Clarifying Blight Criteria for Redevelopment in New Jersey

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Gallenthin v. Paulsboro,191 N.J. 344 (2007) did not change the law; rather the decision has refocused redevelopment on its true purpose to rejuvenate blighted areas as authorized by the New Jersey Constitution. Over the years, the use redevelopment has evolved from the removal of blight towards economic development. While improving an area may provide a public benefit[1], the New Jersey Constitution requires a finding of blight before eminent domain can be used for redevelopment by non-public entities.

> 1. *Blighted areas*, clearance, replanning, development or redevelopment; tax exemption of improvements; use, ownership, management and control of improvements
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> The 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; and improvements made for these purposes and uses, or for any of them, may be exempted from taxation, in whole or in part, for a limited period of time during which the profits of and dividends payable by any private corporation enjoying such tax exemption shall be limited by law. The conditions of use, ownership, management and control of such improvements shall be regulated by law. (emphasis added).
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> N.J.S.A. Const. Art. 8, § 3, ¶ 1

The Court's review of a designation based on *N.J.S.A.* 40AA;12A-5(e) in *Gallenthin* will likely impact the review of determinations based on the other criteria set forth under *N.J.S.A.* 40A:12A-5. Regardless of the criteria, *Gallenthin* substantiates that any determination concerning the existence of the enumerated conditions set forth under *N.J.S.A.* 40A:12A-5 must be consistent with a finding of "blight" that has a significant decadent effect on the surrounding properties:

> "Blight" is generally defined as "[s]omething that impairs growth, withers hopes and ambitions, or impedes progress and prosperity." American Heritage Dictionary 196 (4th ed. 2000); *see New Oxford American Dictionary* 177 (2d ed. 2005) (defining "blight" as "an ugly, neglected, or rundown condition of an urban area"). In 1938, an influential urban planner and author defined "blight" as "an area in which deteriorating forces have obviously reduced economic and social values to such a degree that widespread rehabilitation is necessary to forestall the

[1] See *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005)

development of an actual slum condition." Mabel L. Walker, *Urban Blight and Slums* 5 (1938). A more recent definition, as used in the context of urban redevelopment, describes "blight" as "an area, usually in a city, that is in transition from a state of relative civic health to the state of being a slum, a breeding ground for crime, disease, and unhealthful living conditions." Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 Real Prop. Prob. & Tr. J. 389, 393 (2000). Thus, the term presumes deterioration or stagnation that negatively affects surrounding areas.

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Accordingly, in 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 361-62

This decision was consistent with the history of blight in New Jersey cited in the May 2006 report, *Reforming the Use of Eminent Domain for Private Redevelopment in New Jersey*, prepared by Public Advocate Ronald K. Chen. This report traced the metamorphosis of blight from its inclusion in the 1947 Constitution to its euphemism "area in need of redevelopment" as defined in LRHL.

A constitutional understanding of the term 'blighted area' can also be derived from statements made by delegates to the 1947 Constitutional Convention. The language that became the 'blighted area' clause in the Constitution was sponsored by Delegate Jane Barus, who introduced an amendment to Committee Proposal No. 5-1. Ms. Barus's amendment, which was approved without change and which ultimately became Article VIII, § III, ¶ 1 of the Constitution, stated:

'The 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, and improvements made for these purposes and uses, or for any of them, may be exempted from taxation, in whole or in part, for a limited period of time during which the profits of and dividends payable by any private corporation enjoying such tax exemption shall be limited by law. The conditions of use, ownership, management and control of such improvements shall be regulated by law.'

Chen Report, Appendix at vii – viii.

Specifically, *Gallenthin* addressed Paulsboro's actions to designate a vacant 63-acre parcel of land located on the Delaware River opposite the Philadelphia Airport to be in need of redevelopment under the Local Redevelopment Housing Law ("LRHL"), *N.J.S.A.* 40A:12A-5(e). Paulsboro based this action on its belief that the land was in need of redevelopment merely because it was vacant and underutilized. The Court overturned Paulsboro's determination because the evidence underlying the designation did not establish the "substantial evidence" of blight as required by New Jersey's Constitution.

N.J.S.A. 40A:12A-5(e) states that property may be found to be in need of redevelopment where it is determined that:

> 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.

In *Gallenthin*, the Court held that the mere finding that a property is not "fully productive" was insufficient to support a determination it was in need of redevelopment. The Court stated that such a broad interpretation would make "most properties in the State eligible for redevelopment." (*Gallenthin supra*, 191 N.J. at 365). Instead, the Court held that only areas as a whole which are "stagnant and unproductive due to issues of title, diversity of ownership or other similar conditions" can satisfy this criteria (*Gallenthin, supra*, 191 N.J. at 348). The Court further noted that the property's condition had to prevent "the 'proper development' of surrounding properties to qualify as being in need of redevelopment (*Gallenthin supra*, 191 N.J. at 363).

In addition to addressing the need to find blighted conditions, *Gallenthin* confirms that such a finding must be supported by credible expert testimony. Net opinions and mere recitation of the statutory criteria is not enough. This is true for findings under *N.J.S.A.* 40A:12A-5 and *N.J.S.A.* 40A:12A-3. *Gallenthin, supra*, 191 N.J. at 372-73. See also *Hirth v. City of Hoboken*, 337 N.J. Super. 149 (App. Div. 2001), *ERETC v. v. City of Perth Amboy*, 381 N.J. Super. 268, 277-78 (App. Div. 2005). The Court emphasized the critical need to establish the substantial evidence was because a "redevelopment designation carries serious implications for property owners," including the risk of condemnation for private redevelopment. *Gallenthin, supra*, 191 N.J. at 372-73.

Since *Gallenthin*, there have been several opinions addressing redevelopment designations and challenges thereto. In addition, *Gallenthin* has resulted in some municipalities having to go back and review their determinations to insure they are supported by findings which substantiate the existence of blighted conditions. See *Arborwood I, et als. v. Borough of Lindenwold, et als* (Docket Nos. A-3977-05T2 and A-3992-05T2, decided October 1, 2007).[2]

[2] The unreported decisions cited in this article all can be found at http://njeminentdomain.com.

The recent opinion have review whether the record contains the the requisite "substantial evidence" to justify the designation. For example, in *Land Plans, LLC v. Mayor and Council of Hackensack*, Docket No. Ber-L-8029-06 decided June 29, 2007, the court overturned the designation of properties that was based on the conditions set forth in *N.J.S.A.* 40A:12A-5(d) and (e). Hackensack relied heavily on a review of the properties' improvements to land ratios when determining an area was under utilized. In overturning this finding, the court referenced *Gallenthin* and the standard set forth in *Wilson v City of Long Branch*, 72 N.J. 360, 370 (1958) that properties had to have a decadent effect causing severe decay and decline in order to satisfy the criteria set forth under *N.J.S.A.* 40A:12A-5 (*Land Plus* Slip opinion at 6). Hackensack's conclusion that the properties in question were under utilized failed to include a correlation of that finding with whether the alleged under utilization translated into blight (*Land Plus* Slip opinion at 9). Following *Gallenthin*, the court found that a finding of less than optimal use did not alone support a determination the property was in need of redevelopment (*Land Plus* Slip Opinion at 16-17). Hackensack's findings had to go further in order to establish blight. The *Land Plus* decision indicates that the days when mere reliance on an area having legally non-conforming uses, irregularly shaped parcels, obsolete layout, excessive land coverage, alleged functional obsolescence, parking lots, alleged faulty arrangement or design are over. Instead, a more comprehensive review of the full elements of the statutory criteria must be made to establish such conditions constitute blight.

In *HJB Associates, Inc. v. Council of the Borough of Belmar* (Docket No. A-6510-05T2 decided July 11, 2007), Belmar designated property to be in need of redevelopment based on a planning report which concluded the property was not fully productive. The planning report further concluded that there was a lack of investment in the study area which resulted in the area being unattractive for private investment. Specifically, the planner had indicated that the property suffered from faulty layout and the presence of contamination which stagnated the property's use. (*HJB* Slip Opinion at 3). The planner did not, however, go further analyze whether the condition of the property in question was a detriment to the "public health, safety and welfare" as required by *N.J.S.A.* 40A:12A-5. (*HJB* Slip Opinion at 7). The court found the planner's findings failed to establish the substantial evidence necessary to find the area to be in need of redevelopment and vacated the redevelopment designation. The *HJB* decision based on the municipality's failure to address all of the elements of the statutory criteria was similar to the decisions in *Spruce Manor Enter. v. Borough of Bellmwar*, 315 N.J. Super. 286 (Law Div. 1998) and *Bloomfield Township v. 110 Washington Street Associates* (Docket No. ESX-L-2318-05 decided August 3, 2005) *aff'd* Appellate Division, Docket No. A-6770-04T5 decided August 29, 2006 *cert denied* Docket No. 60,197 decided November 21, 2006.

In *LBK Associates, LLC. et als. v. Borough of Lodi, et als*. (Docket No. A-1829-05T2 decided July 24, 2007), the Appellate Division overturned the designation of two trailer parks and some businesses in Lodi to be in need of redevelopment. Of note in this decision is that the court would not remand the matter for further hearings to permit the Borough another chance to develop a record on whether the properties met the statutory criteria. Instead, it vacated Lodi's determination without prejudice and permitted the Borough to begin the process again. (*LBK* Slip Opinion at 5).

In *Evans et als. v Township of Maplewood, et als* (Docket No. L-16910-06, decided July 27, 2007), the court overturned a determination that was made against the planner's recommendation. This case addressed several interesting issues. The plaintiffs owned two properties at the end of an area designated to be in need of redevelopment. The remaining property owners did not challenge the designation. Maplewood presented a planner who indicated the plaintiffs' properties did not satisfy the criteria under *N.J.S.A.* 40A:12A-5. The planning board did not wish to accept that opinion and produced testimony from an economic development consultant who expressed the need to designate the properties in order to achieve an economic vision he had for the area. The economic development consultant's vision was without regard to whether the properties satisfied the criteria under *N.J.S.A.* 40A:12A-5.

Maplewood considered the economic consultant's testimony and found the properties met the criteria under *N.J.S.A.* 40A:12A-5. As an alternative theory, the Township also alleged that the properties were necessary for the effective redevelopment of the remainder of the area under *N.J.S.A.* 40A:12A-3. This alternative argument under *N.J.S.A.* 40A:12A-3 was developed without evidence in the record that substantiated this alleged need.

The court found Maplewood's designation of the overall area to be in need of redevelopment was based on insufficient evidence. Since the designation of the area was suspect due to the lack of requisite evidence, the court also found that any claim the plaintiffs' properties were needed for the effective redevelopment of the area to be unsupported. (*Evans* Slip Opinion at 7). Based on its findings, the court set aside the designation of the plaintiff property owners. The Court noted that it might have overturned the designation of other properties, but did not do so because those property owners did not challenge the designation. (*Evans*, Slip Opinion at 7).

It is not uncommon for one property owner to try to save money by riding the coat tails of its neighbor who may be challenging a designation. *Evans* demonstrates such a tactic may be risky and that each and every property owner must be vigilant in order to protect their rights. The court also addressed the ripeness of the challenge.

Another issue addressed in *Evans* was the question of ripeness. The township and planning board argued that the property owners' suit was premature because no redevelopment plan had been drafted for the area. They further argued that without a plan, there was not threat of condemnation. The court disagreed and found that the determination was an action that was the proper subject to a challenged before the adoption of a plan. (*Evans* Slip Opinion at 3). Strategically, the attack on the designation is significantly different than an attack on a redevelopment plan. If the designation is set aside, then the municipality is precluded from adopting a redevelopment plan. If a redevelopment plan is set aside, the municipality may still adopt a new plan without going through the designation process. *N.J.S.A.* 40A:12A-7. Therefore, setting aside a designation provides the property owner with greater security than merely setting aside a redevelopment plan.

In *Mulberry Street Area Property Owner's Group v City of Newark* (Docket No. ESX-L-9916-04 decided July 19, 2007), the trial court set aside a determination that was based on the area not being fully productive and the city's conclusion it could be used for something more beneficial. The properties mainly consisted of parking lots, vacant lots, and storage yards which the planner found were not properly or fully utilized. The considered these uses without addressing the issue of ownership as referenced in *N.J.S.A.* 40A:12A-5(e). The city also did not establish evidence that the area had reached a stage of stagnation that negatively affected the surrounding properties. Specifically, the court cited the city's failure to address the question of title on the conditions in the area. Furthermore, the city did not establish evidence that any of the parcels were necessary for the effective redevelopment of parcels which did meet the criteria established under *N.J.S.A.* 40A:12A-5. Finally, the court found that the city did not establish evidence that the condition of the properties "reached a stage of deterioration or stagnation that negatively affects surrounding area." (*Mulberry* Slip Opinion at 59-63). Notwithstanding, the court reviewed the evidence and did not find it demonstrated the conditions necessary to support a designation to be in need of redevelopment. (*Mulberry* Slip Opinion at 67-69). Accordingly, the court citing *Gallenthin* set aside this designation. In its decision, the court noted that there is no litmus test to analyze whether the evidence supports a designation. Instead, the court expressed its opinion that each finding must be evaluated on a case by case basis in light of the evidence adduced during the process. (*Mulberry* Slip Opinion at 63).

Another unreported decision related to the substantial evidence test was *International Realty, LLC v. Hoboken Planning Board, et als.* (HUD-L-3837-06). In *International Realty*, the court addressed the requirement for the planning board to swear witnesses during a hearing to determine its recommendation whether an area is in need of redevelopment (*N.J.S.A.* 40A:12A-6). The court noted that the planning board was a body created under the Municipal Land Use Law, N.J.S.A. 40:55D-1, et seq. ("MLUL"). Under the MLUL, all testimony before a planning board must be "taken under oath or affirmation" and be subject to cross-examination. (N.J.S.A. 40:55D-10(d)). The Hoboken Planning Board's recommendation to designate an area to be in need of redevelopment was based on data, statements, and representations which were not taken under oath. In overturning the determination that the area was in need of redevelopment, the court held that the planning board's requirement under N.J.S.A. 40:55D-10 to take all testimony under oath extends to hearings pursuant to the LRHL. The Court expressed its view that the legislative intent of this requirement was to insure that, at the very least, the testimony relied upon by a planning board in making a decision be sworn (Opinion at 15). The swearing of witnesses is a simple step that is surprisingly missed by Planning Boards when dealing with redevelopment designations. Although it is a simple step, the failure to swear the witnesses could have a fatal impact on a designation.

As demonstrated by the foregoing, *Gallenthin* is a reminder that redevelopment under the LRHL is limited to areas which the substantial evidence demonstrates exhibit conditions of blight. Under *N.J.S.A.* 40A:12A-5(a) through (f), those conditions are likely to be proven by evidence addressing all of the elements of the relied upon criteria. In addition, findings under *N.J.S.A.* 40A:12A-5(g) requires a finding under one of the other criteria in order to permit the use of condemnation. That other criteria are likely to be found under *N.J.S.A.* 40A:12A-5(a)

through (f). Similarly, a designation under *N.J.S.A.* 40A:12A-5(h) will require an additional finding under *N.J.S.A.* 40A:12A-5(a) through (f). *Gallenthin* affirms that a designation must be made based on conditions of blight. Therefore, a designation based on it being consistent with the state's smart growth planning principles will likely require a finding under *N.J.S.A.* 40A:12A-5(a) through (f) to substantiate the requisite blighted conditions.