IN THE

Superior Court of New Jersey
Appellate Division

No. A-001829-05T2

LBK ASSOCIATES, LLC & ROBERT D. BONANNO,
Plaintiffs-Respondents, and

SAVE OUR HOMES, an unincorporated association,
Intervening Plaintiff-Respondent,

v.

BOROUGH OF LODI, MAYOR AND COUNCIL OF THE BOROUGH OF LODI, BOROUGH OF LODI,
Defendants-Appellants,

AND

COSTA REALTY CO. INC.,
Plaintiff-Respondent,

v.

MAYOR AND COUNCIL OF THE BOROUGH OF LODI, PLANNING BOARD OF THE BOROUGH OF LODI, and BOROUGH OF LODI,
Defendants-Appellants.

ON APPEAL FROM A FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION (SAT BELOW: RICHARD J. DONOHUE, J.S.C.)

BRIEF OF AMICUS CURIAE PUBLIC ADVOCATE OF NEW JERSEY

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INTEREST OF THE 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.S.A. 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.S.A. 52:27EE-57, i.e., an "interest or right arising from the Constitution, decision of court, common law or other law 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, however, 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." Mount Laurel v. Department of Pub. Advocate, 83 N.J. 522, 535-36 (1980).

It is the judgment of the Public Advocate that this case, which involves the taking of the homes and businesses of economically underprivileged citizens through the power of eminent domain for private redevelopment, implicates the "public

interest." See Department of the Pub. Advocate, Reforming the Use of Eminent Domain for Private Redevelopment in New Jersey, available at http://www.state.nj.us/publicadvocate/reports/pdfs/PAReportOnEminentDomainForPrivateRedevelopment.pdf) (hereinafter "Public Advocate's Report").

PRELIMINARY STATEMENT

The power to take private property by eminent domain is undoubtedly one of the most awesome powers entrusted by the people to their government. When this power is invoked, citizens lose their homes and their businesses. They also can lose their place in their community and their sense of comfort, stability, and security.

While the New Jersey and United States Constitutions permit private property to be taken for a public purpose, the exercise of that power must be subject to exacting scrutiny to ensure that the rights of citizens are protected. Because the New Jersey Constitution requires a finding of blight as a precondition to the exercise of eminent domain for redevelopment purposes, judicial scrutiny of takings in New Jersey exceeds that required by the Federal Constitution. A just and transparent process is particularly important in the context of private redevelopment, where the opportunities for misuse, abuse, and injustice are often greatest.

In this matter, the trial court reached the correct ultimate conclusion; Lodi's blight designation must fail. However, the trial court's decision and this appeal present significant legal issues relating to a municipality's use of eminent domain for private redevelopment. The Public Advocate recommends that this Court carefully consider five legal issues in reviewing the trial court's decision: (1) the appropriate standard of review of a municipality's determination declaring an area as "blighted" or in need of redevelopment; (2) the allocation of the burden of proof when such a determination is challenged; (3) the quantity and quality of proof that constitutes "substantial evidence" of blight; (4) the appropriate standard for assessing the relationship between a finding of blight and the size of the redevelopment area; and (5) the heightened scrutiny that must be applied when a municipality's blight designation will eliminate affordable housing.

ARGUMENT

I. NEW JERSEY LAW DEMANDS CLOSE JUDICIAL REVIEW OF THE USE OF EMINENT DOMAIN FOR PRIVATE REDEVELOPMENT.

The Public Advocate submits this amicus brief to set forth what the legal standards are or, in some cases, should be for assessing a municipality's determination that an area is to be condemned for private redevelopment: (1) as a matter of law, the

applicable standard for reviewing a municipality's blight determination is whether substantial evidence supports the municipality's finding that the area is in need of redevelopment; (2) the burden of proof in a challenge to a municipality's determination is currently on the objector to show there was no substantial evidence to support the determination; the burden should be placed on the municipality; (3) to satisfy the substantial evidence test, there must be objective evidence of conditions meeting the statutory criteria and a showing that such conditions are detrimental to the community; and (4) when a blight designation includes non-blighted properties, there must be a predominance of blight throughout the target area, and taking the non-blighted properties must be necessary for redevelopment.

A. The Standard For Reviewing A Municipality's Blight Determination Is Whether It Is Supported By Substantial Evidence.

Under both the Local Redevelopment and Housing Law ("LHRL") and the case law, the test for reviewing a blight determination is whether substantial evidence supports the municipality's determination. N.J.S.A. 40A:12A-6(b)(5) ("The determination, if supported by substantial evidence . . . shall be binding and conclusive . . . ."); Lyons v. City of Camden, 48 N.J. 524, 532-34 (1966) ("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."); Lyons v. City of Camden, 52 N.J. 89, 98 (1968) (affirming blight designation because "substantial evidence supports the municipal determination"); Levin v. Township Comm., 57 N.J. 506, 537 (1971) ("If a reviewing court finds that the determination was grounded on substantial evidence, it must be affirmed."). 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 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." Wilson v. City of Long Branch, 27 N.J. 360, 391 (1958), cert. denied, 358 U.S. 873, 79 S. Ct. 113, 3 L. Ed. 2d 104 (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"); 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."). Similarly, in this case, the Law Division set forth a mixed test for assessing, and ultimately rejecting, Lodi's blight designation: "[T]he standard of review is whether the defendants, reached the decision that there was substantial evidence that the area was in need of redevelopment . . . in an arbitrary and capricious manner." LBK Assocs. v. Borough of Lodi, No. BER-L-768-03 (Law Div. Oct. 6, 2005) (slip op. at 9).

These various statements of the standard may invite confusion. Lodi mistakenly urges this Court, for example, to reverse the Law Division and to uphold its blight designation unless the Court finds that the municipality engaged in "willful and unreasoned action in disregard of the circumstances." Db9. This inquiry, focusing on misconduct by the municipality, sets too low a bar. The Pubic Advocate invites this Court to dispel such misunderstandings by articulating a clear and unitary substantial evidence test, drawn from the methodology the New Jersey courts actually employ in reviewing blight designations.

The State 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 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 . . . ." 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." Ibid.

A decade later, in the Lyons v. City of Camden cases, the Court held that judicial review "is not confined to the record made below," but should include evidence presented to the Law Division. 48 N.J. at 533 (emphasis in original). After a remand for completion of the record, the Court affirmed the municipality's blight designation based on a "skilled and thorough" survey by defendants' experts, including interior and exterior inspections of the buildings that found most of them substandard, followed by a site visit by the trial judge, accompanied by counsel for the parties. 52 N.J. at 95.

Similarly, in Levin v. Township Committee, 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 LHRL 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." 57 N.J. at 537-38.

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. 268, 280 (App. Div. 2005), 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 (App. Div. 2001), 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;[1] see also Forbes v. Board of Trs., 312 N.J. Super. 519, 530 (App. Div. 1998) (affirming blight designation based on "substantial evidence that the Village's central business district as a whole was becoming stagnant, deteriorated, obsolescent, and that its economic vitality was seriously declining"). Thus, far from casually affirming flimsy findings, see Chou v. Rutgers, 283 N.J. Super. 524, 539 (App. Div. 1995), this Court searches the record for substantial evidence to support a blight determination, and affirms only when it finds such evidence.

Other states apply the substantial evidence test to review blight designations in the same manner as New Jersey. Describing the substantial evidence standard, the California Court of Appeal stated:

> Defining substantial evidence, one court has well noted: "[I]f the word 'substantial' means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the

[1] Because the trial court had "erred in considering the merits of plaintiff's challenge to the blight determination without reviewing the full record of proceedings before the Board and City Council," id. at 157, this Court undertook such review itself before reaching its conclusion.

> essentials which the law requires in a particular case."

Friends of Mammoth v. Town of Mammoth Lakes Redev. Agency, 82 Cal. App. 4th 511, 537 (Ct. App. 2000) (quoting Estate of Teed, 112 Cal. App. 2d 638, 644 (Ct. App. 1952)). The court goes on to say that a redevelopment agency's findings are not conclusive and that the court is not a rubber stamp; it must ensure that the factors in the Community Redevelopment Law are taken into account in blight determinations. Friends of Mammoth, 82 Cal. App. 4th at 537 (citing Emmington v. Solano County Redev. Agency, 195 Cal. App. 3d 491, 498 (Ct. App. 1987)).

In Massachusetts, another jurisdiction with extensive relevant case law, the substantial evidence test requires proof that a reasonable mind might accept as adequate to support a conclusion. Boston Edison Co. v. Boston Redev. Auth., 371 N.E.2d 728, 741 (Mass. 1977). The substantial evidence test is consistent with the statutory framework requiring public notice and hearings because it entails a "detailed appraisal of private projects by groups other than the public authorities involved." Id. at 739-40. Substantial evidence review is an objective, searching inquiry by the court, designed to insure that the evidence is credible and relevant.

In contrast to New Jersey, jurisdictions that apply a pure arbitrary and capricious test often require a showing of willful

misconduct such as fraud, bad faith, or conflict of interest to overturn a blight determination. The underlying theory is that blight determinations are legislative or quasi-legislative findings that deserve broad deference in the absence of wrongdoing. See, e.g., Housing and Redev. Auth. v. Minneapolis Metro. Co., 104 N.W.2d 864, 874 (Minn. 1960) ("In determining whether a particular area may be legally selected for redevelopment, either under the terms of the statute, or in terms of the requirement that the particular project serve a 'public use,' the role of judicial review is severely limited by the rule that the finding of the redevelopment authority . . . is not generally reviewable, unless fraudulent or capricious, or in some instances, unless the evidence against the finding is overwhelming."); Phoenix v. Superior Court, 671 P.2d 387,394 (Ariz. 1983) ("We hold further that the standard of review is limited to questions of fraud, collusion, bad faith or arbitrary and capricious conduct by the governing body."). These cases employ a standard more deferential than New Jersey's substantial evidence test.

The functional differences between the two tests are important. An "arbitrary and capricious" determination is a random one with no basis, a whim. In jurisdictions that apply a pure arbitrary and capricious test, courts ask whether there was any basis at all for the determination or whether municipal

misconduct might call the designation into question. In contrast, jurisdictions, such as New Jersey, that apply substantial evidence review (regardless of what they may call the test) do not limit themselves to these questions. A determination based on insignificant or irrelevant evidence, while not whimsical, is nevertheless invalid for lack of substantial evidence. A substantial evidence inquiry must take into account the amount and the quality of the evidence presented. The maxim that courts should not second-guess a determination that is debatable does not lessen the necessity of substantial evidence. See Lyons, 52 N.J. at 98. A fairly debatable finding is one that is supported by substantial evidence on the side of the municipality, even if also on the opposing side, and is therefore sustainable.[2]

In this case, the Law Division recited the standard of review in a variety of ways. Compare LBK Assocs., slip op. at 9 ("[P]laintiff must demonstrate that the Municipal Planning Board

[2] This explains the "presumption of validity" the Supreme Court ascribes to blight designations. See, e.g., Levin, 57 N.J. at 537. This presumption, like any presumption, is defined by the evidence required to overcome it. The evidence required is, in turn, determined by the standard of review, in this case, substantial evidence. A presumption of validity exists insofar as there is substantial evidence of blight, even if there is equally compelling evidence to the contrary. In such cases, the presumption permits the municipal designation to prevail over an objection.

reached its decision in an arbitrary, capricious manner or in a manner other th[a]n as prescribed by the law.") with id. at 14 ("The standard of judicial review of a blight determination is limited to whether the governing body's declaration is supported by substantial evidence."). In practice, however, the trial court correctly applied the substantial evidence standard by carefully examining the quality and quantity of the proofs on the record, as discussed further below. This case provides this Court an opportunity to make clear that the substantial evidence test requires just the sort of searching review of the record that the trial court undertook.

B. The Burden Of Proving Blight By Substantial Evidence Should Be Reallocated From The Objectors To The Municipality.

As the law now stands the burden is on an objector to show that there is not substantial evidence to support a determination of blight. See, e.g., Levin, supra, 57 N.J. at 537. This allocation, however, does not best serve the citizens of New Jersey. Placing the burden on the objector can, as a practical matter, deprive a property owner of meaningful third-party review due to limited resources. Furthermore, 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 the negative is a difficult and amorphous task, even in a good case.

Moreover, the current allocation of the burden is inefficient. While the town is required by statute to research and record all the evidence it uses to substantiate its findings of blight, N.J.S.A. 40A:12A-6, the property owners are the ones who must carry the burden of proof when that finding is challenged. 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, the New Jersey Supreme 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). In shareholder suits against corporations, the courts have 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

Chemical 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).

These cases demonstrate that allocation of the burden of proof is not fixed; courts may shift it as efficiency and fairness require. Here, where the town has already assembled the evidence, it would be sensible for it to carry the burden on a challenge to its blight determination. See City of Jacksonville v. Moman, 290 So.2d 105, 107 (Fla. Dist. Ct. App.) (affirming trial court's finding that "city failed to carry its burden of proving by competent and substantial evidence that the property described is needed for the redevelopment of a slum area"), cert. denied, 297 So.2d 570 (Fla. 1974).

Generally, the state carries the burden of proof in situations involving constitutional deprivations. In a criminal prosecution, for example, "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, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) (quoting In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Also in the criminal context, when the prosecution seeks to introduce 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). Likewise in free speech cases, once the plaintiff establishes a burden on the right, the state must prove that its regulation is narrowly tailored to further a compelling government interest. R.M. v. Supreme Court of N.J., 185 N.J. 208, 217 (2005). Similarly, equal protection violations under the New Jersey Constitution demand that the state justify the offending classifications. See, e.g., Planned Parenthood v. Farmer, 165 N.J. 609, 642 (2000) (classifications burdening reproductive choice); Lewis v. Harris, ___ N.J. ___ (2006) (slip op. at 48-49) (classifications burdening marriage).

The New Jersey Constitution guarantees that private property will not be taken, save for a public purpose. N.J. Const. art. I, ¶ 20. When that purpose is private redevelopment, only blighted property may be taken. N.J. Const. art. VIII, § 3, ¶ 1. Given the undisputed deprivation of a constitutionally protected property interest when the government

condemns homes and businesses, the municipality should bear the burden of justifying a taking by proving that substantial evidence supports the blight designation. Such a reallocation of the burden would put redevelopment cases in line, not only with cases affecting other constitutional rights, but also with civil litigation generally. Normally, the plaintiff has the burden of proof, whereas here, it is the owners, defending their property, who must carry the burden.

When a town seeks to take the homes of its lower-income residents, the inequities are even more pronounced. The municipality is pitted against politically weak constituents who often lack the resources to fund drawn-out litigation. See Kelo v. New London, 545 U.S. 469, 125 S. Ct. 2655, 2686-87, 162 L. Ed. 2d 439 (2005) (Thomas, J., dissenting) (noting that renewal programs historically have displaced a disproportionate number of poor and minority citizens). See also Amicus Br. of Northeast New Jersey Legal Services at 1-5 and cases cited therein (describing shortage of low- and moderate-income housing in New Jersey and the precarious financial circumstances of many low- and moderate-income renters).

In reaction to Kelo v. New London, some states are considering or have passed legislation requiring the municipality to prove by clear and convincing evidence the need for redevelopment. See, e.g., S.J. Res. E, 93d Leg., Reg. Sess.

(MI 2005) (awaiting vote by Michigan citizens in 2006), available at www.legislature.mi.gov/documents/2005-2006/jointresolutionenrolled/Senate/pdf/200S-SNJR-E.pdf. 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). In addition, the often cited hornbook, Nichols on Eminent Domain, identifies several states, including New Jersey, that are moving towards stronger oversight of eminent domain. 2A-7 Nichols on Eminent Domain § 7.08 (Lexis 2006). Because of the inequities involved, the inefficiency, and the general evolution of the law, New Jersey should reallocate the burden of proof to the municipality to demonstrate that there is substantial evidence of blight on the record.

C. Substantial Evidence Supporting A Blight Determination Must Include Both Evidence That The Statutory Criteria Are Satisfied And A Demonstration That The Area Is Detrimental To The Community.

The trial court here correctly determined that there was insufficient evidence to support a finding that the subject property was in need of redevelopment. The record is devoid of detailed, specific proofs that the statutory criteria had been met or that the alleged blight was detrimental to the health, safety, and welfare of the community. As the trial court

correctly held, a blight determination may be sustained only upon proof both that the property exhibits conditions meeting the statutory criteria and that those conditions are detrimental to the community. LBK Assocs., slip op. at 16-17, 19-20.

As the California Supreme Court observed in applying its redevelopment statute, "A finding of blight requires (1) that the area suffer 'either social or economic liabilities, or both, requiring redevelopment in the interest of the health, safety, and general welfare' and (2) the existence of one of the characteristics of blight." Sweetwater Valley Civic Ass'n v. City of National City, 18 Cal.3d 270, 277 (1976)(quoting California's Community Redevelopment Law, § 33030 (fn. 3)); see also Regus v. City of Baldwin Park, 70 Cal. App. 3d 968, 980 (Ct. App. 1977) (holding that despite evidence of irregular parcelization of land, a statutory characteristic of blight, property could not be taken because there was no evidence of social or economic liability).

Similarly, subsection (d) of New Jersey's redevelopment statute provides that an area may be determined to be in need of redevelopment if certain specified conditions exist and those conditions are detrimental to the community:

> Areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage,

> deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.

N.J.S.A. 40A:12A-5(d)(emphasis added). Lodi argues there was substantial evidence of obsolescence and that the redevelopment study contains specific, detailed findings supporting the determination for some of the parcels under subsection (d). Db14. Lodi, however, did not provide substantial evidence that this alleged obsolescence was detrimental to the community.

The definition of obsolescence is "the process or state of falling into disuse or becoming obsolete." Black's Law Dictionary 1107 (8th ed. 2004). All properties are constantly becoming obsolescent as buildings grow older, more outdated, less valuable, and less productive. Yet not all properties with older structures are blighted. 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. County of Riverside v. City of Murrieta, 65 Cal. App. 4th 616, 627 (Ct. App. 1998). Because such evidence applies with equal force to all or substantially all property, it does nothing to explain why any particular parcel should be condemned. Nonetheless, subsection (d) provides a limiting principle: Obsolescence falls to the level of blight when it is

detrimental to the community's health, safety, morals, or welfare. N.J.S.A. 40A:12A-5(d).

New Jersey courts, as well as courts in other jurisdictions interpreting similar provisions, have found ways to harmonize the statutory indicia of blight and the harm sections of the law. In the context of an apartment building, a showing of obsolescence requires "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," and not merely that the complex does not conform to construction codes for new buildings. Spruce Manor Enters. v. Borough of Bellmawr, 315 N.J. Super. 286, 297 (Law Div. 1998); see also, e.g., Wilson, 27 N.J. at 392 (substandard dwellings "did not come up to standards for legal permanent construction"); Lyons, 52 N.J. at 92 ("Fourteen of the residential structures are unoccupied and in such state of disrepair as to be untenantable. Twenty-three residential structures are not connected to the City sanitation system. . . . The entire area was said to be subject to fires, 255 fire calls having been made from 1961 through 1965."). Similarly, California requires a showing that a building is unsafe for human occupancy or that physical characteristics prevent it from being economically viable. Graber v. City of Upland, 99 Cal. App. 4th 424, 428 (Ct. App. 2002); Friends of Mammoth, 82 Cal. App. 4th at 551, 554-56.

These cases focus on the appropriate inquiry: whether the record contains objective evidence that a residential area degrades or harms its inhabitants or neighbors, or that a commercial property contributes to economic stagnation or decline.[3]

Well established, objective codes should inform blight determinations. Municipalities have broad powers to identify, and then demolish or repair, any building that has "come into a state of disrepair through neglect, lack of maintenance or use, fire, accident or other calamities, or through any other act rendering the building or buildings, or parts thereof, in a state of disrepair, to the extent that the building is unfit for human habitation or occupancy or use." N.J.S.A. 40:48-2.5a; see also N.J.S.A. 40:48-1, 40:48-1.1, 40:48-2.3 to 40:48-2.6. Regulations issued under the State Uniform Construction Code Act include specific standards to determine when a structure is "unsafe, or unsanitary . . . or . . . constitute[s] a fire hazard or [is] otherwise dangerous to human life or the public welfare." N.J.A.C. 5:23-2.32(a); see generally N.J.S.A. 52:27D-

[3] This Court's approach in Concerned Citizens of Princeton is out of step with this standard. Concerned Citizens held that a viable surface parking lot in downtown Princeton could be taken because a larger parking deck would benefit the town's vitality. 370 N.J. Super. at 459-60. But any such upgrade may affect a town's vitality. This inquiry therefore does little, if anything, to limit the statute's otherwise endless and unconstitutional reach.

123(a); N.J.A.C. 5:23-1.1 et seq. These regulations contain subcodes that detail substantive standards to determine whether a structure presents a hazard. See, e.g., N.J.A.C. 5:23-3.14 (building subcode); N.J.A.C. 5:23-3.15 (plumbing subcode); N.J.A.C. 5:23-3.16 (electrical subcode); N.J.A.C. 5:23-3.17 (fire protection subcode).

Here, the trial court noted that "the municipal planner failed to address the important criteria, i.e., interior inspection of trailers, lack of specific references to safety violations and failure to identify any type of health hazards." LBK Assocs., slip op. at 16. The court dismissed the planner's findings as "vague criticism . . . upon superficial observations," and contrasted the record before it with the facts of cases in which blight determinations were upheld. Id. at 15-17 (citing Lyons, 52 N.J. at 92; Kimberline v. Planning Bd., 73 N.J. Super. 80, 84-86 (Law Div. 1962) (enumerating as among the factors supporting blight determination, "[t]he deterioration and obsolescence of the buildings, the use of those properties which were once single residences for housing many families . . . the hazardous and inadequate streets . . . the almost total deterioration of the sidewalks")). The trial court correctly found that Lodi had failed to provide evidence of even a single code violation. In the absence of any showing that Respondents' properties cause serious detriment to the

community, the trial court correctly concluded that there is insufficient evidence of blight under subsection (d).

Furthermore, Lodi's survey does not constitute substantial evidence because it relies extensively on conclusory statements, which New Jersey courts and other courts have rejected as insufficient. See ERETC, 381 N.J. Super. at 278-81 (holding that city's decision was not supported by substantial evidence because witness' statements and testimony were conclusory); see also Barbara Beach-Courchesne v. City of Diamond Bar, 80 Cal. App. 4th 388, 401 (Ct. App. 2000) (citing Gonzalez v. City of Santa Ana, 12 Cal. App. 4th 1335, 1346 (Ct. App. 1993)); Johnson v. Redevelopment Agency, 913 P.2d 723, 729 (Utah 1995). The Diamond Bar court held that a field survey containing only the surveyor's ultimate conclusions did not amount to tangible proof subject to meaningful scrutiny and thus was not substantial evidence. Diamond Bar, 80 Cal. App. 4th at 402 (citing County of Riverside, 65 Cal. App. 4th at 627).

Lodi's report contains many statements that cannot be scrutinized in a meaningful way and are thus impermissible conclusory evidence. For example, one section alleges that there are multiple, allegedly incompatible uses, without referring to what makes the various uses incompatible. Db15. The report merely states as a conclusion that a trailer park, transmission service area, and a billboard are "incompatible."

Id. In a state where mixed residential-commercial zoning is commonplace, such evidence is not only conclusory, but also counter-intuitive. In another section, the report reads:

> The faulty arrangement and design of the two structures and storage areas located within this area lead to buildings crossing lot lines. Furthermore the faulty arrangement and obsolete layout caused by the nature of ownership is evident when considering the ad hoc character of development of the uses contained on these parcels and the lack of direct accessibility to particular lots.

Db15. Here again, the report fails to state with any specificity what makes that arrangement or design faulty, what the nature of ownership is exactly, or what it means by "ad hoc development of the uses." Id. Such conclusory statements cannot justify uprooting a community.

Hypothetical hazards are also insufficient. Lodi alleges that because some trailers are too close to the highway, there is a danger. Db15. It alleges further that dead end streets might make it more difficult for emergency vehicles to maneuver. Id. Yet Lodi offers no evidentiary support for these speculations. If the mere possibility of danger, nowhere reflected in any code citations, were enough to establish blight, property owners would never have notice of problems serious enough to justify condemnation or a realistic opportunity to alleviate them on their own.

Other evidence that Lodi cites simply cannot be said to be a cognizable detriment supporting a blight determination. In one place, the report suggests, without explanation, that buildings crossing lot lines or a lack of direct access to some lots is somehow detrimental to the community under N.J.S.A. 40A:12A-5(d). Db15. Again, Lodi failed to cite any regulation that the structures violate.

In addition, Lodi argues that many parcels are blighted within the meaning of criterion (e), which reads:

> A growing or total lack of proper utilization of the 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.

N.J.S.A. 40A:12A-5(e).

Underutilization is an economic concept that refers to a use that is less than optimally efficient at the moment of determination. By definition, all capital improvements depreciate, and even new improvements will underutilize the land they occupy at some later date. While there is no express requirement of a showing of detriment to the community under subsection (e), the statute must be applied in a manner consistent with the general limiting principle of a demonstrable detriment to the community. Like the term “obsolescence” in

subsection (d), the term "underutilization" in subsection (e) must be read narrowly in order to effect the statutory purpose and comply with the blight requirement of the New Jersey Constitution.

The New Jersey Supreme Court has summarized the constitutional avoidance doctrine this way:

> 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 (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, 115 S. Ct. 440, 130 L. Ed. 2d 351 (1994) (strengthening

mens rea element of hate crimes statute to avoid unconstitutional vagueness).

Here, a literal reading of subsection (e) would render it facially unconstitutional because its breadth would allow for takings of non-blighted property, and unconstitutional as applied because there is no showing of blight in this case. See Forbes, 312 N.J. Super. at 528 (holding that the finding of blight is a constitutionally mandated precondition to redevelopment); see also Public Advocate's Report, Appendix at ii-viii and authorities cited therein (arguing that historical materials from 1947 New Jersey Constitutional Convention indicate that finding of blight was intended to be a substantive limitation on the use of eminent domain).

In addition to reading statutes to avoid constitutional doubt, courts also read them to avoid irrational outcomes: "[W]here a literal interpretation would create a manifestly absurd result, contrary to public policy, the spirit of the law should control." Turner v. First Union Nat'l Bank, 162 N.J. 75, 84 (1999); Carpenter Tech. Corp. v. Admiral Ins. Co., 172 N.J. 504, 521 (2000); see generally 73 Am. Jur. 2d Statutes § 172 (2006) ("A court must construe statutes to avoid unreasonable or absurd results; or, as sometimes, stated, a court should not adopt an interpretation which produces absurd or unreasonable results, if such interpretation can be avoided. . . .

Furthermore, general terms in a statute should be so limited in their application as not to lead to absurd consequences.") (footnotes omitted).

The LHRL was enacted to alleviate blight, as the New Jersey Constitution mandates, and the various criteria for blight are limitations on the use of eminent domain. See N.J. Const. art. VII, § 1, ¶ 3; see also Public Advocate's Report, appendix at ii-viii. The limiting principle of the LHRL is clear from the legislative findings which read, in part:

> There exist, have existed and persist in various communities of this State conditions of deterioration in housing, commercial and industrial installations, public services and facilities and other physical components and supports of community life, and improper, or lack of proper, development which result from forces which are amenable to correction and amelioration by concerted effort of responsible public bodies, and without this public effort are not likely to be corrected or ameliorated by private effort.

N.J.S.A. 40A:12A-2.

The findings indicate that, in enacting the LHRL, the Legislature was concerned not with economic growth generally, but with a small set of areas with serious and persistent problems unlikely to be corrected by private efforts, the usual source of growth and maintenance. Id. Remedying those problems, and only those problems, is the goal of the statute and marks the outer bounds of the permissible use of eminent

domain for private redevelopment. An interpretation that substantially exceeds this limiting principle is against the spirit of the law.

An "underutilization" criterion, if applied literally, would make any and all property within New Jersey a potential target for redevelopment for the simple reason that any property could hypothetically be put to more productive use. In addition, the breadth of property covered under this construction would render the other criteria nullities. Therefore, if another construction is reasonable, that construction must be applied. Requiring a showing of harm to the community would avoid constitutional problems and effectuate the statute's limited purpose. As reviewed above with regard to the obsolescence criterion, that showing is missing from the record.

D. Predomination Of Blighted Properties, And The Need To Include Non-Blighted Ones, Should Be The Standards For Determining The Scope Of An Area Declared To Be In Need Of Redevelopment.

Lodi argues that even if some of the individual parcels in the subject area do not qualify as blighted, the area as a whole does. Db17. It relies on the well accepted principle that non-blighted properties may be taken if they are part of a larger blighted area. Ibid. (citing Forbes, 312 N.J. Super. at 531).

The property owners argue that there is not substantial evidence that any of the parcels is blighted. Costa Pb47. They argue further that the trial court correctly understood that non-blighted property sometimes could be taken, but only when such a taking was necessary to redevelopment, which is not the case here. Ibid. Lastly, they argue that the area concept only justifies taking non-blighted areas when the vast majority of a unitary area is blighted, which is not the case here. Ibid.

Courts are generally reluctant to question the boundaries of a redevelopment area, and the statute specifically contemplates that non-blighted property may be taken in certain circumstances. Courts, however, must employ some standard for assessing the relationship between the finding of blight and the scope of the condemned area if the statute is to be fairly applied. The concepts of predomination and need, used by courts in other states, assure that the limited, remedial purpose of the statute controls the actual use of eminent domain.

In Berman v. Parker, the United States Supreme Court held that the taking of two non-blighted properties within a larger blighted area in Washington D.C. was not prohibited in a redevelopment scheme because the taking was necessary for effective redevelopment. 348 U.S. 26, 36, 75 S. Ct. 98, 99 L. Ed. 27 (1954) ("If the Agency considers it necessary in carrying out the redevelopment project to take full title to the real

property involved, it may do so. It is not for the courts to determine whether it is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation.")

Since the ruling in Berman, courts, including New Jersey courts, have been reluctant to do a searching review of the boundaries of redevelopment areas. See, e.g., Lyons, 52 N.J. at 98. Courts also recognize, however, that there must be some proportionality between the evidence of blight and the area targeted for redevelopment. For instance, a town could not redevelop an entire neighborhood because a single parcel was blighted. It would be a grossly disproportionate response to the harm the statute seeks to alleviate.

In Regus v. Baldwin Park, the Court of Appeal in California addressed the question whether substantial evidence supported the validity of Baldwin Park's Redevelopment Plan. Supra, 70 Cal. App. 3d at 973. The area designated for redevelopment contained two separate, noncontiguous sites: the Puente-Merced site and the South Baldwin Park site. Ibid. With regard to the inclusion of the Baldwin Park site, the court stated that, while a target area was not required to be blighted in all its portions, "it was required to be blighted when considered as a

whole," meaning "conditions of blight must *'predominate'* and must *injuriously affect the entire area*." Id. at 981 (citing Health and Saf. Code § 33321) (italics in original). Applying this standard, the court noted that, even if Puente-Merced was blighted, nothing in the evidence suggested that "the conditions [there] have any effect on South Baldwin Park." Id.

New Jersey courts upholding blight designations have repeatedly cited the extent of the deterioration. See, e.g., Lyons, 52 N.J. at 95 ("There are 164 dwellings in the smaller area. Defendants' experts found 85 of them to be substandard"); Wilson, 27 N.J. at 393 ("The blighted territory comprised 74.8% of the net project area of 93.2 acres."); Kimberline, 73 N.J. Super. at 84 ("94 structures, or 64% of the total, have been classified as containing building deficiencies, and . . . the area contained a total of 194 dwelling units, of which 154, or 79%, are deficient."). The courts have held further that any non-blighted area marked for condemnation must be "an integral part and necessary to the accomplishment of the redevelopment plan." Wilson, 27 N.J. at 379; see also Lyons, 48 N.J. at 536 (same); Helena v. De Wolf, 508 P.2d 122, 127-28 (Mont. 1973) (holding "where it is shown. . . . that the property is not reasonably necessary to the clearance of the blighted area and prevention of its recurrence, the 'area concept' does not prevail").

Applying a predomination standard to the property here, even if, *arguendo*, there are scattered indicia of blight, those conditions plainly do not predominate in the redevelopment area. There are numerous viable, ongoing businesses with only a single vacant restaurant and no evidence of how long the restaurant has been vacant. Since the report over-stated the number of blighted homes by including homes with only superficial problems like peeling paint, its value as evidence, if any, is significantly discounted. See Friends of Mammoth, 82 Cal. App. 4th at 552 (holding because definition of dilapidation used in survey included buildings that were not unsafe, survey was overbroad, and the town could not determine with reasonable certainty the extent of truly blighted buildings). Even taking the Lodi report as true, it does not suggest that all or even most of the homes are not maintained; it only vaguely states that 'numerous' homes are not well-maintained. The evidence thus does not support a finding that the proposed redevelopment area is predominantly blighted, which is the appropriate standard for reviewing its scope.

II. A MUNICIPALITY THAT DOES NOT PROVIDE ITS FAIR SHARE OF AFFORDABLE HOUSING VIOLATES ITS CONSTITUTIONAL OBLIGATION UNDER SOUTH BURLINGTON COUNTY NAACP V. TOWNSHIP OF MOUNT LAUREL WHEN ITS USE OF EMINENT DOMAIN RESULTS IN A NET LOSS OF SUCH HOUSING.

"There is not the slightest doubt that New Jersey has been, and continues to be, faced with a desperate need for housing, especially of decent living accommodations economically suitable for low and moderate income families." Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 158 (1975), cert. denied, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975) ("Mount Laurel I"). More than thirty years ago, the situation was described as a "crisis" and fully explored and documented by Governor Cahill in two special messages to the Legislature. Id. (citing A Blueprint for Housing in New Jersey (1970) and New Horizons in Housing (1970)). When a municipality's exercise of eminent domain may deepen this crisis, courts must scrutinize the proposed redevelopment plan with extra care to protect the constitutional rights of low- and middle-income residents to remain in the town where they have lived.

As set forth in the amicus brief of Northeast New Jersey Legal Services, the "affordable housing crisis permeates each facet of New Jersey life." Amicus Br. of Northeast New Jersey Legal Services at 2. The municipality of Lodi has not been

immune to the crisis. Lodi has only 222 affordable housing units contained in five developments. COAH Guide To Affordable Housing, Development by County (2004), available at http://www.state.nj.us/dca/codes/affdhsgguide/pdf/bergen.pdf. Of those units, 120 are designated specifically for, and limited to, seniors and people with disabilities. Ibid. All of the remaining units are occupied, and the waiting lists are closed. Amicus Br. of Northeast New Jersey Legal Services at 5. There will therefore be no affordable housing opportunities in Lodi for any tenant displaced from the trailer parks targeted here. Ibid.

In Mount Laurel I, the Supreme Court held that a municipality could not use exclusionary zoning to preclude the construction of housing affordable to low- and moderate-income families. The Court established a fundamental principle under the New Jersey Constitution: "[Z]oning regulation, like any police power enactment, must promote public health, safety, morals or the general welfare," and a zoning ordinance "which is contrary to the general welfare is invalid." 67 N.J. at 175. The Court premised this conclusion on the "elementary theory that all police power enactments, no matter at what level of government, must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws." Id. at 174. The Court recognized that these

requirements are inherent in Article I, ¶ 1, of the New Jersey Constitution and may be more demanding than those of the federal constitution. Id. at 175.

The Court further explained the relationship of the "general welfare" to the need for affordable low- and moderate-income housing: "It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation." Id. at 179. Hence, the State Constitution imposes an obligation on each municipality to provide a reasonable opportunity for an appropriate variety and choice of housing, including low- and moderate-cost housing. Id. at 179. Municipalities may not adopt regulations or policies that flout this obligation. Ibid.

In Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158 (1980) ("Mount Laurel II"), the Court reaffirmed the core constitutional principles underlying Mount Laurel I.

> It would be useful to remind ourselves that the doctrine does not arise from some theoretical analysis of our Constitution, but rather from underlying concepts of fundamental fairness in the exercise of governmental power. The basis for the constitutional obligation is simple: the State controls the use of land, all of the land. In exercising that control it cannot favor rich over poor. . . . The government that controls this land represents everyone.

92 N.J. at 209.

A municipality may not, therefore, regulate land use in a manner that excludes or limits residency on the basis of race, ethnicity or national origin, economic status, or family size and composition. Oakwood at Madison, Inc. v. Madison Twp., 72 N.J. 481, 548 (1977) (constitutional prohibition on exclusionary zoning applies to race as well as economic circumstances); Mount Laurel I, 67 N.J. at 183-186; Borough of Glassboro v. Vallorosi, 117 N.J. 421 (1990) (municipalities may not adopt zoning regulations that unreasonably limit shared residential occupancy by unrelated persons in comparison with individuals related by blood, marriage, or adoption).

The last reported decision rendered by the New Jersey Supreme Court involving the condemnation of residences under the LRHL was its 1971 decision in Levin v. Township Comm., 57 N.J. 506 (1971), four years prior to its landmark opinion in Mount Laurel I. Thus, the Supreme Court has never considered whether the State Constitution's prohibition on the use of exclusionary zoning to prevent the construction of affordable housing applies equally to the use of eminent domain to condemn low-income housing.

In both contexts, however, the same underlying constitutional imperative controls. Municipalities must use their police powers to promote the general welfare, both when

they enact zoning regulations and when they exercise their redevelopment powers.[4] If this principle prohibits municipalities from using zoning to prevent low- and moderate-income families from locating in their communities, a fortiori it forbids the use of eminent domain to expel low- and moderate-income families already living within their communities. Redevelopment plans that otherwise meet the statutory criteria under the LRHL must therefore also conform to this constitutional mandate or be declared invalid.

Under the Mount Laurel cases, a plaintiff makes a prima facie case

> when it is shown that a developing municipality in its land use regulations has not made realistically possible a variety and choice of housing, including adequate provision to afford the opportunity for low and moderate income housing or has expressly prescribed requirements or restrictions which preclude or substantially hinder it ....

Mount Laurel I, 67 N.J. at 180-81. Redevelopment threatens the adequate provision of affordable housing when scarce units are

[4] Like zoning and other land use laws, redevelopment powers are encompassed within the state's police powers. N.J. Const., art. VIII, § 3, ¶ 1 ("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."). The Legislature adopted the LHRL, N.J.S.A. 40A:12A-1 to -73, pursuant to this constitutional provision.

destroyed and not replaced, so that the total stock falls below the constitutional threshold. Thus, in the redevelopment context, a prima facie case should depend on a showing both that the plan will result in a net loss of affordable housing and that the municipality does not "bear its fair share of the regional burden."[5] Id. at 189.

As in the exclusionary zoning context, once a prima facie case is made, the municipality must carry the burden of proof, "and it is a heavy one," to establish the validity of the blight designation. See id. at 181. Fiscal justifications are insufficient to this task:

> [C]onsidering the basic importance of the opportunity for appropriate housing for all classes of our citizenry, no municipality may exclude or limit categories of housing for [a fiscal] reason or purpose. While we fully recognize the increasingly heavy burden of local taxes for municipal governmental and school costs on homeowners, relief from the consequences of this tax system will have to be furnished by other branches of government. It cannot legitimately be accomplished by restricting types of housing through the zoning process in developing municipalities.

[5] A municipality's compliance with its COAH obligations would ordinarily constitute persuasive evidence that it bears its fair share of the regional burden. As Lodi does not participate in COAH, however, it cannot rely on such evidence. See Email from Kate Butler, Principal Planner, Council on Affordable Housing, to Evangeline Gomez, Northeast New Jersey Legal Services (April 26, 2006) (Northeast New Jersey Legal Services App. 59a).

Id. at 186. Similarly, the municipal coffers may not be filled through the condemnation of low-income housing, without provision for replacement housing, in a community that does not provide its fair share of such housing.[6]

Throughout the nation and over time, the use of eminent domain for economic revitalization has disproportionately targeted low-income and minority communities.[7] When an area is taken for "economic development," those who cannot afford to live in the "revitalized" community may be driven from their own neighborhoods. See generally Wendell E. Pritchett, The "Public Menace" of Blight, 21 Yale L. & Pol'y Rev. 1 (2003); John A. Powell & Marguerite L. Spencer, Giving Them the Old "One-Two:" Gentrification and The K.O. of Impoverished Urban Dwellers of Color, 46 How. L.J. 433 (2003). Displaced individuals typically have a difficult time finding adequate replacement housing in

[6] But see Ana M. Alaya, Some Call It Blight, They Call It Home, The Star-Ledger, June 23, 2005, (quoting Lodi's mayor explaining the redevelopment project this way: "[W]e're doing it for better appearance, to fix zoning problems and for ratables.").

[7] Even Justice Thomas, often reluctant to invoke heightened judicial review, noted that "[i]f ever there were justification for intrusive judicial review of constitutional provisions that protect 'discrete and insular minorities,' surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects." Kelo v. New London, 545 U.S. 469, 125 S. Ct. 2655, 2687, 162 L. Ed. 2d 439 (2005) (Thomas, J. dissenting) (citation omitted).

the area. Id. Indeed, the statistics provided by amicus Northeast Jersey Legal Services show that the displaced tenants in this case will have no realistic ability to find alternative affordable housing in Lodi.

The very facts that put low-income families at increased risk of displacement by eminent domain also leave them less able to deal with the consequences. The remaining "affordable" housing in the area is almost certain to become more expensive. When lower cost housing is replaced with either businesses or higher cost housing, the supply of affordable housing in the area is reduced. Unless there are adequate alternative low- and moderate-income options in the region, housing prices will climb. One study indicates that 86% of those relocated by eminent domain paid more for rent in their new residences, with the median rent almost doubling. Herbert J. Gans, The Urban Villagers: Group and Class in the Life of Italian-Americans 380 (2d ed. 1982); see also Scott A. Greer, Urban Renewal and American Cities: The Dilemma of Democratic Intervention 3 (1965) (citing multiple studies and concluding that "[a]ll ten . . . indicate substantial increases in housing costs").

Accordingly, the constitutional mandates announced in the Mount Laurel cases require exacting judicial scrutiny of any redevelopment plan that will result in the net loss of affordable housing and in the shirking of the municipality's

obligation to create and maintain its fair share of housing options for low- and moderate-income residents. Unless the municipality makes an exceedingly persuasive, nonfiscal case for going forward, such a plan is invalid as a violation of our Constitution and a threat to the general welfare.

CONCLUSION

Amicus Public Advocate respectfully urges this Court to affirm the judgment of the trial court, and at the same time to set forth clear and consistent standards for reviewing a municipality's redevelopment determination.

A court should affirm a municipality's determination that an area is in need of redevelopment only when thorough review of a complete record reveals substantial, credible, and relevant evidence to support the condemnation. The burden of proof should rest with the municipality when the determination is challenged. To satisfy the burden, a municipality must show objective evidence of conditions meeting the statutory criteria and of the resulting detriment to the community. A municipality must also demonstrate a predominance of blighted areas and the necessity of taking non-blighted properties for the successful redevelopment of the entire designated area.

Finally, blight designations targeting affordable housing must be closely scrutinized. A redevelopment plan is constitutionally invalid under the Mount Laurel doctrine when it

will result in an overall loss of affordable housing in a municipality that is not providing its fair share of housing accessible to low- and moderate-income residents.

Respectfully submitted,
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