IN THE

Supreme Court of New Jersey

No. 59,982

GALLENTHIN REALTY DEVELOPMENT, INC., a New Jersey Corporation and/or GEORGE A. GALLENTHIN, III and CINDY GALLENTHIN, husband/wife, both jointly and severally,

Plaintiffs-Petitioners,

v.

THE BOROUGH OF PAULSBORO, PLANNING BOARD OF THE BOROUGH OF PAULSBORO, and THE PAULSBORO REDEVELOPMENT AGENCY,

Defendants-Respondents.

ON CERTIFICATION FROM A FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION (NO. A-0222-04T1) (FALL, P.J.A.D., C.S. FISHER, J.A.D. AND NEWMAN, J.A.D.).

BRIEF AND APPENDIX OF AMICUS CURIAE PUBLIC ADVOCATE OF NEW JERSEY

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INTRODUCTION

Amicus Curiae, the Department of the Public Advocate, respectfully submits this brief urging reversal of the reasoning of the Appellate Division below.

INTEREST OF AMICUS CURIAE

The Department of the Public Advocate was reconstituted as a principal executive department of the State of New Jersey on January 17, 2006, pursuant to the Public Advocate Restoration Act of 2005, P.L. 2005, c.155 (N.J. Stat. Ann. § 52:27EE-1 to -85). The Department is authorized by statute to "represent the public interest in such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest." N.J. Stat. Ann. § 52:27EE-57. The public interest is defined broadly to include an "interest or right arising from the Constitution, decision of courts, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J. Stat. Ann. § 52:27EE-12.

The ultimate and enduring mission of the Department of the Public Advocate remains the same as when it was originally created in 1974, and when this Court described it in 1980: "to hold the government accountable to those it serves and . . . [to] provide legal voices for those muted by poverty and

political impotence." Township of Mount Laurel v. Dep't of the Public Advocate, 83 N.J. 522, 535-36 (1980).

It is the judgment of the Public Advocate that this case, in which an area was designated as "blighted" merely because it is undeveloped and in its natural state, thereby subjecting it to possible future condemnation for redevelopment,[1] implicates the "public interest." N.J. Stat. Ann. § 52:27EE-12; see Department of the Public Advocate, Reforming the Use of Eminent Domain for Private Redevelopment in New Jersey (May 18, 2006), available at http://www.state.nj.us/publicadvocate/reports/pdfs/PAReportOnEminentDomainForPrivateRedevelopment.pdf (hereinafter "Public Advocate's Report").

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Public Advocate relies upon the Statement of Facts and the Procedural History in the decision below, Gallenthin Realty Development, Inc., v. Borough of Paulsboro, slip opinion, No. A-0222-04T1 (App. Div. July 14, 2006), with the following additional information.

[1] The Borough has not yet made any attempt to condemn the property through exercise of eminent domain, and it is possible that it may never do so. Nevertheless, since the designation of the area as "in need of redevelopment" becomes "binding and conclusive upon all persons affected by the determination" if not challenged in court within 45 days (N.J. Stat. Ann. § 40A:12A-6), this is the appropriate procedural juncture at which to challenge that designation.

This is a proceeding challenging the designation of an area including Block 1, Lot 3, Borough of Paulsboro, Gloucester County, as a "blighted area," or in the terminology of the 1992 Local Redevelopment and Housing Law (hereafter "LRHL"), an "area in need of redevelopment." There is no factual dispute that the subject property is undeveloped land in an open or natural state. The court below adopted the site description of the Borough's own planner: "there are no physical improvements that I came upon when I was walking that site. All I could see were trees. I could see what appeared to be expanses of phragmites or the cat-of-nine-tails [sic], no development on that site[.]" Slip op. at 12.

It is also a matter of public record that almost all of the subject property has been legally designated as protected wetlands under either the Wetlands Act of 1970, N.J. Stat. Ann. § 13:9A-1 to -10, or the Freshwater Wetlands Protection Act, N.J. Stat. Ann. § 13:9B-1 to -30. Official public maps and databases, on file with the State, Department of Environmental Protection, and the Gloucester County Clerk, show that areas designated as coastal or freshwater wetlands cover the vast majority of the targeted property.[2] Appendix of Amicus Public

[2] Available at http://www.nj.gov/dep/gis/depsplash.htm (including original coastal wetlands maps prepared pursuant to the Wetlands Act of 1970, aerial photograph, and mapping on the Geographic Information System of the DEP).

Advocate at 1-5 ("Am. App. at 1-5"); see N.J. R. Evid. 201(a) (court may take judicial notice of governmental agency determinations); N.J. R. Evid. 201(b) (court may take judicial notice of facts whose accuracy cannot reasonably be disputed).

ARGUMENT

I. THE DEFINITION OF A "BLIGHTED AREA" IS A CONSTITUTIONAL ISSUE THAT IS ULTIMATELY A MATTER FOR THE COURTS.

The striking of balances is a process inherent in constitutional adjudication. For instance, among the most fundamental of rights arising from the constitutions of both the United States and the State of New Jersey are the right to be free from deprivation of property without due process of law,[3] the rights of acquiring, possessing, and protecting property,[4] and the right to be free from government appropriation of private property unless for a "public use" and with "just compensation."[5] But this Court also noted long ago that "[t]he power of eminent domain is a high sovereign power that has been

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[3] U.S. Const., amend. XIV. Although the text of the New Jersey Constitution does not contain a due process clause in language comparable to the Fifth and Fourteenth Amendments of the Federal Constitution, this Court has found that the right to due process of law is implicit in Article I, paragraph 1 of the New Jersey Constitution. E.g., Pasqua v. Council, 186 N.J. 127, 147 (2006).

[4] N.J. Const. art. I, ¶ 1.

[5] U.S. Const., amend. V; N.J. Const. art. I, ¶ 20.

allotted to the legislative branch of the government since the Magna Carta." Abbott v. Beth Israel Cemetery Ass'n, 13 N.J. 528, 543 (1953). The 1947 New Jersey Constitution thus "continued the legislative authority to provide for the exercise of the sovereign power of eminent domain, restricted only by the pertinent clauses of that Constitution." Id. at 545 (emphasis added).

This case presents an opportunity for this Court squarely to consider the delicate constitutional balance contained in Article VIII, section 3, paragraph 1 of the New Jersey Constitution, which states in part:

> 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 . . . .

(emphasis added).

This language strikes a balance between the benefits of private redevelopment and the rights of property owners. On the one hand, "[t]he goal of restoration of blighted areas is . . . a constitutional value in New Jersey." Times of Trenton Publishing Corp. v. Lafayette Yard Community Dev. Corp., 183 N.J. 519, 528 (2005). But since such redevelopment contemplates the use of what the United States Supreme Court has called the

"despotic power," power of eminent domain,[6] our Constitution also creates a special limitation in the context of private redevelopment. While authorizing takings for such traditional public purposes as roads and schools no matter what the condition of the targeted property, N.J. Const. art. I, ¶ 20, the State Constitution permits the use of eminent domain for private redevelopment "only if the area so designated is blighted." Forbes v. Board of Trustees of Twp. Of South Orange, 312 N.J. Super. 519, 528 (App. Div. 1998) (emphasis added).

In the recent case of Kelo v. City of New London, 545 U.S. 469 (2005), while holding that the federal constitution does not limit use of eminent domain for redevelopment to blighted areas, the United States Supreme Court also reaffirmed a basic principle of federalism:

> We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.

[6] Van Horne's Lessee v. Dorrance, 2 U.S. 304, 311 (1795).

See id. at 489 (emphasis added) (noting that "[u]nder California law, for instance, a city may only take land for economic development purposes in blighted areas.").

Such a state-imposed limitation is precisely what New Jersey (and several other states) have enacted by making clear that private redevelopment constitutes a "public use" only if the area in question is "blighted." The courts' well-established role is to ensure that the Legislature's actions are within constitutional parameters.

A. Article VIII, Section 3, Paragraph 1 Of The New Jersey Constitution Creates A Protection Of Individual Rights And A Limitation On Legislative Power.

Respondents misunderstand the separation of powers and denigrate the role of this Court in asserting that the Legislature alone is responsible for "enunciat[ing] the Constitutional definition of blight." Respondents' Supplemental Brief to the Opposition to Petition for Certification at 50 ("Rsb50"). The fulcrum of the constitutional balance rests upon the definition and application of the term "blighted area." Although the text of the Constitution does not define the term, and although the Legislature has also enacted legislation that addresses whether an area is blighted, this Court has the ultimate authority and duty to construe and interpret the

language of the Constitution and to determine whether the Legislature has strayed beyond its limitations.

The proceedings of the 1947 Constitutional Convention establish the drafters' intent that the "blighted area" requirement act as an affirmative and enforceable limitation on the use of eminent domain for private redevelopment. Prior to the adoption of the current language, a convention committee considered a proposal that would have granted unfettered power to the Legislature. The text of that proposal stated:

> The acquisition of real property for development or redevelopment of any area in accordance with a plan duly adopted in a manner prescribed by the Legislature, whether the uses to which such area is to be devoted be public or private uses or both, is hereby declared to be a public use. The Legislature shall make laws governing acquisition, use and disposal of such property by an agency of the State or a political subdivision thereof. The Legislature may authorize the organization of corporations or authorities to undertake such development or redevelopment of any part thereof . . . .

Proceedings of the New Jersey Constitutional Convention of 1947, Vol. III, at 544 (emphasis added).

The proposal thus would have allowed for the taking of any area for private redevelopment, as opposed to the taking of only blighted areas. It also placed control of the process completely with the Legislature.[7] The breadth of the proposed

[7] A similar proposal had been promoted by the Committee of the New Jersey Federation of Official Planning Boards.

delegation of power to the Legislature prompted this colloquy before the convention committee:

> MR. JORGENSEN: Wouldn't that lead to a great deal of possible abuse?
>
> MR. FIFIELD: I think that any enabling law the Legislature might pass would undoubtedly restrict the right of these towns in certain definite neighborhoods. We feel that that would be a detail the Legislature should place in the laws and that it should not be restricted in the Constitution.

Proceedings of the New Jersey Constitutional Convention of 1947, Vol. III, at 545-56. Mr. Fifield's position did not prevail; the full convention did not adopt the sweeping delegation of power to the Legislature and instead adopted language limiting the use of eminent domain for redevelopment to blighted areas.

Amicus does not dispute that the Legislature has concurrent authority to give meaning to the constitutional term. Indeed, Amicus does not dispute that the legislative definition should be given appropriate judicial deference which, like all legislation, enjoys a presumption of constitutionality. But the Legislature enjoys that power subject to ultimate constitutional limitations and requirements. The courts and the Legislature commonly share responsibility to implement and define constitutional norms. But whether it be the definition of "thorough and efficient" education under Abbott v. Burke, the

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Proceedings of the New Jersey Constitutional Convention of 1947, Vol. II, at 1539; see also id., Vol. III, at 546.

obligation to provide affordable housing under the Mt. Laurel doctrine, or the recent directive to the Legislature to respond to the constitutional requirements of equal protection in Lewis v. Harris, the ultimate authority to interpret the Constitution, and to determine whether legislative enactments are consistent with constitutional norms, rests with the judiciary.

New Jersey has adopted the venerable view that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Sherman v. Citibank (S.D.), 143 N.J. 35, 58 (1995) (citing Marbury v. Madison, 5 U.S. 137, 177 (1803)); see also Attorney General ex rel. Werts v. Rogers, 56 N.J.L. 480, *188 (Sup. Ct. 1894). If the framers of the 1947 Constitution had intended to give the Legislature unfettered discretion in determining when property may be taken for redevelopment, it presumably would have adopted the language that was presented to it for that express purpose. But since they decided otherwise, it would defy logic to give the Legislature the exclusive prerogative to define the very term that imposes the limitation on its power.[8]

[8] If the Legislature were to be given unfettered and exclusive authority to define the constitutional term "blighted area," not only would such a holding remove all limitations on its power to authorize use of eminent domain for private redevelopment, but it would also remove all effective constraints on its ability to permit long-term tax abatements, despite the provisions of the Uniformity Clause, N.J. Const. Art. VIII, §1, ¶¶ 1, 2. See N.J. Const. art. VIII, § 3, ¶ 1

Contrary to Respondents' contention, Wilson v. City of Long Branch, 27 N.J. 360, cert. denied, 358 U.S. 873 (1958), supports the axiom that the judiciary is the final arbiter of constitutional interpretation. Wilson involved a challenge to the Blighted Area Act, the precursor to the LRHL. The petitioners in Wilson argued that the Legislature did not have the power to enact a definition of the term "blighted area." The Court responded that "[t]he article declares that redevelopment of 'blighted' areas shall be a public purpose and authorizes the Legislature to empower municipal governments to undertake such redevelopment. Manifestly, the grant of power contemplated development and implementation by the Legislature." Id. at 381. The Court thus stated the unremarkable proposition that the Legislature may implement constitutional provisions through appropriate legislation. But at the same time, Wilson emphasized that "the issue of whether the property acquisition is for public use is a judicial question . . . ." Id. at 385. Since the very reason for Article VIII, section 3, paragraph 1 is to provide a particular definition of "public purpose" in the

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(permitting Legislature to provide for long term tax abatements for improvements made for purpose of redeveloping "blighted areas"). Given the caution with which the 1947 Constitution authorizes deviation from the Uniformity Clause, such a rule would lead to an absurdity, since the Legislature would thereby be able to use the power of definition to remove any constitutional limitations on its own power.

context of private redevelopment, it necessarily follows that the definition of “blighted area” is also a judicial question.

II. A BLIGHTED AREA MUST BE AFFECTED BY A PRESENT STATE OF DETERIORATION THAT CONSTITUTES A DETRIMENT TO THE HEALTH, SAFETY, AND WELFARE OF THE COMMUNITY.

Because the 1947 Constitution does not provide a self-contained definition of the term, this Court must resort to standard and well-known methods of interpretation and construction. As a preliminary matter of syntax, the term “blighted area” is a negative, and in some ways pejorative, description of land, and must have been understood and intended as such by the 1947 Constitutional Convention. It therefore is not possible to use the term accurately to describe land that is merely not as productive as it possibly could be, since this is true of all real property. Indeed, the attempt in the 1992 LRHL to make the nomenclature of redevelopment more palatable by inventing the new term “area in need of redevelopment” is persuasive evidence that the new vocabulary may now extend beyond the limitation intended by the 1947 Constitution.

The report of the County and Municipal Government Study Commission that led directly to the enactment of the LRHL contained the following remarkably candid explanation of its recommendation to replace the term “blighted area” with the term “area in need of redevelopment.”

> The concept of a "blighted area" has changed considerably since the term was introduced in earlier redevelopment statutes. Over the past three decades, the focus of public action with respect to redevelopment has shifted from the elimination of "unsanitary," congested and unsafe slums, to the rehabilitation and conservation of declining neighborhoods, and to the enhancement and improvement of underutilized commercial and industrial areas. It is evident that the concept of a "blighted area" is no longer relevant and, in fact, carries an unnecesarily [sic] negative connotation. In some cases, this can represent a political constraint in municipalities that are considering the redevelopment of parts of their communities.

State of New Jersey County and Municipal Government Study Commission, Local Redevelopment in New Jersey: Structuring a New Partnership 58 (1987) (emphasis added).

Since it does not add clarity to legal analysis to deal in euphemisms, this brief will continue to refer to the original, constitutional term "blighted area." First, it should be difficult to sustain the proposition before this or any other court that language contained in our state Constitution is "no longer relevant." Second, Amicus suggests that the "political constraint" and "negative connotations" associated with the term "blighted area," which in the Commission's view deterred overly expansive designation of areas for possible redevelopment, are transactional costs that the 1947 Constitution presumably intended when it incorporated the term, lest resort to redevelopment become too easy, too facile, or too convenient.

In construing the term "blighted area," the Court may and should "consider any history which may be of aid" in ascertaining the intent of the drafters. See State v. Madden, 61 N.J. 377, 389 (1972) (interpreting legislative intent). And when a legislative body such as the 1947 Constitutional Convention incorporates a technical term of art, "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." Morissette v. United States, 342 U.S. 246, 263 (1952).

The term "blighted area" had accumulated a technical meaning among urban planners in the years preceding the 1947 Constitutional Convention. See generally, Colin Gordon, Developing Sustainable Urban Communities: Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight, 31 Fordham Urb. L.J. 305 (2004). The earliest use of the term "blight" for real estate purposes was by University of Chicago sociologists in the 1920s. They applied the term to describe changes to an area that, although not necessarily meeting the definition of a "slum," constituted properties in a state of decline. See, e.g., Homer Hoyt, One Hundred Years Of Land Values In Chicago 364 (1936); Ernest Burgess, The Growth of the City: An Introduction to a Research Project, in The City 47

(Robert E. Park et al. eds., 1925). See generally, Wendell E. Pritchett, The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 Yale L. & Pol'y Rev. 1, 16 (2003).[9]

Crucial to the historical understanding of blight was that the current condition of the area in question was one of deterioration, decay, and stagnation. See Mabel L. Walker, Urban Blight and Slums 4 (1938) ("Practically the one point on which all writers seem in agreement is that a blighted area is one which is deteriorating, and this is the point most emphasized in

[9] Other scholars and planners soon echoed the Chicago sociologists' definition of "blight." See, e.g., Edith Elmer Wood, Slums And Blighted Areas In The United States 3 (1935) ("A blighted residential area is one on the down grade, which has not reached the slum stage"); President's Conference on Home Building and Home Ownership, 3 Slums, Large Scale Housing And Decentralization 41 (John M. Gries & James Ford eds., 1932) ("A blighted area is an area where, due either to the lack of a vitalizing factor or to the presence of a devitalizing factor, the life of the area has been sapped."); Walker, Urban Blight 6 ("Old buildings are neglected and new ones are not erected and the whole section becomes stale and unprofitable. In other words, blight is a condition where it is not profitable to make or maintain improvements."); id. at 7 ("Instead of being improved in an appropriate manner, buildings are allowed to rot and let out to the most economically helpless of the city's inhabitants."); id. at 17 ("[A]ll the visible manifestations of blight appear. Structures become shabby and obsolete. The entire district takes on a down-at-the-heel appearance. The exodus of the more prosperous groups is accelerated. Rents fall. Poorer classes move in. The poverty of the tenants contributes further to the general air of shabbiness. The realty owner becomes less and less inclined or able to make repairs. . . . At length the worst sections become slums with high disease and high crime rates."); C. Louis Knight, Blighted Areas and Their Affects Upon Land Utilization, in The Annals Of The American Academy 134 (1930).

the . . . definitions."); Clarence Arthur Perry, The Rebuilding of Blighted Areas: A Study of the Neighborhood Unit in Replanning and Plot Assemblage 8 (1933) ("Blight [is] an insidious malady that attacks urban residential districts. It appears first as a barely noticeable deterioration and then progresses gradually through many stages toward a final condition known as the slum.").[10] These respected authorities were current within a decade before the 1947 Constitution.

Courts too have long echoed the notion that blight was predicated on a present, stagnant condition of the land. See, e.g., Berman v. Parker, 348 U.S. 26, 34, 35 (1954) (stating that "blight" refers to an area "possessed of a congenital disease" and containing a "cycle of decay"); Levin v. Township Comm. of Twp. of Bridgewater, 57 N.J. 506, 538 (1971) (stating that a blighted area refers to a situation where "potentially useful land reaches a stage of stagnation and unproductiveness through one or more causes"); id. at 540 (noting that "removing the decadent effect of blight" can "make the difference between

[10] National Association of Housing Officials, Housing Officials Yearbook 241 (1936) (defining "[b]lighted [a]rea as "[a]n area in which deteriorating forces have obviously reduced economic and social values to such a degree that widespread rehabilitation is necessary to forestall the development of an actual slum condition."); James Ford, Slums And Housing at 11 (1936) ("Any area of deteriorated housing in which there is a poor upkeep of houses and premises is a blighted district and a potential slum.").

continued stagnation and decline and a resurgence of healthy growth") (quoting Wilson, 27 N.J. at 370).

A constitutional understanding of the term "blighted area" can also be derived from statements made by delegates to the 1947 Constitutional Convention. In support of her amendment that eventually became Article VIII, section 3, paragraph 1, Delegate Jane Barus stated:

> The older cities in the State, in common with most older cities everywhere, I imagine, have been facing an increasingly difficult situation as the years advance. Certain sections of those cities have fallen in value, and have become what is known as "blighted" or "depressed" areas. This has happened, sometimes, because the population has shifted from one part of the town to another, or one section has become overcrowded.
>
> . . .
>
> These depressed areas go steadily down hill. The original occupants move away, the rents fall, landlords lose income and they make up for it by taking in more families per house. It's impossible to keep the properties in good condition, the houses deteriorate more and more, and what was once a good section of town is on the way to becoming a slum.

Proceedings of the New Jersey Constitutional Convention of 1947, Vol. I, at 742. See also id. at 743 (Ms. Barus stating that a small improvement in a "blighted area" "cannot turn the tide of deterioration"). The framers of the 1947 New Jersey Constitution thus invoked the then current understanding among scholars and urban planners that the term "blight," when applied

to land, necessarily included a current characteristic of decay and deterioration constituting a present detriment to the safety, health, and welfare of the community. Amicus respectfully argues that it is not constitutionally permitted to interpret blight in a way that invites a comparative analysis of what the area could become through forced redevelopment. As Justice O'Connor aptly noted in her dissent in Kelo:

> For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.

545 U.S. at 503 (O'Connor, J., dissenting). Thus, if the Court permits the definition of "blighted area" to become a prospective inquiry into potential future beneficial uses of the land, then with sufficient enthusiasm any land or area could be deemed "blighted."[11]

This Court, like other courts, should reject the concept of prospective "blight." As both the federal and state courts in California have noted in interpreting that state's analogous

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[11] One commentator has coined the term "future blight" in criticizing the notion that an area that might be made more productive or attractive through redevelopment is therefore blighted. Gordon, Developing Sustainable Urban Communities, 31 Fordham Urb. L.J. at 328-29. ("The idea of "future blight" gives developers and development officials in most states the power to blight virtually any urban parcel.").

redevelopment law, "[d]eterminations of blight are to be made on the basis of an area's existing use, not its potential use." Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency, 98 Cal. Rptr. 2d 334, 362 (Cal. Ct. App. 2000); see also, Sweetwater Valley Civic Ass'n v. Nat'l City, 555 P.2d 1099, 1103-04 (Cal. 1976) (stating that "the Legislature made clear its intent that a determination of blight be made - not on the basis of potential alternative use of the proposed area - but on the basis of the area's existing use"); 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1130 & n.2 (C.D. Cal. 2001) (“the notion of avoiding ‘future blight’ as a legitimate public use is entirely speculative and wholly without support in California redevelopment law”).

III. AS APPLIED IN THIS CASE, SUBSECTION (e) OF THE LOCAL REDEVELOPMENT AND HOUSING LAW GOES BEYOND THE CONSTITUTIONAL DEFINITION OF “BLIGHTED AREA.”

A definition of “blighted area” that rejects, as it should, the concept of “future” or “prospective” blight renders constitutionally problematic the statutory section upon which the Appellate Division relied exclusively in reaching its conclusion. It is the position of Amicus that subsection (e) is so infected with the concept of “underutilization” and the allure of more attractive prospective uses for non-blighted property that it cannot survive constitutional scrutiny. Amicus

takes no position, however, on whether or not the record below might support designation of this property through some alternative section of the LRHL.[12]

The current version of N.J. Stat. Ann. § 40A:12A-5(e) in the LRHL provides that an area may be determined to be "in need of redevelopment" if it is characterized by:

> e. A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

Application of subsection (e) therefore depends on several utterly subjective, and arguably undefinable, determinations:

- a lack of proper utilization (whether due to condition of the title, diverse ownership of the real property therein, or "other conditions"), that results 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.

When parsed with care, subsection (e) results in logical constructs that are either tautological or unfathomable. Only

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[12] In particular, Amicus takes no position on whether this property might fall within the meaning of N.J. Stat. Ann. § 40A:12A-5(c), which addresses unimproved vacant land. The trial court expressly avoided basing its decision on subsection (c), and the Appellate Division did not mention it at all, resting its reasoning entirely on subsection (e).

the subjective assessment of the beholder can determine whether a particular utilization is "proper," or whether the land is "not fully productive." And as argued above, the invitation to deem any land "potentially useful and valuable" for new and more attractive or profitable uses is one that virtually any redevelopment process would find difficult to decline. As one California appellate court observed, it is not sufficient for substantial evidence purposes for a town to state a fact that could be true for any property anywhere, such as that buildings age and thus become less valuable, or that a property with a different use could produce more tax revenue. County of Riverside v. City of Murrieta, 65 Cal. App. 4th 616, 627 (Cal. Ct. App. 1998) (rejecting city's attempt to designate an area as blighted as unsupported by substantial evidence). Because such evidence applies with equal force to all or substantially all property, it does nothing to explain why any particular parcel is blighted or should be condemned.

Subsection (e), at least as applied to this case, creates a definition of blight that extends well beyond that permitted by Article VIII, section 3, paragraph 1, of the New Jersey Constitution, since it permits a boundless pursuit of land that, in someone's view, can be made more productive. There is no parcel of land in New Jersey that would be safe from such pursuit.

A. The History Of Subsection (e) Of The LRHL Indicates A Progression Beyond The Intent Of Article VIII, Section 3, Paragraph 1 Of The New Jersey Constitution.

This State's first redevelopment law enacted after the 1947 Constitution, i.e., the 1949 Blighted Area Act, 1949 N.J. Laws c.187, did not contain subsection (e) nor any analogous precursor provision,[13] although most of the other provisions

[13] The first instance in which a provision containing some of the language now found in subsection (e) was enacted by the Legislature was in the Local Housing Authorities Law, 1949 N.J. Laws c.300, codified at N.J. Stat. Ann. § 55:14A-31, repealed by 1992 N.J. Laws c.79, §59, which contained the following relevant legislative determination:

> It is hereby found and declared (a) that there exist in many communities within this State blighted areas (as herein defined) or areas in the process of becoming blighted . . .(d) that there are also certain areas where the condition of the title, the diverse ownership of the land to be assembled, the street or lot layouts, or other conditions prevent a proper development of the land, and that it is in the public interest that such areas, as well as blighted areas, be acquired by eminent domain and made available for sound and wholesome development in accordance with a redevelopment plan, and that the exercise of the power of eminent domain and the financing of the acquisition and preparation of land by a public agency for such redevelopment is likewise a public use and purpose.

1949 N.J. Laws c.300, ¶ 1 (emphasis added). The legislative determination thus distinguished "blighted areas" from "certain areas where the condition of the title, the diverse ownership of the land to be assembled, the street or lot layouts, or other conditions prevent a proper development of the land." Id.

defining a "blighted area" were first found in the 1949 Act.[14] The 1951 Blighted Areas Act, 1951 N.J. Laws c.248, however, contained the following definition of "blighted area":

> 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.

The Appellate Division here found that "The wording of the section of the [1951] Blighted Area Act . . . is identical to that contained in [current] N.J.S.A. 40A:12A-5e." Slip op. at 36. This finding is wrong. The 1992 LRHL, 1992 N.J. Laws c.79, revised the 1951 formulation in at least one critical respect, by replacing the prior prerequisite of "stagnant and unproductive condition" with the relaxed standard of "stagnant or not fully productive condition." N.J. Stat. Ann. § 40A:12A-5(e) (emphasis added). Thus, under the current criterion (e), stagnancy is no longer a requirement. "Stagnant," like "blight," had developed into a term of art with respect to urban renewal by the time of the 1947 Constitution,[15] and therefore

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[14] Judge Pressler described in detail the legislative history of the LRHL and its predecessor enactments in Forbes, 312 N.J. at 523-26 (App. Div. 1998).

[15] New Jersey courts have long-recognized that stagnancy, i.e., the present use of the land, is integral to a finding of blight. See Levin, 57 N.J. at 540 (governing principle of State

effectively restates the constitutionally mandated inquiry into blight. By changing the conjunctive "and" to the disjunctive "or," the 1992 LRHL eliminates this necessary inquiry.

Furthermore, after the 1992 statutory revisions, an area need not be "unproductive" in order to be blighted; it is sufficient if it is simply "not fully productive," which by definition is a comparative inquiry that focuses on alternative future uses of the land. As discussed above, however, blight requires an examination of the current condition of the land, and a present finding of deterioration and stagnation. The term "not fully productive" implies that there can be non-deteriorated areas that fall within its ambit. This usage of "not fully productive" directly contradicts "the one point on which all writers seem in agreement . . . that a blighted area is one which is deteriorating . . . ." Walker, Urban Blight 4.

This shift from an examination of whether the current state of the land is deteriorated to consideration of some alternative, prospective use does not comport with the

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law was that "[s]oundly planned redevelopment [of blighted areas] [would] make the difference between continued stagnation and decline and a resurgence of healthy growth."). Cf. Spruce Manor Enterprises v. Borough of Bellmawr, 315 N.J. Super. 286, 297 (Law Div. 1998) ("Before [a declaration of blight can occur], there must be evidence that the characteristics of the complex lead to unwholesome living conditions or are detrimental to the safety, health, morals or welfare of the community.") (invalidating "area in need of redevelopment" finding made on basis of criteria (a) and (d)).

constitutional meaning of "blighted area" and therefore violates N.J. Const. Art. VIII, section III, paragraph 1.[16] Simply put, if the criterion requires only that an area be "not fully productive," then eminent domain can be used to seize non-blighted areas, in direct violation of the limitation the New Jersey Constitution places on eminent domain for private redevelopment.

B. The Appellate Division's Analysis Applies Subsection (e) Beyond The Limits Permitted By The Definition Of "Blighted Area."

The sole basis upon which the Appellate Division affirmed the finding that Petitioners' land was blighted was the conclusion that it was "underutilized" within the meaning of N.J. Stat. Ann. § 40A:12A-5(e). The opinion of the Appellate

[16] The intent behind the 1992 expansion of subsection (e) was candidly admitted by the State of New Jersey County and Municipal Government Study Commission, whose report led to the 1992 LRHL adopted by the Legislature. The Commission recommended that "a new local housing and redevelopment law allow municipalities to designate an area as either being an 'area in need of redevelopment' or an 'area in need of rehabilitation.'" State of New Jersey County and Municipal Government Study Commission, Local Redevelopment in New Jersey: Structuring a New Partnership 58 (1987). The Committee then suggested that "[t]he definition of an area in need of redevelopment should be adapted from the current definition of a blighted area, broadening it to include the under-utilization of existing commercial and industrial properties in the community." Id. (emphasis added). The Legislature followed the Commission's recommendation by defining a "blighted area" based on the mere "underutilization" of the land. The new criterion (e), however, exceeds even the Commission's recommendation because it does not limit the underutilization-based definition of "blighted areas" to commercial and industrial properties.

Division incorporated the factual findings and conclusions of the study performed by Remington & Vernick, the consultants hired by the Borough to determine whether the area including Petitioners' property fit the criteria of an area "in need of redevelopment." The Remington & Vernick study noted that these properties may be "principally defined by expanses of lands in a natural state, bounding waterways being the Delaware River and Mantua Creek." Slip op. at 10. In discussing the statutory criteria, the study concluded:

> Conditions rising to the level of the requisite criteria for a redevelopment declaration noted from field observation conducted in January 2003 include: a not fully productive condition of land as evidenced by the expanse of vacant unimproved parcels which otherwise could be beneficial in contributing to the public health, safety and welfare of the community resultant 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 [N.J.S.A. 40A:12A-5e]).

Slip op. at 11 (emphasis added). The court below then reasoned:

> Here, however, there is substantial evidence for the determination that plaintiffs' property was an area in need of redevelopment pursuant to the criteria set forth in N.J.S.A. 40A:12A-5e. At the planning board meeting on April 7, 2003, Stevenson, a professional planner, opined that plaintiffs' property required redevelopment under N.J.S.A. 40A:12A-5e because of its underutilization.
>
> . . . .

> [T]here was substantial credible evidence in the record from which it could have been reasonably concluded that there was a "growing lack . . . of proper utilization of" plaintiffs' property, "resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare." N.J.S.A. 40A:12A-5e.

Slip op. at 38-39 (emphasis added).

The Appellate Division therefore legitimated the startling rationale that land that is “unimproved,” i.e. land that is in its “natural state,” and about which the Borough’s own planner’s principal observation was that “All I could see were trees,” slip op. at 12, is thereby underutilized and thus amenable to taking by eminent domain so that it could be made more “useful and valuable” to the community. This reasoning represents the most extreme application of subsection (e) imaginable, and cannot be countenanced. If land may be deemed to be a “blighted area,” not because of some existing deterioration or detrimental condition but simply because someone has determined that it could prospectively be put to a better use, then there is no land in this state that is not blighted, and the constitutional limitation of Article VIII, section 3, paragraph 1, would be rendered meaningless.

1. Land cannot be “blighted” because it is in an undeveloped and natural state.

There is no factual dispute that the land in question is in an undeveloped or “natural” state. The board's professional planner stated that he had conducted a site inspection and displayed photographs of Plaintiffs' property, noting:

> Each of these pictures indicates trees, a lack of improvement of any type, indications of what they call phragmites, which is like cat-of-nine-tails [sic] that you generally see, that type of plan. But what I 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 were trees. I could see what appeared to be expanses of phragmites or the cat-of-nine-tails [sic], no development on that site[.]

Slip op. at 12 (emphasis added). Such evidence cannot support a finding of blight.

It is the public policy of this State, through various statutory enactments, to encourage the preservation of open spaces and land in its natural state. For instance, in the New Jersey Green Acres Land Acquisition Act of 1961, N.J. Stat. Ann. § 13:8A-1 to -18 the Legislature expressed its strong support for preserving undeveloped land for recreation and conservation purposes, finding that:

> (a) The provision of lands for public recreation and the conservation of natural resources promotes the public health, prosperity and general welfare and is a proper responsibility of government;

> (b) Lands now provided for such purposes will not be adequate to meet the needs of an expanding population in years to come;
>
> (c) The expansion of population, while increasing the need for such lands, will continually diminish the supply and tend to increase the cost of public acquisition of lands available and appropriate for such purposes;
>
> (d) The State of New Jersey must act now to acquire and to assist local governments to acquire substantial quantities of such lands as are now available and appropriate for such purposes so that they may be used and preserved for use for such purposes

N.J. Stat. Ann. § 13:8A-2. [17]

Indeed, this Court recently held that a municipality has statutory authority under the Green Acres statutes to condemn

[17] In addition to the Green Acres Acts, other statutory schemes also reinforce the public policy of preserving and encouraging open spaces. For instance, the purpose of the Garden State Preservation Trust Act, N.J. Stat. Ann. § 13:8C-1 to -42, is to "[p]rovide funding to the Department of Environmental Protection, the State Agriculture Development Committee, and the New Jersey Historic Trust for all or a portion of the cost of projects undertaken by those entities or by grant or loan recipients in accordance with the purposes and procedures established by Article VIII, section II, paragraph 7 of the State Constitution and this act." N.J. Stat. Ann. § 13:8C-5. As the State is providing its own funds to increase the supply of agricultural, undeveloped, and historic lands, efforts by the Borough to reduce the supply of agricultural and undeveloped lands would undercut the State's goal.

The Legislature has also expressly recognized the importance of preserving the dwindling supply of agricultural land in New Jersey, in the Agriculture Retention and Development Act, N.J. Stat. Ann. § 4:1C-11 to – 48. The extent of agricultural activity on Appellants' property is unclear, although in the recent past a farmer has mowed the phragmites to feed cows. Slip op. at 14, 15, 39.

property for open space, and that eminent domain may be used to preserve properties previously marked for residential development. Mount Laurel Twp. v. Mipro Homes, L.L.C., 188 N.J. 531, 533-34 (2006) ("[T]he citizens of New Jersey have expressed a strong and sustained public interest in the acquisition and preservation of open space.")[18] Any attempt to reconcile the Appellate Division's reasoning in this case with this Court's ruling in Mipro Homes would lead to an absurdity. On the one hand, Mipro Homes holds that the policy of preserving open space is so strong that a municipality properly exercises the power of eminent domain in order to preserve the land in its natural state. According to the Appellate Division, however, unimproved land in its natural state is per se underutilized and thereby blighted. Or to put in another way, a municipality that uses eminent domain to preserve open space pursuant to Mipro Homes would thereby itself be blighting the land under the reasoning of the Appellate Division. Obviously, one of these two mutually

[18] The Legislature has appropriated funds to this purpose with additional, subsequent Green Acres statutory enactments. See New Jersey Green Acres Land Acquisition Act of 1971, N.J. Stat. Ann. § 13:8A-19 to -34; New Jersey Green Acres Land Acquisition and Recreation Opportunities Act, N.J. Stat. Ann. § 13:8A-35 to -55. The Green Acres Acts and their regulations, N.J. Admin. Code tit. 7 § 36, require State approval to transfer for development any public open space lands in communities that accept Green Acres funding. See In re Amendment to Rec. and Open Space Inventory, 353 N.J. Super. 310 (App. Div. 2002).

inconsistent premises must give way, and Amicus respectfully suggests that it is the latter.

2. Land designated as wetlands does not suffer from lack of "proper utilization" when preserved as such.

Although neither party made mention of this fact in the record below, it is a matter of public record that almost all of the land in question has been designated as protected wetlands, either under the Wetlands Act of 1970, N.J. Stat. Ann. § 13:9A-1 to -10, or the Freshwater Wetlands Protection Act, N.J. Stat. Ann. § 13:9B-1 to -30. See N.J. R. Evid. 201(a) (courts may take judicial notice of agency determination).

Through the Wetlands Act of 1970, the Legislature has expressed the importance of preserving coastal wetlands for their environmental and economic benefits by regulating their filling or other disturbance.

> The Legislature hereby finds and declares that one of the most vital and productive areas of our natural world is the so-called "estuarine zone," that area between the sea and the land; that this area protects the land from the force of the sea, moderates our weather, provides a home for water fowl and for 2/3 of all our fish and shellfish, and assists in absorbing sewage discharge by the rivers of the land; and that in order to promote the public safety, health and welfare, and to protect public and private property, wildlife, marine fisheries and the natural environment, it is necessary to preserve the ecological balance of this area and prevent its further deterioration and destruction by regulating the dredging, filling, removing or otherwise altering

> or polluting thereof, all to the extent and in the manner provided herein.

N.J. Stat. Ann. § 13:9A-1(a).

The Legislature directed the Department of Environmental Protection to prepare maps of all coastal wetlands throughout the State by November, 1972. N.J. Stat. Ann. § 13:9A-1(b). Those maps, on file with the DEP and the Clerk in each county with coastal wetlands, remain in effect. The maps currently show that most of the subject property at issue in this case is coastal wetlands. Coastal Wetlands Map, Mantua Creek North – Woodbury, Sheet No. 364-1836, prepared by DEP in accordance with the Wetlands Act of 1970, last revised 12/19/1998, Am. App. at 5; Affidavit of Richard G. Castagna ¶ 2, Am. App. at 2; See Am. App. at 1 - 5.

Similarly, through the Freshwater Wetlands Protection Act, N.J. Stat. Ann. § 13:9B-1 to -30, the Legislature has expressed the importance of preserving freshwater wetlands for their environmental and economic benefits by regulating their filling or other disturbance.

> 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. Stat. Ann. § 13:9B-2; see also, N.J. Admin. Code tit. 7 § 7A-1.1-17.1 (Freshwater Wetlands Protection Act regulations). A portion of Appellants' property at issue here is designated freshwater wetlands, as indicated on the Department of Environmental Protection's public iMap website. See Castagna Aff., ¶ 2 at Am. App. at 2; Castagna Aff. Ex. A at 3-4; see also http://www.nj.gov/dep/gis.

Both the Wetlands Act of 1970,[19] and the Freshwater Wetlands Protection Act,[20] strictly regulate activity,

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[19] The Act prohibits engaging in a "regulated activity" in any wetland mapped under the Act without first obtaining a permit issued by the DEP. N.J. Stat. Ann. § 13:9A-4(b). The Act defines the term "regulated activity" to include "draining, dredging, excavation or removal of soil, mud, sand, gravel, aggregate of any kind or depositing or dumping therein any rubbish or similar material or discharging therein liquid wastes, either directly or otherwise, and the erection of structures, drivings of pilings, or placing of obstructions, whether or not changing the tidal ebb and flow." N.J. Stat. Ann. § 13:9A-4(a).

[20] "A person proposing to engage in a regulated activity shall apply to the [DEP] for a freshwater wetlands permit." N.J. Stat. Ann. § 13:9B-9(a); N.J. Admin. Code tit. 7 § 7A-2.1. The

including filling, excavating, or the construction of improvements, on designated wetlands areas. While development of such property is not absolutely prohibited, it is not encouraged, and the Commissioner of DEP must issue a permit before it can take place. As neither the Borough nor the Gallenthins have sought a permit from the DEP to build on the land in question, it is impossible to say at this juncture whether development would be permitted.

The finding of blight in this case under subsection (e) of the LRHL, however, is predicated upon the initial premise that there exists a "growing lack or total lack of proper utilization." N.J. Stat. Ann. § 40A:12A-5(e). While that term

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FWPA defines a "regulated activity" broadly, to include "any of the following activities in a freshwater wetland: (1) The removal, excavation, disturbance or dredging of soil, sand, gravel, or aggregate material of any kind; (2) The drainage or disturbance of the water level or water table; (3) The dumping, discharging or filling with any materials; (4) The driving of pilings; (5) The placing of obstructions; (6) The destruction of plant life which would alter the character of a freshwater wetland, including the cutting of trees." N.J. Stat. Ann. § 13:9B-3. The FWPA sets forth exhaustive standards for the DEP to apply when reviewing an application for a freshwater wetlands permit. N.J. Stat. Ann. § 13:9B-9; Tanurb v. Dep't of Env't Prot., 363 N.J. Super. 492, 498 (App. Div. 2003).

The DEP has promulgated detailed regulations to implement the FWPA. N.J. Admin. Code tit. 7 § 7A-1.1 to -17.1. This Court has upheld the purposes of the FWPA and its regulations. In re Freshwater Wetlands Protection Act Rules, 180 N.J. 478 (2004).

may be too indefinite to survive a vagueness challenge, this Court has a duty to interpret subsection (e) so as to avoid constitutional invalidation if reasonably possible.[21] Any such saving construction would have to exclude an interpretation of "lack of proper utilization" to refer to the preservation of protected wetlands. Indeed it would seem manifest that the preservation of wetlands in a manner consistent with the applicable wetlands protection statutes would thereby be per se a "proper" utilization. Thus, subsection (e) cannot be used to characterize the subject area as "blighted."

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[21] It is a cardinal principle of interpretation that "even though a statute may be open to a construction which would render it unconstitutional or permits its unconstitutional application, it is the duty of this Court to so construe the statute as to render it constitutional if it is reasonably susceptible to such interpretation.

State v. Miller, 170 N.J. 417, 433 (2002) (quoting Garfield Trust Co. v. Director, Div. of Taxation, 102 N.J. 420, 433, 508 (1986)). This rule is grounded in the "the assumption that the Legislature intended to act in a constitutional manner." Right to Choose v. Byrne, 91 N.J. 287, 311 (1982). Courts will "seek to avoid a statutory interpretation that might give rise to serious constitutional questions." Silverman v. Berkson, 141 N.J. 412, 417 (1995); see generally In re Commitment of W.Z., 173 N.J. 109, 126 (2002); State v. Johnson, 166 N.J. 523, 540 (2001) (describing "constitutional doubt" doctrine); State v. Mortimer 135 N.J. 517, 523-53 (1994), cert. denied, 513 U.S. 970 (1994) (performing "judicial surgery" to strengthen mens rea element of hate crimes statute in order to avoid unconstitutional vagueness).

IV. THIS COURT SHOULD PROVIDE GUIDANCE FOR LOWER COURTS REVIEWING BLIGHT DETERMINATIONS.

This case also gives the Court an opportunity to consider the burden of proof to establish that an area is blighted and the standard for reviewing a municipal determination of blight. The present allocation of the burden of proof and unclarity in the standard of review can lead to a determination of this critical constitutional fact without appropriate safeguards.

A. This Court Should Place The Burden Of Proof On The Government To Show That An Area Is "Blighted."

Generally, the government must carry the burden of proof where it seeks to impinge upon a constitutionally protected right. Thus, when the Constitution interposes a factual predicate that must be shown before the government may impinge on individual rights, the courts typically impose the burden of proof — and indeed often a heightened burden of proof — upon the government to establish that factual predicate.

In first amendment cases, "[t]o sustain government proscription of the publication of truthful speech, the State has the burden of demonstrating that the law furthers a compelling interest . . . [and] that the regulation is narrowly tailored to achieve that interest." R.M. v. Supreme Court of New Jersey, 185 N.J. 208, 217 (2005); see, Ashcroft v. ACLU, 542 U.S. 656, 668 (2004) (where government impinges on

constitutionally protected free speech interest, it bears the burden to introduce specific evidence that its actions are constitutional). Despite the generous deference usually afforded by appellate courts to the finder of fact, "in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." Bose Corp. v. Consumers Union, 466 U.S. 485, 499 (1984) (citations omitted).

Indeed, courts have often required that constitutional facts affecting individual protections must be proved not merely by a simple preponderance of the evidence standard, but by the enhanced "clear and convincing evidence" standard. See, e.g., Santosky v. Kramer, 455 U.S. 745 (1982) (requiring clear and convincing evidence of neglect to terminate parental rights); V.C. v. M.J.B., 163 N.J. 200, cert. denied, 531 U.S. 926 (2000) (requiring clear and convincing evidence of harm to deny psychological parent visitation); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (requiring clear and convincing evidence in establishing actual malice in libel case); E.B. v. Verniero, 119 F.3d 1077 (3d Cir.1997) (requiring clear and convincing evidence, rather than mere preponderance of evidence, of probability of reoffense in Megan's Law notification in order

to overcome due process and privacy interests of registrant), cert. denied sub nom., W.P. v. Verniero, 522 U.S. 1109 (1998).[22]

It is admittedly the current state of the law in New Jersey that once a municipality has made its initial determination under the LRHL, the property owner effectively bears the burden of showing that his or her property is not blighted. Applying the deference typically afforded administrative determinations in non-constitutional matters, this Court has stated that "The decision of the municipal authorities that the area in question is blighted came to the Law Division invested with a presumption of validity. To succeed, plaintiffs had the burden of overcoming that presumption and demonstrating that the blight determination was not supported by substantial evidence." Levin, 57 N.J. 506, 537 (1970), appeal dismissed, 404 U.S. 803 (1971) (citing Lyons v. City of Camden, 48 N.J. 524, 532-34

[22] The ultimate application of the doctrine that the government bears the burden of proof when it seeks to deprive an individual of a constitutional right is in the criminal context. It is axiomatic that when the state seeks to restrict a person's liberty through a criminal prosecution, "the Constitution protects every criminal defendant 'against conviction except upon [the government's] proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" United States v. Booker, 543 U.S. 220, 230 (2005) (quoting In re Winship, 397 U.S. 358, 364 (1970)). Also in the criminal context, when the prosecution introduces evidence obtained through a voluntary search, the state bears the burden of showing that the search was voluntary and that the defendant understood the right to refuse. State v. Johnson, 68 N.J. 349, 354 (1975) (interpreting New Jersey Constitution).

(1967); Lyons v. City of Camden, 52 N.J. 89, 93, 98 (1968); Wilson, 27 N.J. at 390-91.

This allocation of the burden of proof can, as a practical matter, deprive homeowners of meaningful review of a blight designation. Because the inquiry is whether there is substantial evidence to support the determination, property owners must prove the negative, i.e., that there was not substantial evidence. Proving a negative is difficult at best. Moreover, the resources to litigate the blight designation are usually imbalanced, especially if the cost of municipal attorneys is subsidized (as is often the case) by prospective redevelopers.

When agencies make determinations based upon constitutional considerations, such determinations are not given any deference. See Abbott v. Burke, 100 N.J. 269, 298-99 (1985) ("[A]lthough an agency may base its decision on constitutional considerations, such legal determinations do not receive even a presumption of correctness on appellate review.") (citing Hunterdon Central High Sch. Bd. of Ed. v. Hunterdon Central High Sch. Teacher's Ass'n, 174 N.J. Super. 468 (App. Div. 1980), aff'd, 86 N.J. 43 (1981)); see also, Greenwood v. State Police Training Center, 127 N.J. 500, 513 (1992) (court gave no deference to Commission's misreading of "good cause"). Deference to administrative expertise or quasi-legislative determinations is

largely inapplicable when constitutional obligations are involved because there is no political discretion to ignore the Constitution.

Article VIII, section 3, paragraph 1 of the New Jersey Constitution creates an individualized right against government overreaching by limiting the use of eminent domain for private redevelopment to those instances involving “blighted areas.” The factual predicate of “blight” thus places a constitutional limitation on government action; it follows that government should bear the burden of establishing the basis by which that limitation is lifted. Otherwise, the constitutional protection itself is threatened.

Judicial economy and efficiency also support shifting the burden of proof to the Borough. While the Borough is required by statute to research and record all the evidence it uses to substantiate its finding of blight, N.J. Stat. Ann. § 40A:12A-6, the property owners are the ones who now must carry the burden of proof when that finding is challenged in court. This makes no sense. In other contexts, courts have found that access to information is relevant to allocating the burden of proof. In cases involving discrimination based on disability, for instance, this Court has held that it is “fair to impose the burden of proof on the employer to show that it reasonably arrived at the opinion that the applicant was unqualified for

the job. The employer has the special knowledge, expertise and facts within his control to determine qualifications needed for any particular job classification." Andersen v. Exxon Co., U.S.A., 89 N.J. 483, 500 (1982).[23] Similarly here, when the Borough has assembled the evidence that, it claims, shows the subject property is in need of economic redevelopment, it is in the best position to carry the burden of proof in court on whether the property is blighted.[24]

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[23] In shareholder suits against corporations, the courts have likewise shifted the burden to the corporation to prove the fairness to shareholders of an array of challenged transactions. See, e.g., Brundage v. New Jersey Zinc Co., 48 N.J. 450, 476 (1967) (mergers of companies with common directors); Grato v. Grato, 272 N.J. Super. 140, 150-52 (App. Div. 1994) (freeze-out maneuvers in a closely held corporation); see also Nopco Chem. Div. v. Blaw-Knox Co., 59 N.J. 274, 282-83 (1971) (where plaintiff sued all carriers of a damaged good, but had no affirmative proof as to which handler caused the damage, "'reason and ordinary common sense dictate'. . . that the burden should be shifted to 'those parties most likely to possess knowledge of the occurrence to come forward with facts peculiarly within their possession.'") (internal citations omitted).

[24] In reaction to the United States Supreme Court's recent decision limiting federal protections against the exercise of eminent domain in Kelo v. City of New London, 545 U.S. 469 (2005), 29 states have passed legislation, ballot initiatives, or constitutional amendments requiring municipalities to prove by clear and convincing evidence the need for redevelopment. United States Government Accountability Office, Eminent Domain: Information about Its Uses and Effect on Property Owners and Communities Is Limited, November 2006, GAO-07-28; see, e.g., Mich. Comp. Laws, § 1.10.2 (effective December 23, 2006). Some scholars have supported this approach. See, e.g., Susan Crabtree, Public Use in Eminent Domain: Are There Limits after Oakland Raiders and Poletown?, 20 Cal. W.L. Rev. 82, 107 (1983).

Because of New Jersey's explicit constitutional limitation on the use of eminent domain for private redevelopment except upon a showing of blight, because equity and efficiency demand a reallocation, and because of the general evolution of the law, New Jersey should place the burden of proof on the municipality to demonstrate that there is substantial evidence of blight in the record.

B. Judicial Review of a Blight Determination Requires a Searching Review of the Record.

Given the critical role that our state Constitution places upon the factual existence of a "blighted area" in balancing the encouragement of redevelopment against the danger of overreaching use of the power of eminent domain, it is essential that the judiciary engage in an independent evaluation and review of whether that factual predicate exists. "When the issue on appeal turns on a constitutional fact, i.e., a fact whose determination is decisive of constitutional rights, appellate courts have the obligation to give such facts special scrutiny. Constitutional litigation demands fact analysis of the most particularized kind." Zold v. Mantua, 935 F.2d 633, 636 (3d Cir. 1991) (quoting New Jersey Citizen Action v. Edison Township, 797 F.2d 1250, 1259 (3d Cir. 1986)) (internal citations omitted). Thus the Constitution calls for close judicial review of municipal blight designations.

Under both the LRHL and the case law, the test for reviewing a blight determination is whether substantial evidence supports the municipality's determination. N.J. Stat. Ann. § 40A:12A-6(b)(5) ("The determination, if supported by substantial evidence . . . shall be binding and conclusive . . . ."); Levin, 57 N.J. at 537 ("If a reviewing court finds that the determination was grounded on substantial evidence, it must be affirmed."); Lyons, 52 N.J. at 98 (affirming blight designation because "substantial evidence supports the municipal determination"); Lyons, 48 N.J. at 532-34 ("The function of the Law Division as prescribed by the statute is to decide whether the determination of the public body is supported by substantial evidence."). The substantial evidence test is an objective analysis of the quality and quantity of the proofs presented and is designed to ensure that the determination is founded on solid, credible, and relevant evidence.

New Jersey courts have on occasion invoked what appear to be alternative standards for reviewing blight determinations, including whether the municipality's action was "arbitrary and capricious" or "corrupt, irrational or baseless." Wilson, 27 N.J. at 391 (explicitly reserving the question whether, "if the evidence shows that the municipal determination was not arbitrary or capricious, it follows, as of course, that the evidence in support is substantial"); see also, e.g., Lyons, 48

N.J. at 533 ("Absence of such support [by substantial record evidence] would indicate arbitrary and capricious action."); Concerned Citizens of Princeton, Inc. v. Mayor & Council, 370 N.J. Super. 429, 453 (App. Div. 2004) ("Thus, the burden is on the objector to overcome the presumption of validity by demonstrating that the redevelopment designation is not supported by substantial evidence, but rather is the result of arbitrary or capricious conduct on the part of the municipal authorities.").

But whatever doctrinal labels are used, this Court has consistently searched the record for real evidence of blight. Thus, in Wilson, after upholding the Blighted Area Act against an array of constitutional challenges, the Court went on to approve the municipality's blight determination based on an extensive review of the record.[25] A decade later, in Lyons, 48 N.J. 524 (1967), this Court held that judicial review "is not confined to the record made below," but should include evidence presented in the first instance to the Law Division, thus

[25] In one area, 41 of 71 dwellings were substandard in that they showed "serious conditions of disrepair, either of the outside walls, roof, foundation, inside walls, floors or ceilings; . . . did not come up to standards for legal permanent construction; or . . . lacked such major facilities as running hot water . . . ." Wilson, 27 N.J. at 392. In another, mainly unimproved area, six of ten parcels were in tax delinquency, and the city held foreclosure title to two parcels. Id. at 393. All in all, "[t]he blighted territory comprised 74.8% of the net project area of 93.2 acres." Id.

requiring a plenary examination of all relevant evidence. 48 N.J. at 533 (emphasis in original). Similarly, in Levin, 57 N.J. 506, the Court reviewed at length the metes, bounds, history, and characteristics of the target area -- including, for example, evidence about diversity of ownership and disputed titles relevant under LRHL criterion (e) -- before affirming a blight designation on the ground that the area was "then and thereafter stagnant, undeveloped and unproductive . . . [I]t had become an economic wasteland." Id. 57 N.J. at 537-38. Thus, even under the relatively deferential "substantial evidence" standard, courts must be vigilant in ensuring that the record reasonably supports the factual finding of blight. The courts below failed in that duty by relying on nothing more than the openness of the targeted areas to affirm a designation of blight.

CONCLUSION

For the reasons expressed herein, Amicus Department of the Public Advocate respectfully urges this Court to reject the reasoning and opinion of the Appellate Division and to remand this matter for further proceedings.

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Respectfully submitted,

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