HARRISON REDEVELOPMENT AGENCY, Plaintiff-Respondent, v. ANTHONY DeROSE, Defendant/Third Party Plaintiff-Appellant, v. TOWN OF HARRISON and PLANNING BOARD OF THE TOWN OF HARRISON, Third Party Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-958-06T2
HARRISON REDEVELOPMENT AGENCY, Plaintiff-Respondent, v. AMARAL AUTO CENTER INC., AMARAL AUTO ELECTRIC INC., AMARAL AUTO SALES, FERNANDA M. AMARAL and MANUEL V. AMARAL, Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-3862-06T2
HARRISON REDEVELOPMENT AGENCY, Plaintiff-Respondent, v. HARRISON EAGLE, LLP, and PROMONTA REALTY CORP., Defendants-Appellants, and BEVERLY ADLER, BOBANELL'S LIQUORS INC., CAPITAL ONE BANK, CENTRAL PARKING CORPORATION, JOSEPH COMPRELLI, DRIVER-HARRIS COMPANY, GLOBE METALS, THE GREENWOOD TRUST CO., INFINITE SIGN INDUSTRIES INC., PUBLIC SERVICE ELECTRIC AND GAS COMPANY, JOHN SCURA BANKRUPTCY TRUSTEE, SPRINT NEXTEL CORPORATION (successor to SPRINT AND NEXTEL COMMUNICATIONS INC.), STATE OF NEW JERSEY	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-4474-06T2

DIVISION OF TAXATION, THE TOWN OF HARRISON, THE UNITED STATES OF AMERICA, US ICEWEAR INC.,

Defendants.

HARRISON REDEVELOPMENT AGENCY,

Plaintiff-Respondent,

v.

ANTHONY DeROSE,

Defendant-Appellant,

and

OFFICE OF THE PUBLIC DEFENDER, SEARS ROEBUCK AND CO., CHARLES A. STANZIALE JR. BANKRUPTCY TRUSTEE, STATE OF NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELEOPMENT DIVISION OF WORKERS' COMPENSATION UNINSURED EMPLOYERS FUND, STATE OF NEW JERSEY DEPARTMENT OF THE TREASURY DIVISION OF TAXATION, and TOWN OF HARRISON,

Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-382-07T3

All appeals from the Superior Court of New Jersey, Law Division, Hudson County

Sat below: Hon. Maurice J. Gallipoli, A.J.S.C.

BRIEF OF AMICUS CURIAE DEPARTMENT OF THE PUBLIC ADVOCATE OF NEW JERSEY

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PRELIMINARY STATEMENT

This case presents important questions regarding the interaction between substantive and procedural protections that limit the government's power to take property through eminent domain. As our Supreme Court recently noted, the New Jersey Constitution places "significant limitations on the State's eminent domain power," including the limitation that "the State may take private property only for a 'public use.'" Gallenthin Realty Dev. Inc. v. Borough of Paulsboro, 191 N.J. 344, 356 (2007). In defining the term "public use" in the context of redevelopment, the 1947 Constitution substantively restricts government redevelopment to "blighted areas." N.J. Const. art. VIII, § III, ¶ 1. "That limitation reflects the will of the People regarding the appropriate balance between municipal redevelopment and property owners' rights. The New Jersey Constitution does not permit government redevelopment of private property solely because the property is not used in an optimal manner." Gallenthin, 191 N.J. at 373.

The constitutional limitations imposed upon the eminent domain power are not only substantive, however; they are also procedural. "No person may be deprived of property without due process of law." Gallenthin, 191 N.J. at 356; accord Township of West Orange v. 769 Assocs., 172 N.J. 564, 572 (2002). The

robust protection of substantive constitutional rights demands an equally robust process for determining those rights.

In light of the critical importance Gallenthin places on the substantive determination of "blight" in circumscribing government power to exercise eminent domain for redevelopment, the important procedural constitutional questions presented in these consolidated appeals are: (1) whether the Legislature is competent to prescribe the time and manner by which a judicial challenge to a governmental determination of "blight" is made, and (2) even if it is empowered to do so, whether the provisions of N.J.S.A. 40A:12A-6 comport with procedural due process and fundamental fairness in how they purport to limit the time and manner by which constitutionally protected interests are adjudicated.

In light of its extended study of the use of eminent domain for redevelopment, Amicus Curiae the Department of the Public Advocate believes that the procedural limitations that the Legislature has imposed upon judicial review of municipal determinations of "blighted areas" within the meaning of the State Constitution run afoul of both separation of powers and procedural due process principles. Although this case directly involves three specific Appellants, their experiences are typical. New Jersey families and businesses located within redevelopment areas throughout the State often come to

understand that a municipality intends to take their property only long after the expiration of the 45-day period to challenge a blight designation set forth in N.J.S.A. 40A:12A-6. Like Appellants here, they must then surmount a time-bar even to be allowed to argue their objections to the designation. Moreover, even if they clear this hurdle, trial courts often address the merits of their challenge to a blight designation under a standard of review so deferential as to abdicate the judicial role in enforcing the constitutional limitation.

The 1947 Constitution guarantees the availability of meaningful judicial review over government action, and due process under both the federal and state constitutions demands that a property owner be given clear notice of the government's decision to use eminent domain before the owner can be expected to mount a challenge to that action. These appeals present an opportunity to vindicate the basic constitutional norms of fair notice and a meaningful right to be heard.

INTEREST OF AMICUS CURIAE

The Department of the Public Advocate 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.S.A. 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.S.A. 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 the Supreme 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 Pub. Advocate, 83 N.J. 522, 535-36 (1980).

It is the judgment of the Public Advocate that this case, which concerns a property owner's right to challenge the basis of the taking of his property and involves important constitutional principles of separation of powers and procedural due process, implicates the "public interest." N.J.S.A. 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; Department of the Public Advocate, In Need of Redevelopment: Repairing New Jersey's Eminent Domain Laws (May 29, 2007), available at http://www.state.nj.us/publicadvocate/home/reports/pdfs/Eminent%Domaincolor.pdf. The Public Advocate has also appeared as Amicus Curiae in four recent eminent domain cases: Gallenthin, 191 N.J. 344; LBK Assocs., L.L.C. v. Borough of Lodi, No. A-1829-05T2 (App. Div. July 24, 2007); City of Long Branch v. Brower Nos. A-191-06, A-192-06, A-194-06, A-195-06, A-196-06, A-197-06, A-198-06, A-199-06, A-654-06 (App. Div. filed Aug. 30, 2006); City of Long Branch v. Anzalone, No. A-67-06 (App. Div. filed Aug. 30, 2006).

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

The procedural history of the Harrison redevelopment project followed the typical chronology contemplated by the Local Redevelopment and Housing Law ("LRHL"), N.J.S.A. 40A:12-1 to -49: (1) on September 4, 1997, the Harrison Town Council ("Town Council" or "Council") adopted the blight designation recommended by the Planning Board; (2) the Town Council adopted a Redevelopment Plan ("Plan") on November 16, 1998 and subsequently revised and readopted the Plan on April 4, 2000, and again on July 23, 2003;[2] and (3) the condemnation actions against the properties of Appellants were commenced on July 12, 2006 (Harrison Eagle), August 22, 2006 (Amaral), and June 1, 2007 (DeRose).

Thus, notice to the property owners that their land would actually be taken occurred nine to ten years after the initial

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[1] The record below will be cited as follows:
AM: Appellant Amaral's Appendix;
EA: Appellant Harrison Eagle's Appendix;
DRa: Appellant DeRose's Appendix for A-958-06-T2, HUD-L-2001-06;
DRb: Appellant DeRose's Appendix for A-382-07-7T3, HUD-L-2744-07;
Pa: Harrison Redevelopment Agency's Appendix (in the Eagle case);
AMPa: Harrison Redevelopment Agency's Appendix (in the Amaral case);
Pb: Harrison Redevelopment Agency's Brief (in the Amaral case).

[2] See DRa89a; DRa93a.

blight determination that provided the essential factual predicate for the constitutional use of the eminent domain power and that the trial court below held could not be reopened in the condemnation proceeding.

A. The Blight Study and Determination

To begin redevelopment, the governing body of the municipality first adopts a resolution directing the planning board to conduct a preliminary investigation assessing whether or not an area meets one of seven substantive criteria defining a "blighted area," also known as an "area in need of redevelopment" under the 1992 LRHL.[3] N.J.S.A. 40A:12A-6(a). The

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[3] The change in terminology occurred in the 1992 LRHL. The legislative study commission whose report led to the adoption of the LRHL advised against use of the term blight. "It is evident that the concept of a 'blighted' area is no longer relevant and, in fact, carries an unnecessarily [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).

Of course, among the "political constraints" caused by the prominent use of the term "blight" would be a greater awareness by the public of the gravity of the blight designation, including the possibility of the use of eminent domain for redevelopment. As described below, the municipal desire to avoid the inconvenience to the redevelopment process of premature public awareness of that gravity is amply demonstrated in the record in these appeals.

Since the term "blighted area" is contained in the constitution, it is still relevant, despite legislative wishes to the contrary, and this brief uses the terms "blighted" and "in need of redevelopment" interchangeably. See N.J.S.A. 40A:12A-6(c)("An area determined to be in need of redevelopment

(Footnote continued . . .)

results of the preliminary investigation are usually presented in a written report provided to the planning board for its review. Thus, the record in this case reveals that "[o]n April 1, 1997, the Mayor and Council of Harrison passed a resolution requesting that the Board undertake an investigation of whether the properties in the study area were in need of rehabilitation." AM559a-560a (Pathparc Assocs., L.L.C. v. Town of Harrison, No. A-3417-01T5, slip op. at 4-5 (App. Div. Apr. 23, 2003)). Thereafter, by resolution dated May 9, 1997, the Planning Board retained Susan Gruel, Town Planner and engineer with the firm of Moskowitz, Heyer & Gruel (the "engineering firm"), to conduct the preliminary investigation. AM560a (Pathparc, slip op. at 5). "A copy of this May 9, 1997 resolution was sent for publication to both The Star Ledger and The Jersey Journal." Id. The engineering firm prepared a report of the study area for the Planning Board in July 1997 (the "Redevelopment Study"). AM288a-372a.

Once the preliminary investigation is complete, the planning board is required to hold a public hearing on the proposed blight designation. N.J.S.A. 40A:12A-6(b). Notice of the public hearing must be published in the newspaper twice

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pursuant to this section shall be deemed to be a "blighted area" for the purposes of Article VIII, Section III, paragraph 1 of the Constitution").

(once a week for two consecutive weeks), with the last publication appearing at least 10 days prior to the hearing. N.J.S.A. 40A:12A-6(b)(3). The notice should also be mailed to the last known owner of each property within the proposed redevelopment area. Id. However, "[f]ailure to mail any such notice shall not invalidate the investigation or determination thereon." Id. The notice need be sent only ten days in advance of the hearing. Id.

Moreover, this notice need not, and typically does not, inform the property owner that a blight designation empowers the redevelopment agency subsequently to take the property for redevelopment using eminent domain, much less that the redevelopment agency intends to use that power.

Thus, on July 24, 1997, the Secretary to the Harrison Planning Board sent a notice to all known owners of properties potentially affected by the contemplated blight designation. DRa45a (Harrison Redev. Agency v. DeRose, No. HUD-L-2001-06, slip op. at 2 (Law Div. Sept. 22, 2006)). The notice read as follows:

> PLEASE TAKE NOTICE that on Thursday August 7, 1997 at 7:00 p.m., at the Harrison High School Auditorium, 1 North Fifth Street, Harrison, New Jersey, the Planning Board of the Town of Harrison will hold a public hearing pursuant to Section 6 of the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq. The purpose of the hearing will be to undertake a preliminary investigation to determine whether portions of the Town of Harrison, as more

particularly described below, should be designated as a "redevelopment area" according to criteria set forth in Section 5 of the Local Redevelopment and Housing Law.

The area which is the subject of this preliminary investigation (referred to herein as the "Study Area") consists of approximately 250 acres of land located on the Passaic River and between and/or around Interstate Route 280 and the Amtrak railroad tracks in the Town of Harrison. The western border of the Study Area stretches south along the Passaic River from Harrison Avenue to the Flexo-Craft light industrial complex at the south end of vacated First Street. The Study Area then extends eastward along the Passaic River toward the end of Cape May Street and PATH property and northward to the Amtrak railroad tracks, Interstate Route 280, and Bergen Street.

A map delineating the Study Area has been prepared and may be inspected at the Office of the Municipal Clerk, 318 Harrison Avenue, Harrison, New Jersey. For the convenience of readers of this notice, a copy of this map is included as part of this notice.

A report entitled "Redevelopment Area Study, Town of Harrison, Hudson County, New Jersey" prepared by Moskowitz, Heyer & Gruel, P.A., community planning consultants, dated July 1997, has also been prepared and a copy is also available for inspection in the Office of the Municipal Clerk at the address stated above.

If interested, you may appear and be heard at the public hearing.

AMPa74. As the trial court found, each Appellant received this notice. DRa45a (DeRose, slip op. at 2)[4]; AM227a (Harrison Redev.

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[4] "DeRose received notice not as the owner of the Property here in question, but rather as the owner of another property also located within the area considered for redevelopment (Block 99, Lot 10)." DRa45a (DeRose, slip op. at 2).

Agency v. Amaral Auto Center, No. HUD-L-4116-06, slip op. at 2 (Law Div. Feb. 13, 2007)); EA946a (Harrison Redev. Agency v. Harrison Eagle, LLP, No. HUD-L-3250-06, slip op. at 2 (Law Div. Feb. 13, 2007)).

During the public hearing, testimony is typically provided by the planning professionals who conducted the investigation. Additionally, interested persons may comment during the public portion of the meeting or lodge objections, either orally or in writing. N.J.S.A. 40A:12A-6(b)(4). This public hearing is the only one required before the designation of blight that empowers the redevelopment authority to take property by eminent domain.

The Harrison Planning Board conducted the August 7th Special Meeting as scheduled to discuss the Redevelopment Study and potential redevelopment area designation. DRa100a-149a (Transcript, hereinafter "Tr."). The Planning Board distributed a handout about the redevelopment process at the hearing. AM418a. Under the heading "The Purpose of Redevelopment," the handout extolled only the positive effects of redevelopment. "Redevelopment can improve and restore property values, provide new business and housing opportunities, create jobs, improve the municipal tax base, and create a better community in which to live. The designation of an area as a 'redevelopment area' is the first step in the redevelopment process." Id.

As is typical of such blight determination hearings, however, the Planning Board and its agents affirmatively avoided the issue of what effect the blight designation might have on specific properties and deflected inquiries about whether any properties might be condemned by eminent domain. "Little of substance was revealed at the August 7, 1997 public meeting as to the consequences of designating an area as one 'in need of redevelopment.'" AM562a (Pathparc, slip op. at 7). In the handout, under the heading "How will you be affected?" the Planning Board advised, "[W]hat kind of redevelopment might take place, and how property owners may be affected, will *not* be discussed or decided at tonight's hearing. These questions can only be answered when a 'redevelopment plan' is adopted." AM418a (emphasis added). During her testimony Susan Gruel, the engineer, told the attendees that the redevelopment determination "is only the first phase of a two-phase process. . . . This is only to determine the delineated area. It is not to determine what the redevelopment plan would be or the type of uses that would be permitted within the area so that any questions regarding future uses really cannot be answered at this point." DRa107a-108a (Tr. 8:19-9:4).

Continuing in this vein, Brian Burns, attorney for the Planning Board, responded to questions from attendees by stating, "[T]his designation does nothing to affect anybody's

rights in property, okay? Excuse me. So that if no redevelopment plan were ever adopted, things will continue as they are." DRa111a (Tr. 12:4-7).[5] Thus, the Planning Board indicated at the hearing that it would be premature at the blight designation stage to discuss whether any properties might eventually be acquired through eminent domain.

The LRHL provides that, after the hearing, the planning board should forward its recommendation to the municipal governing body for consideration. N.J.S.A. 40A:12A-6(b)(5). Accordingly, at its regularly scheduled meeting on August 27, 1997, the Harrison Planning Board passed a resolution recommending that the Town Council designate the study area as

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[5] Mr. Burns also advised:

> A redevelopment study is what we're doing here tonight and what it is doing is simply identifying an area that is an area that has a potential for redevelopment. It's simply identifying the area. The second step, which is the redevelopment plan, is the drawing up of a plan for uses and requirements that would be designed for that area. What kind of uses would exist, what would those requirements be, how would that affect people that own property in that area. All of those things because of the way the statute is written will be determined as part of the redevelopment plan and if the determination is made tonight, that would be step two. The redevelopment plan would be step two.

DRa111a-12a (Tr. 12:20-13:9).

"in need of redevelopment" (i.e. "blighted").[6] AM562a (Pathparc, slip op. at 7). During that same meeting, the Planning Board also began to review a proposed redevelopment plan that the engineering firm had provided prior to the meeting. AM407a-416a (Tr. 7:16-16:1). Explaining the proposed redevelopment plan to the Planning Board members, Gruel stated, "[A]s the board is aware, not all parcels within a redevelopment area must be acquired. The uses that are there can stay and that is something in terms of evaluation that occurs within this next step that's required by state statute." AM408a (Tr. 8:3-7).

The public was not provided a copy of the proposed redevelopment plan, however. Indeed, when a local resident asked when the plan would be available for public comment, AM412a (Tr. 12:1-2), Planning Board member Peter Higgins advised that the public could only become involved

> [a]t the time that this board adopts it and forwards it to the council . . . . At the time that it's determined that we should go forward with a

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[6] On August 20, 1997, the Planning Board requested that a notice of the August 27 meeting be published in the Star Ledger. AM562a (Pathparc, slip op. at 7). The notice stated: "The purpose of the meeting will be to memorialize a Resolution by the Planning Board recommending that the Mayor and Council adopt a Resolution determining that the area delineated in the Redevelopment Area Study dated July 1997, prepared by Moskowitz, Heyer & Gruel, Planning Consultants, is a redevelopment area in accordance with N.J.S.A. 40A:12A-5 and that it be approved as such." DRa187a. There is no evidence in the record that the Appellants saw the published notice in the newspapers.

> redevelopment plan, at that point, as Ms. Gruel has said, it's a bottoms up approach. It's all public input and property owner input that goes into that plan. This document itself is a proposal for that plan. This is not public information. It is not up for discussion until such time as this board has had an opportunity, the board members have had an opportunity to digest this and make a determination as to whether or not to go forward with a redevelopment plan.

AM412a-413a (Tr. 12:3-4; 12:20-13:6).

Once it has received the planning board's report and recommendation, the municipality may, by resolution, designate the area in need of redevelopment. N.J.S.A. 40A:12A-6(b)(5). The governing body is not required to hold a public hearing at this stage, and no formal public notice is required other than the standard advertisement of the governing body agenda under the Open Public Meetings Act, N.J.S.A. 10:4-6 to -21.

Thus, at a meeting on September 4, 1997, the Town Council of Harrison adopted a resolution determining the study area to be a redevelopment area as defined in N.J.S.A. 40A:12A-3. AM422a. The LRHL calls for individual notice of the adoption of the blight designation only to those who previously filed written objections to this designation. N.J.S.A. 40A:12A-6(b)(5). The statute provides further that those who filed written objections may seek judicial review of the blight designation within 45 days of its adoption. N.J.S.A. 40A:12A-6(b)(7).

The record does not contain any evidence that the Town advised Appellants of the right to object in writing to the proposed redevelopment area designation, or the consequences of failing to object for both future notices and judicial review. This is despite the Town's subsequent arguments that failing to object indeed had meaningful consequences: a waiver of the right to challenge the blight designation after the expiration of the statutory period for filing an action in Superior Court. Pb30-32.

B. Drafting the Redevelopment Plan

After designating the blighted area, the governing body directs the planning board or the redevelopment agency to prepare the redevelopment plan, or reserves the right for itself. N.J.S.A. 40A:12A-7. Once the plan is complete, the governing body approves the plan by ordinance, which requires a public hearing. Id. "[T]he only hearing required before adoption of a redevelopment plan, as with any other municipal ordinance, is a legislative hearing before the governing body." Hirth v. City of Hoboken, 337 N.J. Super. 149, 165 (App. Div. 2001) (citing N.J.S.A. 40:49-2b.) "[N]o notice beyond that required for adoption of ordinances by the municipality shall be required for the hearing on or adoption of the redevelopment plan or subsequent amendments thereof." N.J.S.A. 40A:12A-7(c).

In a resolution passed on September 4, 1997, the Town Council directed the Planning Board to prepare a redevelopment plan as defined in N.J.S.A. 40A:12A-3, and to comply with N.J.S.A. 40A:12A-7 in preparing the plan and transmitting it to the Town Council. AM563a (Pathparc, slip op. at 8). In a resolution adopted September 23, 1998, the Planning Board recommended that the Harrison Town Council adopt the Redevelopment Plan prepared by the Planning Board. On October 13, 1998, notice was published in The Jersey Journal regarding the redevelopment plan. AM563a (Pathparc, slip op. at 8). The Harrison Town Council adopted an ordinance approving the Redevelopment Plan on November 16, 1998, with two minor amendments not relevant to these cases. DRa210a.

Although the LRHL directs the municipality to include in the redevelopment plan "[a]n identification of any property within the redevelopment area which is proposed to be acquired," N.J.S.A. 40A:12A-7(a)(4), the Harrison plan, like many others, provided only a general statement of its power to use eminent domain in the Redevelopment Area but without identifying any specific parcels to be condemned:

> This Redevelopment Plan authorizes the Town to exercise its condemnation powers on all properties in the Redevelopment Area, to acquire property or to eliminate any restrictive covenants, easements or similar property interests which may undermine the implementation of the Plan.

> The Town plans, however, to assist the designated redevelopers in working with affected property owners and businesses to promote private redevelopment, where appropriate, of the parcels within the Redevelopment Area.

EA735. This language was carried forward when, in 1999, and again in 2003, the Town amended the Plan. DRa45a (DeRose, slip op. at 2).[7]

C. Implementing the Redevelopment Plan and Using Eminent Domain

After a redevelopment plan has been adopted, the governing body may designate a redevelopment entity, which is the public body responsible for implementing the redevelopment plan and is granted all the redevelopment powers authorized by state law. N.J.S.A. 40A:12A-8. The redevelopment entity has the power to condemn any property in the redevelopment area. N.J.S.A. 40A:12A-8(c) and -15. The Town created the Harrison Redevelopment Agency ("HRA") and retained Value Research Group, L.L.C., to prepare appraisal reports for the various properties that the Town considered for acquisition. AM94a.

Accordingly, by letter to Mr. DeRose dated January 30, 2004, Value Research Group requested access to the properties in order to prepare an appraisal report "for the possible

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[7] As found by the trial court, "DeRose never received official notification of the Property's designation in the Plan, nor did he receive notice of the Town's adoption of the Plan and subsequent amendments." DRa45a (DeRose, slip op. at 2).

acquisition of the property." DRa211a. The letter did not mention eminent domain or any compulsory acquisition of the property. Id. Value Research Group scheduled its inspection of the DeRose Property for February 18, 2004. Id. Additionally, by letters dated October 11, 2005, Value Research Group requested access to the other properties. AM94a. As with the letter to Mr. DeRose, there was no mention of eminent domain. Id. Value Research Group scheduled its inspection of the Amaral Property on October 26, 2005, and Harrison Eagle on October 24, 2005. Id.; Pa131.

Harrison Eagle Property

HRA sent a letter dated June 1, 2006, formally advising Harrison Eagle that it intended to acquire the Harrison Eagle Property and included a copy of the appraisal report. EA322a-23a.[8] On or about June 29, 2006, HRA informed Harrison Eagle that it would be commencing condemnation proceedings on July 10, 2006 to acquire the Harrison Eagle Property. EA330a. Accordingly, on July 12, 2006, HRA initiated a condemnation action, which the trial court granted in a written opinion

[8] Additionally, HRA advised Harrison Eagle that "[s]tate law provides that condemnation proceedings cannot be initiated for 14 days from the time of mailing of this letter for negotiation and discussion. Once that period expires, the Agency may proceed in court. Failure to respond to this offer within the 14 day period shall constitute conclusive proof of the inability of the Agency to acquire the property through amicable negotiations." EA323a.

issued on February 13, 2007. EA1a-26a; EA944a-59a, 960a-64a. Harrison Eagle filed a motion for reconsideration, which the trial court denied by order dated April 23, 2007. EA1135a-36a.

On May 1, 2007, Harrison Eagle filed its notice of appeal. EA1137a-43a. An emergent motion for a stay pending appeal was filed with the Appellate Division on May 8, 2007, and denied on May 11, 2007. EA1144a. Harrison Eagle then sought a stay from the New Jersey Supreme Court, which denied the motion by order dated May 22, 2007. EA1145a-46a.

Amaral Property

In November 2005, HRA was granted access to the Amaral Property to conduct an environmental inspection.[9] On August 22, 2006, HRA filed a complaint initiating condemnation proceedings to obtain the Amaral Property. AM3a-13a. The trial court conducted a hearing on November 29, 2006, and issued a written opinion on February 13, 2007, authorizing HRA to exercise eminent domain and denying the Amarals' request for a stay. AM226a-38a (Amaral, slip op.). The Amarals filed a Notice of Appeal on March 26, 2007, followed by a motion for a stay

[9] Phases I and II of the environmental site assessment were conducted in December 2005 and April 2006, respectively. AMPa201. From June to August 2006, HRA and the Amarals engaged in negotiations about the voluntary transfer of the Amaral Property. AM573a-79a. The negotiations were unsuccessful, and by letter dated August 17, 2006, HRA advised the Amarals that it would initiate condemnation proceedings. AM579a.

pending appeal on April 9, 2007. AM243a-45a. By Order filed April 26, 2007, the Appellate Division denied the stay. AM247a. On May 2, 2007, the Amarals applied to the New Jersey Supreme Court for a stay which was denied on May 9, 2007. AM248a.

DeRose Property

By letter dated July 7, 2004, HRA advised DeRose that it intended to acquire his property and included a copy of the appraisal report. DRa213a-14a. Additionally, HRA informed DeRose of the 14-day period for response, after which condemnation proceedings could begin. DRa214a.

On April 19, 2006, HRA filed a complaint seeking access to the DeRose Property for an environmental assessment. DRa1a-23a. On May 15, 2006, DeRose filed an answer, counterclaim, and third-party complaint in lieu of prerogative writs. DRa24a-40a. The trial court dismissed DeRose's counterclaims and third-party complaint, with prejudice, by order dated September 21, 2006. DRa43a, 44a-55a (DeRose, slip op. 1-12). On October 16, 2006, DeRose filed a notice of appeal. DRa73a.

Additionally, DeRose appeals from an order authorizing the HRA to exercise its power of eminent domain. On June 1, 2007, HRA filed a condemnation action to obtain the DeRose Property. DRb1-12. On September 7, 2007, the trial court entered an order authorizing the HRA to exercise eminent domain and denying DeRose's application for a stay. DRb226-27. DeRose filed a

notice of appeal with this Court on September 18, 2007. DRb228-33. On October 25, 2007, the Appellate Division denied DeRose's application for a stay pending appeal. DRb234.

ARGUMENT

I. THE LRHL VIOLATES SEPARATION OF POWERS PRINCIPLES BY IMPINGING UPON THE EXCLUSIVE AUTHORITY OF THE JUDICIARY TO CONTROL THE PRACTICE, PROCEDURE, AND ADMINISTRATION OF REVIEWING THE CONSTITUTIONALITY OF A TAKING.

To the extent that the LRHL limits or precludes judicial review of a blight designation - the key factual predicate that Article VIII, Section III, Paragraph 1 of the New Jersey Constitution requires for the use of eminent domain - the LRHL violates separation of powers principles.

The LRHL provides that a municipality "may adopt a resolution determining that [a] delineated area, or any part thereof, is a redevelopment area." N.J.S.A. 40A:12A-6(b)(5). This determination, "if supported by substantial evidence," is "binding and conclusive upon all persons affected." Id. The only exception to this general rule of finality is that persons who previously "filed a written objection" to the proposed determination of blight have "45 days" after the municipality's adoption of the determination to seek review in Superior Court "by procedure in lieu of prerogative writ." N.J.S.A. 40A:12A-6(b)(7). This 45-day clock runs regardless of whether a property owner has notice that the municipality intends to acquire his particular parcel by eminent domain.

The judiciary has the exclusive authority to control the practice, procedure, and administration of reviewing the constitutionality of a taking. To the extent N.J.S.A. 40A:12A-6(b)(7) operates as a legislative bar to a property owner's assertion of an otherwise available constitutional interest or defense in a subsequent judicial proceeding, including a condemnation action, the statute violates separation of powers principles.[10]

A. UNDER NEW JERSEY COURT RULES, A PROPERTY OWNER IS ENTITLED TO CHALLENGE THE CONSTITUTIONALITY OF A TAKING AT THE CONDEMNATION STAGE.

Although these appeals arise from condemnation actions that the taking authority initiated under Court Rule 4:73, once the municipality makes clear its decision to use eminent domain,

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[10] N.J.S.A. 40A:12A-6(b) also has the effect of fragmenting judicial review of eminent domain for redevelopment by requiring piecemeal litigation: property owners must file a challenge at the blight designation stage and then defend at the condemnation stage. This procedure, which requires that elements of a single cause of action be divided into component parts, to be litigated separately, is inconsistent at least with the spirit of the entire controversy doctrine. See generally, Oliver v. Ambrose, 152 N.J. 383, 392 (1998). Amicus does not mean to suggest that the entire controversy doctrine should be read to forbid an affected party from bringing an immediate challenge to a blight designation, and there may be other reasons, independent of potential use of eminent domain, why a property owner who has the resources to do so may decide to bring such an immediate challenge. But to the extent that the courts consider whether or not to accommodate the Legislature as a matter of comity (see infra Point I.C.), they should at least take into account the wisdom of a rule that requires that litigation be brought piecemeal.

that action could just as easily be challenged by the property owner in an action in lieu of prerogative writs under Rule 4:69. Obviously, the ability to raise a constitutional claim or defense cannot depend on which party, the municipality or the property owner, happens to arrive at the courthouse first.

By way of stark contrast to N.J.S.A. 40A:12-6(b), Rule 4:69-6(a) provides in pertinent part that "[n]o action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed" (emphasis added). The court "may enlarge" this time "where it is manifest that the interest of justice so requires." R. 4:69-6(c).

Courts have construed the term "accrual" liberally to permit meaningful judicial review of official action. Thus courts have found that the right to challenge a municipal action "accrues" when the injury occurs, i.e., when the person deprived of the right receives notice of the deprivation. See Dolente v. Borough of Pine Hill, 313 N.J. Super. 410, 417-18 (App. Div. 1998) (time to challenge action taken during meeting held in violation of Open Public Meetings Act, N.J.S.A. 10:4-15, does not begin to run until action becomes public); Concerned Citizens of Princeton v. Mayor of Princeton, 370 N.J. Super. 429, 445-47 (App. Div.) (time of injury measured from date Borough affirmatively acted to prevent public referendum on bond

issue, not from municipal adoption of blight designation), certif. denied, 182 N.J. 139 (2004).

In a redevelopment project that uses eminent domain, a distinct and actionable injury to the constitutional property right arises when the municipality reveals its decision to take a given property. A redevelopment designation typically occurs months and even years before the municipality decides, let alone announces, that it intends to take particular properties. Accordingly, under Rule 4:69-6, the 45-day period in which to challenge a blight designation does not to begin to run until the property owner receives notice that the blight designation will in fact result in the taking of his property and that he must challenge this designation in court within a specific period of time or waive the right to review. Cf. Trenkamp v. Twp. of Burlington, 170 N.J. Super. 251, 259 (Law Div. 1979) (considering whether to enlarge time under Rule 4:69-6(c) in cases where claimant did not have reasonable notice of action challenged).[11]

While the trial court below did acknowledge the possibility that equitable considerations might require enlargement of the

[11] Trenkamp further noted: "The unfairness in requiring a plaintiff to bring suit within 45 days from the date a building permit is issued, when he was ignorant of any reason to do so and without notice of any fact which would require that a diligent inquiry be undertaken, is obvious." 170 N.J. Super. at 259.

45-day time limit of Rule 4:69-6, the court found that the Appellants in each of these cases had subsequently become aware of circumstances sufficient to inform them that their action had accrued, and thus they were still time-barred. For example, the trial court found that DeRose learned through discussions with representatives of HRA in January 2004 that the Town intended to condemn his property, "although [DeRose] never received formal notice that this would occur." DRa50a (DeRose, slip op. at 7). With regard to Harrison Eagle, the trial court found that it was generally aware of the Town's redevelopment plan for several years, and was on notice of the Town's intentions when an order granting pre-condemnation access for valuation was entered in 2000. EA956a-957a (Harrison Eagle, slip op. at 12-13). With regard to Amaral, the trial court found that knowledge of the redevelopment plan was sufficient to trigger accrual of the action, AM229a (Amaral, slip op. at 4), even though the redevelopment plan failed to disclose an intention to exercise eminent domain over any particular property.

It is contrary to the orderly administration of justice, however, to determine the accrual of the action on a case-by-case estimate of when a particular property owner has acquired sufficient anecdotal information to enable him to infer that the municipality intends to use eminent domain. Property owners should not be put to the task of guessing the municipality's

intentions. Any uncertainty on this issue is generated by the municipality itself, and the municipality may dispel it by the simple device of stating its intention with clarity. Such a declaration would provide a clear and easily provable point at which to mark any limitations period. In the end, the certainty desired to promote a redevelopment process would be best served by such a device, rather than depending upon an inevitably empirical inquiry that would vary from owner to owner.

Moreover, courts traditionally have refused to allow laches to bar a prerogative writ such as certiorari in cases where the notice that affected property owners received was constitutionally inadequate.[12] The one exception to this general rule is when a town has relied on the owner's inaction. See In re Application of Buckeye Pipe Line Co., 13 N.J. 385, 389 (1953) (plaintiff stood by for months watching defendant construct and operate pipeline before challenging condemnation). But that reliance must be reasonable, foreseeable, and unfairly prejudicial to the local government.

Here, the evidence of record does not establish that the Town provided clear notice to Appellants as to the purpose of

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[12] See Holloway v. Township of Pennsauken, 12 N.J. 371, 374 (1953); Frank v. Mayor of Jersey City, 6 N.J. Misc. 446, 447 (Sup. Ct. 1928); Walsh v. City of Newark, 78 N.J.L. 168, 169-70 (Sup. Ct. 1909); State v. North Bergen, 39 N.J.L. 456, 457 (Sup. Ct. 1877).

the redevelopment designation, the Town's intention to take their property, their right to appeal the designation by a certain time, and the consequences of a failure to file a challenge.[13] Until the Town clearly notified Appellants that it would permanently deprive them of their property rights and they received a fair opportunity for judicial review, it was not reasonable for the Town or its redevelopment partners to make any investment in reliance upon owning those properties.

B. THE LEGISLATURE IS NOT EMPOWERED UNDER THE NEW JERSEY CONSTITUTION TO IMPOSE PROCEDURAL BARRIERS TO JUDICIAL REVIEW SUCH AS THOSE CONTAINED IN N.J.S.A. 40A:12A-6(b).

There are at least two state constitutional provisions that curtail legislative attempts to dictate the procedures by which the courts review agency action: the general requirements set out in Winberry v. Salisbury, 5 N.J. 240 (1950), based upon Article VI, Section II, Paragraph 3 of the Constitution ("The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts"); and the more specific provisions

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[13] In fact, the record indicates that the Town affirmatively encouraged property owners to forego a challenge to the blight designation until after the prescribed time limit. See supra Statement of Facts. The Town therefore cannot be heard afterwards to assert reliance on the natural consequences of its own actions. Sprenger v. Trout, 375 N.J. Super. 120, 136 (App. Div. 2005) ("If the plaintiff creates or contributes to the situation on which it relies, the court denies equitable relief in order to deter the wrongful conduct.").

of Article VI, Section V, Paragraph 4, which provide for judicial review of administrative action as of right, subject only to "terms and in the manner provided by rules of the Supreme Court." Under either of these clauses, the Legislature, in enacting N.J.S.A. 40A:12A-6(b), strayed beyond its permitted constitutional competence in attempting to delimit the manner in which an affected person may make a constitutional challenge to government action.

3. The Action in Lieu of Prerogative Writs Clause

Article VI, Section V, Paragraph 4 of the New Jersey Constitution provides in pertinent part: "Prerogative writs are superseded and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court, on terms and in the manner provided by rules of the Supreme Court, as of right" (emphasis added). "On its face, this constitutional provision grants to all individuals a review 'as of right,' in the Superior Court in any situation where, prior to 1947, they may have been entitled to a prerogative writ; and so the provision has been interpreted consistently." Hills Dev. Co. v. Township of Bernards, 103 N.J. 1, 44 (1986) (holding that, because certiorari had been traditionally available before 1947 to review municipal ordinances, Article VI, Section V, Paragraph 4

granted constitutional right to seek judicial review of ordinance by action in lieu of prerogative writs).[14]

It follows logically that the Constitution grants to the Supreme Court, and not the Legislature, the exclusive power to establish the terms and manner in which such actions are brought: if instead the Legislature could define the procedures delimiting an action in lieu of prerogative writs, then it could easily define, and thereby limit, the substantive action itself. But the Constitution does not permit the Legislature to be its own guardian.

> By the clearest language, the Constitution commits to the Supreme Court the regulation of the new remedies provided in lieu of prerogative writs. Review, hearing and relief shall be had on such terms and in such manner as the Supreme Court alone may provide by rule. In the administration of these remedies, there is to be no division of authority. . . . No distinction is made between the substantive jurisdiction to afford the relief theretofore available through the prerogative writs and the mode and manner of the exercise of the power. The whole is within the exclusive jurisdiction of the Supreme Court. Neither the exercise of the power inherent in the old Supreme Court by means of the prerogative writs nor the regulation of the remedy is subject to legislative control.

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[14] Accord Rivkin v. Dover Twp. Rent Leveling Bd., 277 N.J. Super. 559, 569 (App. Div. 1994), aff'd, 143 N.J. 352 (1996); Warner Co. v. Sutton, 274 N.J. Super. 464, 474 (App. Div. 1994); see generally Alexander's Dep't Stores v. Borough of Paramus, 125 N.J. 100, 107-08 (1991); In re LiVolsi, 85 N.J. 576, 592-94 (1981).

Fischer v. Bedminster Township, 5 N.J. 534, 541 (1950) (emphasis added).

In Fischer, the Court struck down a statute that imposed a 30-day time limit on bringing an action in lieu of prerogative writs to challenge a local zoning ordinance. The Court concluded: "The statute of limitation is without efficacy. It purports to bar the 'review, hearing and relief' in lieu of the commonlaw prerogative writs afforded by Article VI, Section V, paragraph 4" of the State Constitution. Id. at 538-39. Thus, "[i]n New Jersey, judicial review of administrative agency determinations has the support of a special constitutional provision which largely immunizes it from legislative curbs." In re Senior Appeals Examiners, 60 N.J. 356, 363 (1972). New Jersey "is conscious of itself as the jurisdiction in which judicial review has been most freely available with the least encumbrance of technical apparatus." Id. (internal quotation omitted).

By regulating the time and manner in which the constitutionality of a municipal blight determination is reviewed by the courts, N.J.S.A. 40A:12A-6(b) appears to be an attempt by the Legislature to exercise control precisely in the area in which Article VI, Section V, Paragraph 4 of the New Jersey Constitution grants the Supreme Court exclusive rule-making authority. Especially when the Legislature is seeking to

compel property owners to act in counterintuitive ways in order to preserve their right to bring a constitutional challenge to the use of eminent domain, its arrogation to itself of prerogatives vested by the Constitution in the Supreme Court should be assessed with skepticism.

4. The Supreme Court's Rulemaking Power under Winberry v. Salisbury

In Winberry v. Salisbury, 5 N.J. 240 (1950), the Supreme Court interpreted Article VI, Section II, Paragraph 3 of the New Jersey Constitution as granting to it the exclusive power to make rules for practice and procedure in the courts, which rules were not subject to "overriding legislation." Id. at 255. Winberry also involved a legislative attempt to establish a limitation period for bringing an appeal. The Court held that, by virtue of its constitutional authority to promulgate rules of court, it had the power to prescribe a 45-day limit for appealing a judgment of a trial court, notwithstanding legislation that would have allowed an appeal within one year after judgment. Id. at 243, 255.

The Winberry doctrine differs somewhat from the Action in Lieu of Prerogative Writs Clause, in that Article VI, Section II, Paragraph 3 of the New Jersey Constitution, upon which the Court's general rule-making power is based, contains the qualifying clause "subject to the law." As Winberry itself

teaches, however, this does not permit the Legislature to override rules of procedure, but rather acknowledges its role in promulgating substantive law. 5 N.J. at 247-48. Thus, in prescribing rules of general application that apply to all actions, including claims against private defendants, the courts must make the distinction between substantive law and procedural law, whereas in an action in lieu of prerogative writs challenging government action, there is no distinction made between substance and procedure, and the Supreme Court has exclusive control over all aspects of the action. Fischer, 5 N.J. at 541.

Even if the constitutionality of N.J.S.A. 40A:12A-6(b) were to be assessed solely under the Winberry doctrine, however, the statute would still fail, because it impermissibly intrudes upon the Supreme Court's rule-making power. N.J.S.A. 40A:12A-6(b) seeks to pose a bar to assertion of a constitutional right or defense in a subsequent equitable proceeding, including a condemnation action, in which a property owner would otherwise be able to assert all available objections.[15] See Bergen County

[15] Because N.J.S.A. 40A:12A-6(b) effects a kind of claim preclusion, it is more aptly characterized as a legislatively mandated imposition of the doctrine of laches or of collateral estoppel than as a statutory limitations period. Whatever label is used, however, rules that determine the manner in which such equitable rights and defenses are presented, or may be

(Footnote continued . . .)

v. S. Goldberg & Co., 39 N.J. 377, 380 (1963) (condemnee has full opportunity to object to condemnation even in summary condemnation action).

C. BEFORE THE COURTS CAN DECIDE WHETHER TO ACCOMMODATE THE LEGISLATURE AS A MATTER OF COMITY, THEY MUST FIRST DETERMINE THAT THE ACCOMMODATION IS CONSISTENT WITH FUNDAMENTAL FAIRNESS.

It is true that even if a matter falls within the Supreme Court's exclusive rule-making power under Winberry, the Court may decide whether to accommodate the Legislature as a matter of comity. See Knight v. Margate, 86 N.J. 374, 389-91 (1981) (Supreme Court has authority "to permit or accommodate the lawful and reasonable exercise of the powers of other branches of government even as that might impinge upon the Court's constitutional concerns in the judicial area"). The Court has also applied this doctrine of comity in actions in lieu of prerogative writs. Hills Dev. Co., 103 N.J. at 47.

When the Court accommodates a legislative enactment, it does so as an act of comity, not obedience. In Ferreira v. Rancocas Orthopedic Associates, 178 N.J. 144 (2003), Justice Zazzali explained in his concurring and dissenting opinion that the courts "have accommodated legislative enactments touching on integral areas of the judicial system only when those enactments

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precluded, fall within the realm of procedure that Winberry vests exclusively with the Supreme Court.

'have not in any way interfered with this Court's constitutional obligation' to 'insure a proper administration of the court system.'" 178 N.J. at 163 (Zazzali, J., joined by Long, J., and Pressler, P.J.A.D., dissenting and concurring) (quoting Passaic County Probation Officers' Ass'n v. County of Passaic, 73 N.J. 247, 255 (1977)).

> [J]udicial toleration of legislative intrusion has pivoted on a two-prong analysis. Initially, we have considered whether the judiciary has fully exercised its power with respect to the matter at issue. In the absence of complete judicial action, we then have inquired into whether the statute serves a legitimate legislative goal, and, "concomitantly, does not interfere with judicial prerogatives or only indirectly or incidentally touches upon the judicial domain."

Id. (quoting Knight, 86 N.J. at 391 (internal citation omitted)).

Applying this two-pronged analysis to these cases, it is doubtful that N.J.S.A. 40A:12A-6(b) survives even the first prong, because the judiciary has fully exercised its power with respect to the matter at issue. Rule 4:69 provides a comprehensive scheme by which actions in lieu of prerogative writs shall be brought. In particular, Rule 4:69-6 delineates the times within which actions shall be brought. Section (a) prescribes the general rule (45 days from the time of "accrual" of the right to review), section (b) provides for different time periods in particular actions, and most importantly section (c)

permits the court to enlarge any time limit "where it is manifest that the interest of justice so requires." Since the Court Rule completely occupies the field, the judiciary has in fact "fully exercised" its power with respect to the matter at issue.

Even if one were to proceed to the second prong of the analysis, the statute is not one suitable for accommodation. To the extent that N.J.S.A. 40A:12A-6(b) is read to require a rule of absolute finality in a blight determination regardless of the "interest of justice," or indeed the requirements of procedural due process (see infra Point II), then the statute clearly "interfere[s] with this Court's constitutional obligation to insure a proper administration of the court system." Ferreira, 178 N.J. at 163 (Zazzali, J., concurring and dissenting) (internal citations omitted). Until the courts can be satisfied that they have met their primary obligations, no act of accommodation is possible.

II. APPELLANTS RECEIVED NEITHER THE FAIR NOTICE NOR THE MEANINGFUL JUDICIAL REVIEW GUARANTEED BY DUE PROCESS PRINCIPLES.

This Court has posed to parties and amici the question whether an owner who fails to challenge a blight designation within 45 days of its adoption may nevertheless challenge it in defense to an ensuing condemnation proceeding. Courts have

addressed this issue by reference to time-bars and their exceptions in various statutes and court rules. Resolution of the problem does not ultimately lie in these sources of law, however. It lies instead in consideration of constitutional due process.

Some courts have noted an apparent conflict in the pertinent statutes concerning when a property owner may challenge a blight designation. See, e.g., AM757a-759a (Township of North Bergen v. Spylen of North Bergen, No. A-6868-03T2, slip op. at 23-25 (App. Div. June 13, 2005)). On the one hand, the LRHL permits "a person who filed a written objection to a [blight] determination" to challenge it "within 45 days after [its] adoption." N.J.S.A. 40A:12A-6(b)(7). On the other hand, the Eminent Domain Act grants to courts hearing condemnation actions jurisdiction over "all matters incidental thereto and arising therefrom, including . . . jurisdiction to determine the authority to exercise the power of eminent domain." N.J.S.A. 20:3-5. Attempting to resolve this tension, some courts have resorted to creative solutions such as limiting the LRHL's time-bar to its precise terms so that it would apply only to those who had previously filed a written objection to the blight designation. AM758a (Spylen, slip op. at 24); see also Hirth, 337 N.J. Super. at 160. One court concluded simply that the Eminent Domain Act "temper[s]" any provision that might

otherwise be read to limit a condemnee's right to raise all relevant defenses. See AM789a (City of Long Branch v. Brower, No. MON-L-4987-05, 2006 WL 1746120, at *8 (Law Div. June 22, 2006), appeals filed, Nos. A-191-06, A-192-06, A-194-06, A-195-06, A-196-06, A-197-06, A-198-06, A-199-06, A-654-06 (App. Div. Aug. 30, 2006).

Other courts, including the trial court below, have instead looked to Rule 4:69-6 to determine whether to allow a condemnee to assert the affirmative defense of an improper blight designation. Applying this analytic framework, some, like the trial court here, have barred challenges to the blight designation, while others, citing the exception to the time-bar in Rule 4:69-6(c), have permitted such challenges as being in "the interest of justice."[16] In cases allowing property owners to make their challenges, the courts rely on the public interest in adjudicating "alleged numerous violations and misapplication of the LRHL, as well as arbitrary and capricious municipal action in the redevelopment designation . . . ." Concerned Citizens of Princeton, 370 N.J.Super. at 447; see also Hirth, 337 N.J. Super. at 160 (noting "broader public interests" that

[16] Compare, e.g., Concerned Citizens of Princeton, 370 N.J. Super. at 446-47 (not barred), with AM567a-568a, 572a (Pathparc, slip op. at 12-13, 17) (barred); AM807a-808a (Union City Redev. Agency v. UC Overlook Dev., L.L.C., No. A-4485-05T1, 2007 WL 1319456, at *2 (App. Div. May 8, 2007) (barred).

may be served by judicial review of blight designation). In contrast, courts enforcing the time-bar reject such reasoning as swallowing a rule designed to achieve repose of municipal determinations. E.g., AM808a (Union City Redev. Agency, 2007 WL 1319456, at *2) (enlargement of time would render blight designations "entirely ineffectual in every subsequent condemnation case").

While these cases cite various sources of law and reach sometimes opposing conclusions, they all assume that property owners must overcome a time-bar in order to be allowed to challenge a blight designation in a condemnation proceeding. This assumption is incorrect. The time-bars in question, whether originating in the LRHL or the court rules, are unconstitutional as applied below and in similar cases. Due process principles make clear that a property owner does not forfeit his right to challenge any basis for a municipal taking before the government notifies him of that taking and of his right to challenge it. This constitutional imperative overrides any conflicting statutes or rules and compels reversal of the trial court's decision barring Appellants' challenges to the blight designation in Harrison.

If the trial court is instructed to entertain Appellants' challenges to the blight designation on remand, it will need guidance on the proper standard of review. In its alternative

rulings on the merits, the trial court applied a standard so deferential as to abdicate its role in enforcing the constitutional limitation that a municipality may take property for private redevelopment only in "blighted areas." See Gallenthin, 191 N.J. at 358-59.

A. AS A MATTER OF DUE PROCESS, AN OWNER'S RIGHT TO CHALLENGE THE BASIS OF A TAKING CANNOT BE EXTINGUISHED UNTIL HE HAS RECEIVED CONSTITUTIONALLY SUFFICIENT NOTICE THAT HIS PROPERTY WILL BE TAKEN.

Due process demands that an affected party be allowed to make his objections when he has the appropriate incentive to do so. Because a property owner may not have sufficiently urgent reason to challenge a blight designation until he knows that it will result in the taking of his land, his right to mount such a challenge must survive at least until then. Due process requires further that an affected party receive individualized notice of an impending deprivation of his property rights. This notice must make the proposed deprivation clear and must inform the recipient of his recourse against it. The LRHL fails to require such notice and the Town of Harrison did not provide it until the initiation of the condemnation proceedings. Absent such notice, Appellants cannot be held to have forfeited their right to object to the blight determination.

1. Due Process Requires Notice and a Meaningful Opportunity To Be Heard Before a Municipality Takes Property.

The Fourteenth Amendment of the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." "That the property interests mentioned in both [the New Jersey and United States] Constitutions refer to interest in real estate have [sic] been settled by innumerable decisions by both this Court and the United States Supreme Court." Township of Montville v. Block 69, Lot 10, 74 N.J. 1, 7 (1977) (citations omitted). The fundamental requirements of procedural due process are adequate notice to the property owner of the proposed deprivation and an opportunity for him to dispute the claims against him. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950). Due process is "flexible and calls for such procedural protections as the particular situation demands." Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (internal quotation omitted); see also Walker v. City of Hutchinson, 352 U.S. 112, 115-16 (1956). The process due in a given situation depends upon (1) the private interest at stake, (2) the risk of erroneous deprivation of that interest under current procedures, and (3) the burden on the government of using additional procedural safeguards. Mathews, 424 U.S. at 334-35.

The New Jersey Constitution also protects a person's right to acquire, possess, and protect property. N.J. Const. art. I, ¶ 1 ("All persons shall . . . have certain natural and unalienable rights, among which are those of . . . acquiring, possessing, and protecting property."); see also Doe v. Poritz, 142 N.J. 1, 99 (1995). Although the New Jersey Supreme Court looks to the U.S. Constitution as a "sound basis" for interpreting due process under the New Jersey Constitution, the Court has noted that the State Constitution affords even "greater protections." Township of Montville, 74 N.J. at 18. Following U.S. Supreme Court precedent, New Jersey courts have held that the critical components of due process are adequate notice, opportunity for a fair hearing, and availability of appropriate review. City of Passaic v. Shennett, 390 N.J. Super. 475, 485 (App. Div. 2007) (internal quotation omitted); Borough of Keyport v. Maropakis, 332 N.J. Super. 210, 220-221 (App. Div. 2000) (internal quotations omitted). In determining the nature of the process due under the New Jersey Constitution, our Supreme Court has also looked to the Mathews standard. Doe, 142 N.J. at 106-07.

2. By Requiring Owners To Challenge a Blight Designation Before They Know Whether and How the Designation Will Affect Their Property, Current Law Deprives Them of a Meaningful Opportunity To Contest The Basis of a Taking.

A Property owner is deprived of a meaningful opportunity to be heard if his challenge to the constitutional basis of a condemnation is barred before he understands that the government intends to take his property. An integral part of the concept of an "opportunity to be heard" is the requirement that the party must have an incentive to litigate the issue at hand. "[I]t would violate due process to assert collateral estoppel against a party who had little knowledge or incentive to litigate fully and vigorously in the first action due to the procedural and/or factual circumstances presented therein." Ingram v. City of Columbus, 185 F.3d 579, 593 (6th Cir. 1999) (quoting Goodson v. McDonough Power Equip., 443 N.E.2d 978, 985 (Ohio 1983)). As the Ninth Circuit has noted, also in the collateral estoppel context, "due process requires both that the prior litigation of the issue have been motivated by the same underlying purposes, and that the original party have had an incentive and opportunity to litigate the issue in the manner best suited to furthering those common underlying purposes." Jones v. Bates, 127 F.3d 839, 848 (9th Cir. 1997); see also Ackerman v. Ackerman, 676 F.2d 898, 905 (2d Cir. 1982)(res

judicata not applied where prior action did not afford opportunity to be heard since party had no incentive to litigate quasi in rem action based on property worth much less than party thought).

It is axiomatic that issue preclusion based on prior litigation does not apply when the party sought to be precluded "did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action." Restatement (Second) of Judgments § 28(5)(c) (1982) (emphasis added). The specific Restatement formulation of this general rule has been "recognized in the case law of this State." Ensslin v. Township of North Bergen, 275 N.J. Super. 352, 370 (App. Div. 1994) (citing Zoneraich v. Overlook Hosp., 212 N.J. Super. 83, 94 (App. Div.), certif. denied, 107 N.J. 32 (1986)); see also Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 523 (2006) (holding that Restatement (Second) of Judgments § 28 informs the determination whether administrative proceedings merit the deference accorded to final judgments).

Applying this rule to the eminent domain context, property owners will generally lack the requisite "incentive to obtain a full and fair adjudication" of the blight designation until the municipality declares its decision to exercise eminent domain. At the time of the redevelopment designation, the municipality has neither determined nor publicized what properties it will

take. In general, therefore, owners cannot undertake at this time the calculus of interests that would enable them to make an informed decision about whether to oppose the blight designation.[17]

This Court has recently embraced a rule requiring a declaration of definitive governmental intent in the inverse condemnation context. In OFP, L.L.C. v. State, 395 N.J. Super. 571 (App. Div. 2007), certif. granted, ___ N.J. ___ (Dec. 5, 2007), a property owner challenged the constitutionality of the Highlands Water Protection and Planning Act, alleging that it amounted to a constructive taking. Because the property owner had failed to seek a waiver available under administrative regulations, however, this Court found that it was not possible to know whether the government regulation amounted to a taking.

> Because the determination whether a governmental regulation limiting the use of land has resulted in a taking depends on the "complex of factors" identified in Palazzolo, the agency responsible for such regulation must "arrive[ ] at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question" before a court can decide whether a taking has occurred.

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[17] Moreover, opposing a blight designation is a costly endeavor. In addition to retaining skilled counsel, affected owners must pay expert witnesses to analyze and rebut the municipality's arguments in favor of blight. See Levin v. Bridgewater, 57 N.J. 506, 528 (1971), appeal dismissed, 404 U.S. 803 (1971); ERETC, L.L.C. v. City of Perth Amboy, 381 N.J. Super. 268, 274 (App. Div. 2005).

Id. at 581 (citing Palazzolo v. Rhode Island, 533 U.S. 606, 615 (2001) and quoting Williamson County Regional Planning Comm. v. Hamilton Bank, 473 U.S. 172, 191 (1985)) (emphasis added). "'[A] landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation.'" Id. at 582 (quoting Palazzolo, 533 U.S. at 620-21) (emphasis added). Thus, while "the extent of the restriction on property is not known . . . a regulatory taking has not yet been established." Id.

Likewise in the context of redevelopment, a property owner simply does not know whether his land will be taken until the municipality formally tells him that it is taking that parcel. The owner may have no interest, or an insufficient interest, in challenging the blight determination unless it will lead to a condemnation. If the Appellants had attempted to bring an action alleging a constructive taking after the blight designation but before a municipal decision to condemn, they would certainly have confronted the same issues of ripeness as did the property owners in OFP and Williamson County. But if the ripeness doctrine prohibits a property owner from litigating a putative taking before the municipality actually declares its intent to effect an actual or inverse condemnation, then it would be both logically absurd and unconstitutional for the

Legislature or the courts to bar as untimely a challenge to the constitutional basis for the taking once the municipality has made clear its decision to condemn. Yet both N.J.S.A. 40A:12A-6(b) and Rule 4:69-6 as interpreted by the trial court appear to pose such a time-bar.[18] It obviously cannot comport with due process to hold that assertion of a constitutional objection to a taking is both unripe and thus too early if done at the blight designation stage, but also precluded and thus too late if done at the condemnation stage.

The history of this case directly demonstrates this proposition. In July 1997, Appellants received a notice that the Town was contemplating including their properties in a redevelopment area. DRa45a (DeRose, slip op. at 2). There was not even an inkling in this notice, however, that the Town was interested in acquiring Appellants' properties, either through

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[18] The federal district court in RLR Invs. v. Town of Kearny, No. 06CV4257 (DMC), 2007 U.S. Dist. LEXIS 44703 (D.N.J. June 20, 2007), held that the plaintiff had a right to raise, as a defense to a condemnation complaint, an argument that a taking of property was unconstitutional. Id. at *12 (the government may "condemn Plaintiff's property by filing a condemnation complaint in Superior Court. At that time, Plaintiff may challenge the validity of such a decision.") (emphasis added) (citations omitted). The court also noted that raising such an objection before commencement of the condemnation action would be unripe. Id. at *15-16. Because the New Jersey Constitution guarantees the right to judicial review of government actions that violate constitutional rights, the courthouse doors must remain open until such time as an owner has actual notice that his property is slated for taking.

voluntary sale or forcible transfer. AMPa74, 78. Nor was there any such indication at the public hearing. In fact, residents were told exactly the opposite. See Statement of Facts, supra. Likewise, while the 1998 Redevelopment Plan gave a general indication that eminent domain might be exercised anywhere in the designated redevelopment area (which encompasses approximately 32% of the entire Town), EA704, it also stated that "private redevelopment" not involving the forcible taking of property was a viable alternative, EA735. Even the 2004 and 2005 letters from appraisers to property owners gave no indication that a plan to effect a taking by eminent domain - rather than a generalized interest in ascertaining a sale price for subsequent voluntary negotiations - was afoot. DRa211a; AM94a. Indeed, the Town never clearly notified Appellants of its intent to take their property until it served and filed declarations of taking in connection with the condemnation proceedings. See EA1a-26a; AM3a-13a; DRb1-12.

If a municipality wants early certainty about its property acquisition plan, it can of course notify a property owner of its definitive intent to condemn whenever it chooses, as early as the blight designation stage.[19] But if the Town should be

[19] Again, the redevelopment plan should identify the property targeted for acquisition, N.J.S.A. 40A:12A-7(a)(4), but the Harrison plan did not do so, EA735.

heard to argue that it would be unduly burdensome for it to predict its own acquisition plans early in the redevelopment process, then property owners cannot be penalized for failing to divine those plans. The owner simply cannot be held to have forfeited a constitutional challenge to the blight designation until the municipality unequivocally manifests its decision to take his property and advises him of the actions he must take to contest this decision.

3. The LRHL Fails To Require Sufficient Notice of a Municipality's Intention To Exercise Eminent Domain.

In addition to requiring notice at the critical juncture when a town decides to take property, due process demands notice by means "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." Mullane, 339 U.S. at 314. Such notice must be more than a "mere gesture." Id. at 315. "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Id.; see also Township of Montville, 74 N.J. at 10. The fundamental purpose of the notice requirement is to "apprise the affected individual of, and permit adequate preparation for, an impending 'hearing'" which may affect legally protected interests. Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1, 14 (1978). Thus, notice must be delivered in a manner designed to reach known, affected

parties, and its contents must clearly explain the proposed deprivation and the opportunity to challenge it.

In Township of Montville, the State Supreme Court invalidated the notice provisions of the In Rem Tax Foreclosure Act under both the state and federal constitutions. 74 N.J. at 19. Like the LRHL, the Foreclosure Act provided for individualized notice only to owners who requested it in writing. Compare id. at 5 n.1 (Foreclosure Act provided for "notice to owners who [so] request in writing within the previous five year period") with N.J.S.A. 40A:12A-6(b)(5) (providing for notice of a blight designation only to those who previously "filed a written objection thereto"). And, again like the LRHL, the Foreclosure Act purported to hold the government harmless for failing to send even this limited notice. Compare 74 N.J. at 5 n.1 (Foreclosure Act stated that "failure to send such notice does not invalidate any action brought pursuant to the Act") with N.J.S.A. 40A:12A-6(b)(3) (stating that "[f]ailure to mail any such notice [of the initial hearing on the proposed blight designation] shall not invalidate the investigation or determination thereon"). Relying heavily on Mullane, 339 U.S. 306, as well as on United States Supreme Court decisions requiring individualized notice of condemnation proceedings, see Schroeder v. New York, 371 U.S. 208 (1962), and Walker v. City of Hutchinson, 352 U.S. 112, our Supreme Court

concluded that "notice by publication is insufficient in a tax foreclosure proceeding where a landowner's name and address are at hand," Township of Montville, 74 N.J. at 15.

Likewise here, notice to owners of the municipality's intention to take their property should be by individualized mailing rather than by publication.[20] The burden of providing individualized notice would be de minimis, especially given that N.J.S.A. 40A:12A-6(b)(3) already requires the municipality to mail notices to all affected owners regarding the public hearing on the proposed blight designation. The mailing list is therefore at hand. Mullane, 339 U.S. at 319 (one mailing to affected individuals is "persuasive" evidence that additional mailings are not burdensome); Brody v. Village of Port Chester, 434 F.3d 121, 129 (2d Cir. 2005) (requiring individualized notice of "public use" determination in New York's redevelopment process).

Notice of an intended taking must also state plainly the nature of the proposed deprivation, the consequences of the recipient's failure to act, and the time that the recipient has to contest the deprivation. The recent Second Circuit decision

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[20] The LRHL requires "[a]n identification of any property within the redevelopment area which is proposed to be acquired in accordance with the redevelopment plan," N.J.S.A. 40A:12A-7(a)(4), but provides only for notice by publication of "the hearing on or adoption of the redevelopment plan or subsequent amendments thereof," N.J.S.A. 40A:12A-7(c).

in Brody v. Village of Port Chester, 434 F.3d 121, speaks directly to this issue in the context of local redevelopment.[21] In Brody, a commercial landowner whose property was condemned challenged the content of a redevelopment notice provided by the municipality. The notice informed Brody of an impending "public use" determination (New York's equivalent to New Jersey's blight designation) but failed to tell him when he must challenge it. Id. at 129. The court held that, under Mullane, Brody had a constitutional right to be informed of the time period in which to challenge the determination. Id. at 130-32. The court reasoned that most landowners would not know that the notice triggered the exclusive period within which they could object to the public use finding, and that after that period ended, they would lose the right to seek review. Id. at 132. Given the important "role of the judiciary" in enforcing the "constitutional limitation on the sovereign's power to seize private property" by "setting the outer boundaries of public use," id. at 129, given the small burden on the municipality of

[21] The Third Circuit has addressed notice requirements in analogous contexts. See, e.g., Anderson v. White, 888 F.2d 985, 992 (3d Cir. 1989) (child support notices sufficient where they informed recipients that actions were pending, explained that tax refunds could be intercepted, and gave "timely advice that administrative review was available and how to go about getting it."); Finberg v. Sullivan, 634 F.2d 50, 62 (3d Cir. 1980) (notice of garnishment must inform debtor of exemptions for which they might qualify and of procedure for claiming these exemptions).

notifying owners of the deadline, and given landowners' pressing need to know of the deadline, notice of the deadline was constitutionally required, id. at 130, 132.

Mr. Brody did not challenge the timing of the notice. That is, he did not argue that his right to challenge the public use determination should survive until the village notified him that it intended to take his property. Cf. supra Point II.A.2. Instead, he argued for explicit notice of his right to challenge the public use determination at the time it was made. 434 F.3d at 129-30. Nevertheless, the same constitutional principles govern the contents of notice of a municipality's intent to acquire property: it should state clearly that a taking is definitively intended; that the owner has a right to challenge the basis for the taking, including the blight determination; and that this right will expire with a prescribed time.

As the Second Circuit held in Brody, each of these components is constitutionally compelled: it is not enough that an owner knows that the government plans to take his property; he must also know that he has a right to contest the taking and when that right expires. 434 F.3d at 130-32. The trial court thus erred below in holding that the time to sue ran, at the latest, from the date when Appellants should have known of a taking. EA946a (Harrison Eagle, slip op. at 13); AM227a (Amaral, slip op. at 4); DRa45a (DeRose, slip op. at 7).

Because they were not notified that they had a right to challenge the blight designation at that point, and within what timeframe, they cannot be held to have forfeited the challenge.[22]

Such notice would satisfy due process by alerting owners "that the matter is pending" and allowing them to choose "whether to appear or default, acquiesce or contest." Mullane, 339 U.S. at 314; see also Borough of Keyport, 332 N.J. Super. at 221-222 ("[N]otice is not clear unless its meaning can be comprehended without explanation.") (citation omitted). Again, such notice would impose little burden on the municipality. See Hill v. O'Bannon, 554 F. Supp. 190, 196 (E.D. Pa. 1982) ("Sending out an adequate informative notice in the first place would have cost the state little or practically nothing and the benefits of such a notice in providing a meaningful opportunity for a hearing are extremely weighty.").

The LRHL does not demand such notice and the Town of Harrison did not provide it. In fact, the record reveals that Town officials stated that the rights of property owners would not be affected by the redevelopment designation, DRa111a (Tr. 12:4-7), and otherwise discounted its importance, see supra

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[22] Indeed, Mr. DeRose testified that "[b]y the time I realized that my property was subject to condemnation, I first learned that the time to bring an appeal of the designation had long since passed." DRa45a (DeRose, slip op. at 7) (quoting Suppl. Certif. of Anthony DeRose. June 15, 2006, ¶¶ 3-5)

Statement of Facts. Such statements did the exact opposite of providing clear notice: they obscured the gravity of the issues at stake and created the false impression that affected owners did not need to act to protect their property. The Town's actions, as well as the provisions of the LRHL that authorized its conduct, are therefore unconstitutional.

B. THE LAW DIVISION DEPRIVED APPELLANTS OF A FAIR OPPORTUNITY TO BE HEARD BY MISAPPLYING THE "SUBSTANTIAL EVIDENCE" STANDARD IN ITS REVIEW OF APPELLANTS' CHALLENGES TO THE BLIGHT DESIGNATION.

The trial court erred in its review of the municipality's blight designation by interpreting the "substantial evidence" test in a manner that is inconsistent both with the Supreme Court's recent decision in Gallenthin and with the constitutional protection of property rights.

Under current law the test for reviewing a blight designation is whether "substantial evidence" supports the municipality's determination.[23] N.J.S.A. 40A:12A-6(b)(5). This

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[23] This test itself is constitutionally suspect. Courts typically require that constitutional facts affecting individual rights must be proved by "clear and convincing evidence." See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (requiring clear and convincing evidence in establishing actual malice in libel case); Santosky v. Kramer, 455 U.S. 745 (1982) (requiring clear and convincing evidence of neglect to terminate parental rights); E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997) (requiring clear and convincing evidence of probability of re-offense in Megan's Law notification in order to overcome due process and privacy interests of registrant). As the New Jersey Constitution expressly places "acquiring, possessing, and

(Footnote continued . . .)

test requires an objective analysis of the quality and quantity of the proofs presented and is designed to ensure that the municipality's determination is founded on solid, credible, and relevant evidence.

As the New Jersey Supreme Court explained last term in Gallenthin, the State Constitution requires an amply supported finding of blight before the government can deprive an owner of his property for the purpose of giving it to another private owner for redevelopment. 191 N.J. at 344. "At its core, 'blight' includes deterioration or stagnation that has a decadent effect on surrounding property." Id. at 365. The facts showing this level of decay must be evident in the record:

> In general, a municipality must establish a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met. Because a redevelopment designation carries serious implications for property owners, the net opinion of an expert is simply too slender a reed on which to rest that determination.

Id. at 373.

Here, the trial court failed to undertake the thoroughgoing review of the record that Gallenthin requires. Addressing the

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protecting property" among our enumerated "natural and unalienable rights," N.J. Const. art. I, ¶ 1, the clear and convincing evidence standard should apply no less in this case than in other cases where fundamental constitutional rights are threatened. In the eminent domain context, at least three states have imposed this burden on government by statute. See Ariz. Rev. Stat. Ann. § 12-1132 (2007); Colo. Rev. Stat. § 38-1-101(2)(b) (2007); Mich. Comp. Laws § 213.23(4) (2007).

challenges of two of the Appellants to the blight designation,[24] the Law Division concluded that those challenges lacked merit. These holdings were premised on the mistaken view that such designations must survive judicial review so long as "'any state of facts may reasonably be conceived to justify them.'"[25] EA954a (Harrison Eagle, slip op. at 10) (quoting Quick Chek Food Stores v. Township of Springfield, 83 N.J. 438, 447 (1980)); accord AM231a (Amaral, slip op. at 6). Yet, if neither the "bland

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[24] The DeRose opinion does not include an alternative holding on the merits. However, the trial court recited without comment that DeRose challenged the blight designation as "arbitrary, capricious, and unreasonable." DRa48a-49a (DeRose, slip op. at 5-6).

[25] Pre-Gallenthin decisions articulating the standard for judicial review of blight designations may well have contributed to the trial court's confusion. Prior courts have sometimes invoked what on the surface appear to be alternative standards for reviewing blight determinations, including whether the municipality's action was "arbitrary and capricious" or "corrupt, irrational or baseless." See, e.g., Wilson v. City of Long Branch, 27 N.J. 360, 391 (1958) (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"); Lyons v. City of Camden, 48 N.J. 524, 533 (1967) ("Absence of such support [by substantial record evidence] would indicate arbitrary and capricious action."); Concerned Citizens of Princeton, 370 N.J. Super. at 453 ("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.").

The Gallenthin decision helped to dispel such misunderstandings by articulating a clear substantial evidence test, 191 N.J. at 372-73, drawn from the methodology the Court actually employs in reviewing blight designations.

recitation" of the statutory blight criteria nor the "net opinion of an expert" is an adequate basis for a blight designation, Gallenthin, 191 N.J. at 373, then the trial court's search for any conceivable rational basis for the Harrison designation was misplaced. Equally misguided was the trial court's refusal to "second guess any of the [Harrison Redevelopment Agency's] decisions, because there is no evidence that any of those decisions were motivated by bad faith or inappropriately made." EA955a (Harrison Eagle, slip op. at 11). This inquiry, focusing on misconduct by the municipality, sets too low a bar when constitutionally protected property rights are at stake. The trial court was obliged instead to search the record for substantial evidence of "deterioration or stagnation that negatively affects surrounding properties." Gallenthin, 191 N.J. at 363.

While the Gallenthin Court may have articulated most clearly how detailed a review of the record the substantial evidence test entails, in practice the Supreme Court has consistently searched the record for real evidence of blight. In the seminal case of Wilson v. City of Long Branch, 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: in one area, 41 of 71 dwellings were substandard,

27 N.J. at 392; in another, six of ten parcels were in tax delinquency, and the city held foreclosure title to two parcels, id. at 393. The Court found that, all in all, "[t]he blighted territory comprised 74.8% of the net project area of 93.2 acres." Id. A decade later, in Lyons v. City of Camden, the Court affirmed a municipal blight designation that was based on a "skilled and thorough" survey by defendants' experts, including interior and exterior inspections of each building that found most of them substandard. 52 N.J. 89, 95 (1968). Similarly, in Levin v. Township Committee of Bridgewater, the Court reviewed at length the metes, bounds, history, and characteristics of the target area 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." 57 N.J. 506, 537-38 (1971).

This court has followed the Supreme Court's example by carefully reviewing municipal blight determinations. In ERETC, L.L.C. v. City of Perth Amboy, 381 N.J. Super. at 280, for example, this Court rejected a blight determination based on "conclusory" testimony by a planner who admitted that he "did not inspect the interiors of buildings, did not review applications for building permits, did not review occupancy rates or the number of people employed in the area." Conversely, in Hirth v. City of Hoboken, 337 N.J. Super. 149,

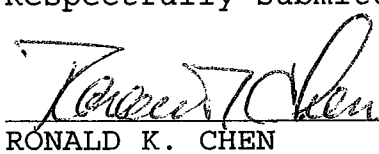
this court affirmed a blight determination based on "detailed block-by-block findings concerning the condition of buildings in the proposed redevelopment area and the nature and level of the economic activity being conducted there." Id. at 163. These inspections revealed that "the area as a whole appears to be suffering from a substantial degree of long-standing vacancy of land, commercial and industrial building abandonment, lack of maintenance and a general sense of stagnancy and under-utilization." Id. at 162. Thus, far from casually affirming blight designations so long as there is no evidence of municipal misconduct, this Court searches the record for substantial evidence to support a blight determination, and affirms only when it finds such evidence.

At a minimum, this Court should instruct the trial court to undertake a careful review of the record on remand and to affirm the blight designation only if the record contains substantial evidence to support it.

CONCLUSION

For all of these reasons, Amicus respectfully requests that this Court reverse the trial court's decisions regarding the time-bar and remand for consideration of Appellants' challenges to the blight designation under the proper standard of review.

Respectfully submitted,



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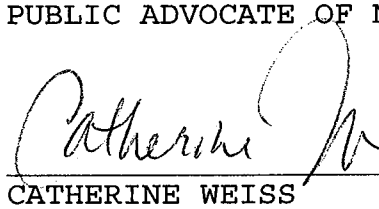

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