blighted area," the severely negative connotations of decay and decline remain and are reinforced.

Court decisions confirmed the definitional requirement of a dynamic of decline and disease when the term "blight" was used. In Wilson v. City of Long Branch, 27 N.J. 360, 370 (1958), this Court said that blight had a "decadent effect" and involved "continued stagnation and decline." A blighted area was described as one becoming "more congested, deteriorated, obsolescent, unhealthy, stagnant, inefficient and costly." Id. In Berman v. Parker, 348 U.S. 26, 35 (1954), the Court said that "blight" refers to an area "possessed of a congenital disease" and features a "cycle of decay."

In Forbes v. Board of Trustees, 312 N.J. Super. 519 (App. Div.), certif. denied, 156 N.J. 411 (1998), the court said of the 1951 amendments:

> while the focus on residential slums remained substantially unchanged, the Legislature had recognized ... that the concept of blight also embraced the total unproductivity of unimproved vacant land and that commercial blight embraced not only economic deterioration in tax revenue but also all the adverse physical conditions of property that individually or in combination impeded its reasonable productivity and resulted in negative impact upon the general welfare and economic well-being of the community. Consequently, an area in which such properties predominated and which established its general character was eligible for the blight declaration.

Id. at 525 (emphasis added). Our views on much of the state's "unimproved vacant land" have of course matured since 1951, but in all events the 1951 amendments still included the Constitutional necessity of a "negative impact upon the general welfare and economic well-being of the community."

In 1992, the Legislature enacted the LRHL. In the new version of subsection e, the language was changed in two critical respects:

> 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 ~~and~~ other conditions, resulting in a stagnant ~~and unproductive~~ or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

L. 1992, c. 79, §5. While the addition of the word "lack" in the first line seems cosmetic, the other changes are not. A lack of proper utilization caused by "condition of the title, diverse ownership of the real property therein and other conditions" is not necessarily the same thing as "condition of the title, diverse ownership of the real property therein or other conditions." More importantly, "stagnant and unproductive" is not the same as

stagnant or not fully productive."[8]

Notwithstanding the 1992 changes, it is by now well settled that in the LRHL, the Legislature did not – and indeed, could not – do away with the requirement that only "blighted" property could be taken for economic development purposes. Forbes v. Board of Trustees, supra. The court there said:

> In comparing the repealed [Blighted Area Act] with the definitional provision of the LRHL, N.J.S.A. 40A:12A-5, it becomes immediately evident that the fundamental differences between them are cosmetic only . Their substantive provisions as well as their structure and verbiage are virtually identical. Thus,...the word "blight" has been banished, replaced by "area in need of redevelopment."

312 N.J. Super. at 526 (emphasis added).

> We agree with plaintiff – but so do defendants – that the Constitution permits the undertaking of public redevelopment only if the area so designated is blighted.

312 N.J. Super. at 528 (emphasis added).

> It is of signal importance to our analysis here that the blight definition of the Blighted Area Act was virtually unchanged by the LRHL. Thus, the Legislature may have taken the word "blight" out of the statute in favor of the more euphemistic "area in need of redevelopment," but what is of paramount importance is that the definitional standards were not changed in any material respect. Thus, an area, except for public lands or those located in enterprise zones, cannot, under the

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[8] The Appellate Division opinion in this case and at least one reported decision have affirmatively stated that the 1992 amended language of subsection e is "identical to" or the same as the prior language. App. Div. Op. 36; Concerned Citizens of Princeton, Inc. v, Mayor and Council of Borough of Princeton,370 N.J. Super. 429, (App. Div.), certif. denied, 182 N.J. 139 (2004). This is clearly erroneous. A court cannot presume that in changing "and unproductive" to "or not fully productive" the Legislature did not intend a substantive change in the law. See e.g. Kasper v Board of Trustees of Teachers' Pension and Annuity Fund, 164 N.J. 564 (2000).

> 1992 statue, be declared in need of redevelopment unless it meets exactly the same standards of blight required by the Blighted Area Act. The word "blight" may have been left out of the LRHL but the concept and longstanding definition of blight remain firmly fixed therein, and defendants themselves so understood. Thus, to the extent any comment made by the trial judge in rendering his oral decision may be construed as suggesting that the 1992 Act "liberalized" the standards for designation of an area in need in (sic) development, we reject the notion. The area must be found to be blighted in conformance with the same standards as theretofore even though we no longer call it a blighted area but rather an area in need of redevelopment.

312 N.J. Super. at 529 (emphasis added). Accord, Concerned Citizens of Princeton v. Mayor and Council, 370 N.J. Super. 429 (App. Div.); certif. denied, 182 N.J. 139 (2004). The Appellate Division in this case agreed in word, App. Div. Op. 28, but not in application.

B. The Gallenthin Property Is Neither An "Area In Need Of Redevelopment" Nor Rationally Part Of Any Such Area

The Gallenthin property does not meet any of the definitional requirements for an "area in need of redevelopment," if those requirements are read consistently with the Constitutional necessity for finding "blight." In making the designation, Paulsboro relied on subsection e. As to the Gallenthin property, this would require showing at least four distinct facts: (1) a "growing lack or total lack of proper utilization," (2) "caused by conditions of title, diverse ownership of the real property or other [unspecified] conditions," (3) resulting in a "stagnant or not fully productive condition" (4) of land "potentially useful and valuable for contributing to and serving the public health, safety and welfare." It seems beyond dispute that there must be

"substantial evidence" to support each of these distinct elements, and a failure to make the showing as to any one of the elements means that the designation cannot be sustained. We will take these in turn.

(1) There is no report or testimony by Remington & Vernick or any evidence at all to support any claim that there is a "growing" lack of proper utilization, since there is no discussion of the history of the use of the property. It cannot be said that there is a "total" lack of proper utilization, as some activity has clearly taken place. Finally, as we discuss below, the Legislature has declared as a matter of law that the wetlands portions of the property are being properly utilized.

(2) If there is anything wrong with the use of the property, no one has claimed that it is due to problems with title or ownership. There is no report or testimony by Remington & Vernick or any evidence to this effect (nor, indeed, any indication that they even bothered to look). This is one tract of land with one owner.[9]

If we read the "diversity of ownership" to refer to the diversity of ownership of all of the properties in Paulsboro designated as "in need of redevelopment," that claim would support including virtually any property in the Borough in the area in need of redevelopment, which would be arbitrary and capricious. To

[9] Mr. Gallenthin indicated to the Law Division that he had successfully pursued litigation to clear title to the property. IIPa259.

sustain a claim on this basis, then, the Borough must provide some plausible explanation as to why this property, which does not have title or ownership problems, must nonetheless be included with all the other diverse properties as well. As we explained above, the Borough has never identified any use for this land in the redevelopment efforts other than a contingent access road use, which now appears to have been dropped. Nowhere in the two URS studies or any of the LRHL "redevelopment plans" is there any claim, or any evidence to support any claim, that the Borough's ambitious redevelopment plans cannot go forward without the Gallenthin property. Since there is no rational explanation for why this property needs to be part of the redevelopment of the other properties, this argument is unpersuasive. Nor can the Borough rely upon the vague, standardless "or other conditions" language, as no evidence or testimony was adduced or present to support that claim.

(3) As we have pointed out above, in the 1992 LRHL the third element was changed to permit a finding of either "stagnant" or "not fully productive." The only evidence offered in the Remington & Vernick report to support either one of these elements was that the land is "a not fully productive condition of land as evidenced by the expanse of vacant unimproved parcels." In other words, the only thing wrong with the Gallenthin property is that it is vacant and undeveloped.

But the use of the word "stagnant" means that more than mere vacancy or lack of development is required. "Stagnant" is not a

neutral term in the sense of simply being "stable," but has negative connotations of decay and adverse consequences. To fulfill the Constitutional necessity of "blight," the term "stagnant" must understood as a condition that means the subject property is becoming "more congested, deteriorated, obsolescent, unhealthy, stagnant, inefficient and costly." Wilson v. City of Long Branch, supra, 27 N.J. at 370, and that the property has a "negative impact upon the general welfare and economic well-being of the community." Forbes supra, 312 N.J. Super. at 525. No such showing has or can be made.

It is also clear that some substantial portion of the Gallenthin property cannot be materially changed from its wetlands state because of the provisions of the Freshwater Wetlands Protection Act discussed above. In other words, if the wetlands can be considered "stagnant" simply because they are "stable" or "vacant and undeveloped," then the Legislature has mandated that they remain "stagnant." The legislative findings contained in N.J.S.A. 13:9B-2 which we quoted at length above demonstrate that in fact wetlands are anything but "stagnant," as they perform water purification and numerous other positive functions.

As for "not fully productive," we concede that the Gallenthin property is at least susceptible of literally being so labeled. If so, then that is literally true of just about every other square inch of real property in New Jersey, including virtually all open space and any property not already devoted to the highest and best money-making and property tax revenue-producing use permitted by

zoning and land use laws and variances. To read this phrase literally is therefore to grant "a delegation of unbridled discretion, to these subordinate agencies, [which] would constitute an abdication of the authority committed to the Legislature by the Constitution." Wilson v. Long Branch, supra, N.J. at 378. This Court has repeatedly emphasized that it will not engage in a literal reading which produces an absurd result or one at odds with the purpose of the statute. See, e.g., Hubbard ex rel. Hubbard v. Reed, 168 N.J. 387, 392-393 (2001); Matter of JWD, 149 N.J. 108 (1997).

The term "not fully productive" must therefore bear some relationship to the overall purpose of the statute, which is to attack and prevent "blight" in the Constitutional sense of spreading "decay" and "disease," and which has a "negative impact upon the general welfare and economic well-being of the community." Forbes supra, 312 N.J. Super. at 525. In the case of vacant and undeveloped land, as this Court recently alluded to in MiPro Homes, supra, numerous laws, hundreds of millions of dollars and decades of efforts have been devoted to ensuring that a great deal of land remains or returns to being "not fully productive."[10] Subsection c of N.J.S.A. 40A:12A-5 specifically addresses the limited

[10] The Industrial Sites Recovery Act, N.J.S.A. 13:1K-6 et seq., requires that many industrial sites at which operations are to cease must essentially be returned to a condition approximating the "not fully productive" nature of the Gallenthin property, even at great expense.

instances in which vacant land can be understood to be blighted. It requires a findings that by reason of its "remoteness, lack of means of access to developed portions of the municipality or topography, or nature of the soil, [the vacant property] is not likely to be developed through the instrumentality of private capital." This language certainly seems to include a requirement that development is demonstrably beneficial or desirable, and if not, the Constitutional necessity of "blight" certainly would. But the Gallenthin property does not meet these definitional requirements and that is presumably why Paulsboro did not rely upon subsection c.

(4) The requirement that the designated land be "potentially useful and valuable for contributing to and serving the public health, safety and welfare" has the same undesirable boundless quality as "not fully productive." There is no better illustration than this case.

The Remington & Vernick testimony on this was:

> we find condition that lends itself to economic deterioration. That is, you have no improvement; you have vacant unimproved conditions. There's just no activity, and I would suggest to the board that if there would be improvement upon those parcels, particularly if there would be improvement in conjunction with the plan that's been previously approved, the aggregate that would be beneficial to the municipality in that there would be commerce occurring, there would be job creation resulting from that commerce occurring and the bottom line it would certainly enhance the tax base for the municipality, and so I am able to state to the board that because we have vacant, unimproved conditions, because there's bits of land that could otherwise be more beneficial.

(p.10, LL20-25, to p. 11, LL1-12) IPa73-74 (emphasis added). Thus,

the only stated reason for the productive potential of the property was that it is "vacant." If the statute is read in this sense, then again it can be read to apply to every piece of vacant land and almost any parcel of improved real estate other than those with the most recent and highest and best construction.

But in at least one obvious sense, we can easily conclude that all or at least a significant portion of the Gallenthin property is already "useful and valuable for contributing to and serving the public health, safety and welfare" because it consists of wetlands and open space.

The Constitutional necessity of "blight" means that land that is vacant is, as we said before, spreading "decay" and "disease," and having a "negative impact upon the general welfare and economic well-being of the community." If that is not true, as it is not true of the Gallenthin property, then development potential is irrelevant. Even so, it is incumbent on Paulsboro to explain how it intends to use the property in a manner more beneficial than its current uses and to state how it can undertake that use in light of restrictions on development of wetlands. No such proof appears in this record including anywhere in the extensive plans already accomplished to date.

It is unheard of for a municipality to take a sixty-three acre property for a proposed "public use" that consists of using only a very small fraction of the land mass proposed to be taken – assuming that is still even a possibility, as it appears not to be. This stands in remarkable contrast to the normal condemnation

proceeding in which only the lands necessary for the road itself are subject to a taking. See, e.g. Township of West Orange v. 769 Associates, 172 N.J. 564 (2002); see also Lehigh Valley R.R. Co. v Chapman, 35 N.J. 177, 183-184, cert. denied, 368 U.S. 928 (1961),("the taking of right, title and interest of an owner should not be greater than necessary to effectuate the public use which called the public power into play") Wes Outdoor Advertising Co. v Goldberg, 55 N.J. 347, 353 (1970)("the express purpose of the acquisition does delineate a sufficient guide for the reasonable exercise of the power of condemnation").

In City of Atlantic City v. Cynwyd Investments, 148 N.J. 55, 73 (1997), ths Court said that "[t]he condemnation process involves the exercise of one of the most awesome powers of government," and then quoted with approval this excerpt: "[i]n determining whether projects with substantial benefits to private parties are for a public purpose, this Court has held that the trial court must examine the "underlying purpose" of the condemning authority in proposing a project as well as the purposes of the project itself." Wilmington Parking Authority v. Land With Improvements, 521 A. 2d 227, 231 (Del. 1986). If the wisdom of Paulsboro's ambitious redevelopment project is not before this Court, it is nonetheless relevant that there seems to be no legitimate reason for declaring all 63 acres "in need of redevelopment" when nothing more than the remote possibility of an access road is all that anyone can point to. Indeed, no redevelopment plan or redeveloper is need for that; as simple easement would fully accomplish that goal.

In sum, the Gallenthin property simply doesn't meet the definitional and Constitutional requirements for an "area in need of redevelopment" and "blight," and there is no rational reason to include it with the other parcels already designated. The evidence offered in support of the designation was nothing more than a consultant's rather obvious remark that the property is "vacant." Despite these obvious shortcomings, two courts of this state have said that Paulsboro's designation was not arbitrary and capricious and was supported by substantial evidence. The reason is that the lower courts are always not applying the tests in a consistent and careful manner.

C. This Court Must Affirm That Truly "Substantial Evidence" Is Required To Support A Designation That A Property Is "In Need Of Redevelopment"

There is a serious discrepancy among lower court opinions as to what constitutes "substantial evidence" and the degree to which a governing body must find evidence of real blight, as opposed to a municipality nurturing what one judge described as "dreams of grandeur," ERETC v. City of Perth Amboy, 381 N.J. Super. at 276, and allowing such notions to becloud its judgment.

There are few reported decisions on what is precisely meant by the term "substantial evidence." A typical case is Mead Johnson and Co. v. South Plainfield , 95 N.J. Super. 455, 466 (App. Div. 1967), in which the court defined "substantial evidence" as "such evidence as a reasonable mind might accept as adequate to support a conclusion." Yet this opinion cites to this Court's opinion in In Re Public Service Electric and Gas Co. , 35 N.J. 358, 376-377

(1961), which identifies a series of specific and detailed inquiries that the Board of Public Utilities was required to undertake by the "substantial evidence" requirement before it could exempt a utility from a local zoning regulation if it found that action to be "reasonably necessary for the service, convenience or welfare of the public." These inquiries included consideration of numerous land use questions including alternatives. This Court concluded by saying that the substantial evidence test included this: "[t]he Board's obligation is to weigh all interests and factors in light of the entire factual picture... ." Id. at 377.

Whatever "substantial evidence" might mean in a case involving a lesser interference with someone's private property, it has to mean something truly "substantial" when the end result is taking that private property away and giving its economic development benefits to someone chosen in a political process without such normal safeguards as the necessity of competitive bidding. N.J. Const. art I, ¶ 1 declares that among the inalienable rights secured is the right of "acquiring, possessing, and protecting property."[11] Designating a property as "in need of redevelopment" is inevitably a prelude to the taking of that property, Lyons v. City of Camden, 48 N.J. 524, 535 (1967), and that represents the most severe interference possible with the Constitutionally secured

[11] While this right is subject to the police power, see, e.g., Jones v. Haridor Realty Corp., 37 N.J. 384 (1962), it is not a right to be easily overridden by the outright taking of property based on the minimal evidence and excessive deference shown here and in other cases.

right to possess and protect property. Before a municipality is permitted to undertake that severest of interference, it is not too much to ask that it demonstrate truly "substantial evidence" to support that decision.

This Court's opinions have shown exactly what is required. In Lyons v. City of Camden, 52 N.J. 89 (1968), this Court set very high standards of evidence and study and judicial review needed before an area could be declared to be "blighted," the pre-1992 equivalent of "in need of redevelopment." The Court's searching and lengthy review of the extensive evidence offered in that case should have demonstrated to the lower courts that "substantial" was meant to be taken very seriously.

Some lower court opinions have followed this searching and indeed skeptical review. In ERETC v. City of Perth Amboy, 381 N.J. Super. 268 (App. Div. 2005) although the court said it would apply a "heightened deference" standard, it nonetheless refused to uphold a designation that was based "almost exclusively" on an expert's report that it characterized as "conclusory and failed to include any evidence to support his determination." Id. at 280. In Spruce Manor Enterprises v. Borough of Bellmawr, 315 N.J. Super. 286 (L. Div. 1998), evidence that a habitable apartment complex did not meet "current design standards regarding units per acre, number of parking spaces, recreational facilities and handicap accessability" was deemed inadequate to support "redevelopment area" designations in light of the "[s]ignificant consequences that befall an owner of a complex which is declared a redevelopment area" including a

reduction in the "market value of the property involved which flow from such a finding." Id. at 294-296. Thus the court acknowledged that injury to the property owner flows directly from the redevelopment area determination in advance of any decision to exercise eminent domain. Similarly, in Winters v. Township of Voorhees, 320 N.J.Super. 150, 152 (Law Div. 1998), the court struck down a "redevelopment area" decision regarding municipally owned land due to the absence of "substantial evidence that the tract is not likely to be developed through the instrumentality of private capital," citing N.J.S.A. 40A:12A-5c (addressing "[l]and that is owned by the municipality....or unimproved vacant land" similar to the Gallenthin property.)

A more recent unreported decision has followed this level of proper scrutiny which we urge the Court to formally adopt here. See, e.g., Tp. of Bloomfield v. 110 Washington Street, No. ESX-L-2318-05, slip op. at 6 (Law Div. August 3, 2005):

> In order to make a determination that a property is detrimental to public health, safety and welfare...there must be something more than a mere finding that it...is underutilized... . There must be substantial evidence that the condition noted 'is detrimental to the safety, health, morals or welfare of the community.' The position taken by Plaintiff that proof of any enumerated condition also automatically constitutes proof of a detriment is not supported by case law.

(Emphasis added.)[12]

Unfortunately, however, other lower courts have adopted an excessively deferential approach at odds with Lyons and other

[12] Copies of the unreported opinions are furnished with this brief.

cases. In Concerned Citizens of Princeton, supra, the court simply accepted the unsubstantiated assertions of an "expert" to the effect that any surface parking lot in any New Jersey municipality was "yesterday's solution." In City of Long Branch v. Brower, et al., No. MON-L-4987-05, at 29-30 (Law. Div. June 22, 2006), the court held that a challenge to a redevelopment area designation "can overcome a presumption of validity only by proofs that there could have been no set of facts that would rationally support a conclusion that the enactment is in the public interest. Hutton Park Gardens v. West Orange Town Council, 68 N.J. 543, 564-565 (1975). *** The same presumptions apply to a finding of an area in need of redevelopment." (Hutton, it should be noted, was a case sustaining a rent control ordinance against claims that it was "confiscatory," and hence, not relevant to the "substantial evidence" test for an LRHL designation.)[13]

In this case, the lower courts also followed an excessively deferential approach.

The Law Division may have misunderstood the meaning of "substantial evidence." In rendering its opinion on the record, the court said "[w]hat this Court would have done and what this Court thinks of the quality of the evidence is not a basis for a decision of [what] the planning board thought." IIPa276 (emphasis added). It is very much the province of the reviewing court to consider the quality of the evidence on which the designation was

[13] This case involves a plan to replace older single-family homes with expensive high-rise condominiums.

based, as shown by Lyons and the other cases we discussed above.[14] The trial court also said that this was essentially a matter of two competing experts, and that the planning board could believe one expert and not the other. Id. If the expert whom the board chose to believe rendered a "conclusory opinion," ERETC v. City of Perth Amboy, supra, the board is not free to choose between two opinions.

The Appellate Division made somewhat the same mistake as the Law Division, preferring to criticize the Gallenthins' expert and focus on his concessions instead of the skimpiness of the evidence on which Paulsboro relied. App. Div. Op. 38-39. The Appellate Division also plainly misread the holding of Levin v. Tp. Committee of Bridgewater, 57 N.J. 506, appeal dismissed, 404 U.S. 803 (1971), mistakenly reading a portion of the dissent in that case as if it were the majority opinion. The Appellate Division said that in Levin this Court "rejected a determination of blight," when in fact this Court upheld that determination, 57 N.J. at 545, and then referred to the dissent of Justice Haneman, not the majority opinion. App. Div. Op. 38; 40. The Appellate Division's excessive deference also led it to mistakenly conclude that "all sixty-three acres constituted usable property for development purposes," which is also inaccurate. The "expert" report here clearly identified the property as including a substantial amount of Phragmites australis, and the Appellate Division not only noted this, but in

[14] In what is surely an understatement, the trial judge had said earlier that the Paulsboro expert's testimony was "not lengthy." IIPa 274.

a footnote also said that these plants grow "in wet or muddy grounds." App. Div. Op. 3, n.1. The lack of adequate scrutiny meant that the Appellate Division was too accepting of the skimpy evidence before the planning board and failed to appreciate that there are serious obstacles to development of portions of the property, as well as no apparent use for it anywhere in the Borough's redevelopment plans.

This case demonstrates the pressing need for this Court to reassert what it said in Lyons v. City of Camden, supra: that the evidence supporting an "area in need of development" designation must be truly substantial and judicial review must be searching.

D. This Court Must Reaffirm That "Substantial Evidence" To Support A Designation That A Property Is "In Need Of Redevelopment" Must Meet The Constitutional Requirement Of Blight

As we set forth at some length in discussing how the Gallenthin property cannot legitimately be designated as "in need of redevelopment" or a rational part of any such area, the 1992 LRHL cannot be construed to avoid the requirement that any such property must be "blighted" in the Constitutional sense. It is plain that the Borough of Paulsboro has a very ambitious redevelopment plan. Perhaps it thinks it has better idea of how to use the Gallenthin property, although other than a passing reference to an alternate route for an access road, it hasn't yet revealed what that allegedly better use may be. But there is nothing in the record to support any notion that this property is unsafe, unhealthy, decaying, or a source of tax delinquencies or

confusion of title. It lacks the negative connotations inherent in the term "blight" as it was understood when the Constitution was adopted and as it is still understood today. No finding can be made that the property is becoming "more congested, deteriorated, obsolescent, unhealthy, stagnant, inefficient and costly." Wilson v. City of Long Branch, supra, 27 N.J. at 370. Both the Law Division and Appellate Division opinions focus on the claim that the property is "underutilized," but that is a far cry from the Constitutional necessity of having a "negative impact upon the general welfare and economic well-being of the community." Forbes supra, 312 N.J. Super. at 525. A claim of "underutilized" is also deficient against a backdrop of having no plan from the Borough as to how it might "better" utilize the property.

Allowing a designation and taking of private property solely on the basis that it is "underutilized" or "not fully productive" without the necessary element of "blight" grants dangerous and unbounded powers to a municipality to appropriate the economic, aesthetic, or other benefits of property from an owner who has been a faithful steward of the land but chooses not to develop it to its highest and best use, and give those benefits to a developer who can be selected without the normal safeguards against favoritism (or worse) or just plain bad decision-making such as competitive bidding.[15] Along with a more stringent application of the

[15] The only limitations on the power of the municipality to convey the property taken pursuant to this power are in N.J.S.A. 40A-12A-16.

"substantial evidence" test and the necessity for expert assistance, making municipalities find substantial evidence of real "blight" is not just a Constitutional necessity, it is a guarantor that the power will not be misused or carelessly used.

E. "Substantial Evidence" To Support A Designation That A Property Is "In Need Of Redevelopment" Must Ordinarily Be Based On An Adequate Expert Report Or Testimony

The question of the "substantiality" of the evidence also implicates whether the information relied upon by the governing body for a determination of "blight" or "in need of redevelopment" must be examined and testified to by an expert. No one can claim that a municipal governing body, an elected group of citizens, necessarily possesses any expertise in these areas. While planning board and governing body members may in some sense be familiar with the subject property, that does not lead to the conclusion that they are qualified without expert assistance to understand what is meant by the Constitutional requirement of blight or the definitions of what must be shown for an "area in need of redevelopment." Yet in Concerned Citizens, supra, the opinion essentially indicated that a governing body does not need expert testimony before making the designation. 370 N.J.Super. at 444, 463-464. The court apparently did so because the contents of the "expert" report in that case appeared to be minimal and the equivalent of a net opinion.[16] The expert opinion furnished to the

[16] The "expert" opinion appeared to simply say that level parking lots were "yesterday's solution," and somehow "separate[d] shops and deters shoppers from walking from destination to destination" in unexplained ways that a proposed

Paulsboro Planning Board is certainly a net opinion.

This Court should make it clear that except in unusual circumstances, the designation of an "area in need of redevelopment" must be based upon expert advice or testimony, and that the net opinion test will be applied.

In our State's courts, the standards for when an expert opinion is required are well settled. More specifically, "expert opinion is necessary and admissible if the general subject matter at issue, or its specific application, is one with which an average juror might not be sufficiently familiar, or if the trial court determines that the expert testimony would 'assist the jury in comprehending the evidence and determining issues of fact.'" State v. Berry, 140 N.J. 280, 292-93 (1995) (quoting State v. Odom, 116 N.J. 65, 70 (1989); see also State v Kelly, 97 N.J. 178, 208 (1984).

However, when the expert's opinion consists of nothing more than a bare conclusion unsupported by any factual evidence, as was the case here, it is inadmissible as a net opinion. Buckelew v. Grossbard, 87 N.J. 512, 524 (1981); Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 102 (App. Div. 2001). The net opinion rule is designed to exclude testimony that is based merely on unfounded speculation and unquantified possibilities. Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997), certif. denied, 154 N.J. 607 (1998). It requires the expert to give the "why and

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parking garage in the same place would not. 370 N.J. Super. at 458-460.

wherefore" of his opinion, Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002).

The complex definitions for what constitutes an "area in need of redevelopment" include information beyond the knowledge of the typical planning board member. All four discrete elements of subsection e would ordinarily require some expert assistance.

In seeking this requirement of expert participation, we do not ask this Court to break new ground. In Smart SMR v. Fair Lawn Bd. Of Adjustment, 152 N.J. 309, 336 (1998), this Court established that expert testimony will normally be required to prove an adverse effect on adjacent properties and the land use plan when a municipality decides the question of granting or denying a use variance to construct a cellular telephone tower. The Court noted that a municipality could not rely upon "[b]are allegations" that the tower would "cause a decline in property values." Id. The Court further noted that the testimony of a real estate agent that the tower would lower property values was "tantamount to a net opinion." Id. at 334. Accord, Cell South of N.J. v. Zoning Bd. Of Adjustment, 172 N.J. 75, 87 (2002)(testimony of lay witnesses insufficient to overcome several expert witness on issue of possible diminution of property values); New Brunswick Cellular v Bd. Of Adjustment, 160 N.J. 1, 16 (1999)(opinion unsupported by any studies or data a net opinion). Designating a property as "in need of redevelopment" is certainly a far more intrusive interference with a private owner's constitutionally guaranteed rights to enjoy his property. Deciding whether a particular property is "blighted"

in the Constitutionally defined sense is no less difficult or susceptible of lay understanding than the question of whether an adjacent cellular telephone tower will have an adverse impact on nearby property values. The Forbes test of showing that the subject property is having a "negative impact upon the general welfare and economic well-being of the community" is analogous to the showing of an adverse effect on property values, and if anything, more complex.

We are aware that the LRHL does not necessarily contemplate strictly adjudicatory hearings, N.J.S.A. 40A-12A-6, and that prior decisions of this Court have indicated that the designation is more of a "legislative" judgment. The leading case to this effect is Wilson v. Long Branch, supra, 27 N.J. at 384-389. Yet having said this, the Court in Wilson proceeded to uphold the "blighted area" designation very much because of the presence of numerous trial-type procedures, including extensive expert assistance: a "large number of photographs," a "series of maps," an "elaborate report of the planning consultant," the lack of an expert witness on behalf of the objectors, and the submission of the housing authority's expert to "about 4 ½ hours" of cross-examination. Id. at 390. It can be inferred that the Court was saying that courts reviewing "blighted area" designations should take such fact-finding protections into account, even if they were not necessarily to be required in all instances.

Moreover, this Court has noted that in certain instances, the Law Division hearing a challenge to a blighted area designation

must hold a trial-type hearing to supplement the record before the planning board and the governing body. In Lyons v. City of Camden, supra, the Court remanded a challenge to the trial court to hold an evidentiary hearing. The Court noted that "in justice to the plaintiffs whose homes undoubtedly will be taken eventually if the declaration of blight is sustained," those plaintiffs should be permitted to supplement the record compiled before the planning board, including calling and cross-examining the experts on whose evidence the declaration was based. Indeed, the failure of the planning board to permit cross-examination seems to have played a considerable role in the Court's decision. 48 N.J. at 534-535. See also Lyons v. City of Camden, 52 N.J. at 91(remand in prior opinion "was done because our examination of the record indicated that the plaintiffs had not been accorded an adequate opportunity to cross-examine the municipal witnesses and to introduce proof of their own... .")

It is thus no meaningful departure for this Court to finally formalize what its earlier opinions and some in the lower courts have often noted: that expert assistance is usually necessary and cannot be conclusory, crytpic and lacking in evidence and an adequate explanation for the expert's conclusions. It is not unfair or burdensome to require that an expert opinion used in determining the future of entire neighborhoods adhere to the same net opinion standards applied to simple negligence cases.

VI. CONCLUSION

There is nothing wrong with Paulsboro engaging in serious

efforts to return to productive use the areas of the closed BP and Essex Chemical plants. Given the extensive area encompassed by those plants as well as the loss of tax revenues that surely occurred when they were closed, redevelopment of those sites would seem to properly be a high priority of the Borough government, and a challenge not unlike those faced in many other New Jersey municipalities that were once the centers of industrial activity. The wisdom of the Borough's current plans is not before this Court, although those plans are certainly very ambitious.

That said, it is arbitrary and capricious to simply lump the Gallenthin property into the same category as the BP and Essex Chemical plants. The Gallenthin property is not a closed industrial site or previously intensively used property. Nor have its owners allowed the property to deteriorate or decay or become an unsafe or unhealthy property. Despite minimal income, they have paid their property taxes. They have gone to court to obtain clear title. There is no possible claim that the property is a detriment to the Borough. The owners are interested in developing those portions of the property that can be developed. If there are economic development benefits to be realized from the property, nothing about the Constitution, the Blighted Area Act or the Local Redevelopment and Housing Law permits the Borough to take those benefits away from the owners of land that is not blighted and give them to a favored developer, no matter how much more tax revenue an aggressive development might bring in.

For the reasons given in this brief, plaintiffs respectfully request that this Court reverse the determination of the Borough of Paulsboro that their property is "in need of redevelopment."

Respectfully submitted,

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