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REAL ESTATE LAW

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Reversal of Blight

New crop of cases face *Gallenthin*'s substantial, credible evidence test

Eminent domain decisions in several municipalities demonstrate that courts are looking at prerogative writs actions and expert testimonies through the lens of *Gallenthin Realty v. Borough of Paulsboro*, 191 NJ 344 (2007). New Jersey courts would not accept or give deference to municipal blight declarations that were not supported by substantial, credible evidence in redevelopment projects in Belmar, Lodi, Newark, Camden and Maplewood.

Only one decision, involving properties in Mt. Holly, upheld the blight designation. Municipalities that presented less evidence than required by *Gallenthin* were subject to losing their blight designations, and cast a dubious light on the future of their redevelopment projects. In *Citizens in Action v. Township of Mt. Holly* (A-1099-05T3), the plaintiffs, a group of home owners, resided in or owned property in the section of Mt. Holly known as Mt. Holly Gardens. The trial court, after affording plaintiffs a hearing and an expansion of the record, affirmed the designation of an area in need of redevelopment. The Appellate Division unanimously affirmed the trial court and found that the municipality had met the burden under the Local Redevelopment Housing Law (LRHL), N.J.S.A. 40A:12A-1 et seq., of providing substantial, credible evidence to support a finding of blight. The case was argued in October 2006, but it was decided July 5, after the *Gallenthin* decision.

The court discusses *Gallenthin* in support of its opinion that redevelopment designations, like all municipal actions, are vested with a presumption of validity and that judicial review of a redevelopment designation is limited to whether the designation is supported by substantial credible evidence. It is clear from the text of the opinion that the substantial credible evidence standard will be strictly enforced, and equally clear in this case, that Mt. Holly's expert met the test. The presumption of the validity of the municipal action remained intact — a difficult issue for objecting property owners to overcome. Neither the courts nor the Legislature will deny a municipality the tool of eminent domain where they seek to redevelop clearly blighted properties.

On July 11, another appellate panel reversed Monmouth County Assignment Judge Lawrence Lawson's decision affirming Belmar's blighting of waterfront property belonging to Freedman's Bakery in *HJB v. Borough of Belmar* (A-6510-05T5). The appellate court in *HJB* stated that "the statutory language of subsection 5(d) requires that the conditions listed in the first part of the sentence be 'detrimental to the safety, health, morals or welfare of the community.'" While the investigation report prepared for Belmar by Schoor DePalma may demonstrate that Freedman's Bakery was obsolete, with faulty design and land coverage, the court found there was no proof that conditions were detrimental to the safety, health, morals or welfare of the community. *Spruce Manor Enter. v. Borough of Bellmawr*, 315 N.J. Super. 286 (Law Div. 1998), held that failure to meet current design standards could not, by itself, serve as a basis for a designation that the area was in need of redevelopment. Furthermore, the court said that the New Jersey Constitution restricts government redevelopment to "blighted areas" and quoted the Supreme Court's observation in *Gallenthin*: "[t]he New Jersey Constitution does not permit government redevelopment of private property solely because the property is not used in an optimal manner." Thus, even if its design was not optimal for commercial purposes, Freedman's Bakery is not a blighted area.

On July 16, five members of the Lodi Borough Council voted unanimously to drop the appeal of a lower state court decision that found the borough had no grounds to blight land belonging to Brown's Trailer Park and Costa Trailer Court, comprising approximately 20 acres in the vicinity of Route

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46. More than 40 residents were affected by the town's attempt to seize the properties by eminent domain. Bergen County Superior Court Judge Richard Donohue's decision in the case, *LBK Associates, LLC and Save Our Homes v. Borough of Lodi* (A-1829-05T2), was under appeal and pending at the time of the Borough Council's decision. The Office of the Public Advocate submitted an amicus brief in this case on behalf of the property owners. Public Advocate Ronald Chen said, "In this matter, the trial court reached the correct ultimate conclusion — Lodi's blight designation must fail."

Then, on July 24, a unanimous per curiam opinion was issued by New Jersey Appellate Judges Kestin, Payne and Lihotz, affirming Superior Court Judge Richard Donohue in *LBK Associates and Costa Realty*, and throwing out prior resolutions of the Lodi Planning Board, mayor and council that blighted the subject properties. The court rejected the argument that the plaintiffs failed to overcome the presumption of validity. Moreover, the court drew upon *Gallenthin*, stating, "Once plaintiffs demonstrated the redevelopment designation was not supported by substantial evidence, that municipal action was no longer entitled to the deference normatively afforded."

In light of its findings concerning blight and the absence of substantial, credible evidence, the court did not address other important issues raised in the amicus briefs filed by the Office of the Public Advocate and the Northeast New Jersey Legal Services regarding the municipality's constitutional obligation to make provisions for affordable housing and the effect of the exercise of eminent domain, which in these cases, would result in a net loss of affordable housing.

On July 17, a decision was issued by the Appellate Division in *Cramer Hill Residents Association v. Primas* (A-5486-05T3), a suit brought by the South Jersey Legal Services involving the Cramer Hill Neighborhood of Camden. The Appellate Division unanimously reversed the trial court regarding Camden's attempt to use eminent domain to acquire several parcels of land under the Fair Housing Act, N.J.S.A. 52:27D-325. Camden sought to use this act rather than the Local Redevelopment Housing Law (LRHL) after the trial court threw out Camden's redevelopment plan. The *Courier Post* reported that the city decided to redo the Cramer Hill redevelopment plan prior to the court's ruling on July 17. The basis for the city's eminent domain action was that the acquisitions would increase the number of affordable housing units in Camden. In reversing the trial court, the Appellate Division agreed with plaintiffs that a hearing was required at the trial level to establish that the proposed acquisitions would in fact increase the number of affordable housing units. The court accepted the plaintiffs' description of the Cramer Hill neighborhood: "The buildings are variously constructed of wood, brick and stone. The residential area contains modest, mostly single and semidetached family homes. They are primarily of nineteenth century construction with many fine period structures which continue to be solid, comfortable urban dwellings. Many homes are well-maintained and have attractively landscaped yards and gardens."

In reaching its conclusion, the court noted and relied upon the N.J. Supreme Court's recent decision in *Gallenthin.* The court reiterated that a hearing is necessary, when dealing with statutory construction and the use of eminent domain, to determine whether there is a rational basis to sustain the municipal action authorizing the use of eminent domain, which in this case, with reference to the Fair Housing Act, is designed to provide low and moderate income housing to the municipality.

Two days after the *Cramer Hill* opinion was released, on July 19, Essex County Superior Court Judge Marie P. Simonelli issued a detailed 71-page opinion in *Mulberry Street Area Property Owner's Group v. City of Newark* (ESX-L-9916-04), and threw out Newark's attempts to blight the Mulberry Street project area. The area consisted of 14 acres of land improved with a mix of residential and commercial buildings and several parking lots. There are 166 lots: all but seven lots are owned by private businesses or individuals, located approximately one block east of the Newark Arena project presently under construction on Broad Street.

Sixty pages of the decision were devoted to a parcel-by-parcel analysis of the properties and concluded, after reviewing the reports and testimony of the respective planning experts, that the city had not provided substantial credible evidence of blight as required by the LRHL. The court also relied on *Gallenthin Realty v. Borough of Paulsboro:* "Thus, regardless of whether the property is located in a small municipality, such as Paulsboro, or a large municipality, such as Newark, whether it is vacant or unimproved or a parking lot, gravel lot or storage yard, a municipality cannot take property for redevelopment solely under N.J.S.A. 40A:12A- 5(e) merely because it believes that the land is not fully productive and can be use for something more beneficial to the general welfare." The evidence demonstrated that the majority of the residential, mixed-use, commercial and industrial buildings are not deteriorated, dilapidated, abandoned or obviously beyond restoration. In fact, they were structurally sound, fully occupied, properly utilized, well-maintained and in good to fair condition or undergoing renovations or rehabilitation. The court found that Newark's declaration of the Mulberry Street neighborhood as an area in need of redevelopment under the LRHL was not supported by substantial evidence.

The Mulberry Street plaintiffs also made allegations of impermissible favoritism given to politically-connected developers. Although there was no determination regarding the merits of the corruption claim, the court noted the indictment of former Mayor Sharpe James for, among other things, alleged improprieties surrounding the sale of city owned property.

Finally, on July 28, Essex County Superior Court Judge Donald Goldman vacated Maplewood's blight declaration for two properties. *Carolyn Evans and Rivco Group, LLC v. Township of Maplewood* (L-6910-06), was an action in lieu of prerogative writs where the plaintiffs contested the inclusion of their properties in an area in need of redevelopment under the LRHL. The plaintiffs argued that the action of the defendant township was arbitrary and capricious and not based on substantial, credible evidence as required by the law. Relying on *Gallenthin*, the court rejected Maplewood's argument that the suit was

premature because no plan for redevelopment has been adopted and no condemnation was imminent. The court said:

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

Maplewood's argument was disingenuous, but not uncommon. Municipalities often attempt to intimidate property owners who oppose blight designations under the 45-day time constraints. A blight designation, left unchallenged, is indeed the foundation for subsequent eminent domain action by the municipality.

Gallenthin has offered the courts an important tool to deal fairly with property owners contesting blight. The Blighted Areas Clause in the New Jersey Constitution both grants and limits to the state's redevelopment authority. Through *Gallenthin*, we are reminded that, while the Legislature enlarged the power of eminent domain to include the taking of private property for redevelopment purposes, the judiciary is the final arbiter. As Justice Zazzali said, "The People entrusted certain powers to the Legislature, and the courts are responsible for ensuring that the terms of that trust are honored and enforced." ■