DEPARTMENT OF THE PUBLIC ADVOCATE

Reforming the Use of Eminent Domain for Private Redevelopment in New Jersey

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

Eminent domain is one of the most awesome powers that Americans have entrusted to their government. When this power is invoked, citizens lose their homes and businesses. More importantly, they can also lose their place in their community, and their sense of comfort, stability and security.

It is therefore crucial that the laws governing the use of eminent domain ensure a just and transparent process in which the rights of tenants and property owners are fully protected and eminent domain is used rarely and only in very specific circumstances. This is particularly important in situations where eminent domain is used for private redevelopment because, in these cases, the opportunities for misuse, abuse and injustice are often even greater.

Unfortunately, in New Jersey the current laws governing the use of eminent domain for private redevelopment do not adequately protect the rights of tenants and property owners. These current laws:

- allow for the use of eminent domain in areas that do not meet the constitutional requirement of a 'blighted area';
- require little meaningful notice to affected tenants and property owners;
- offer few opportunities for real public participation;
- provide little meaningful opportunity to appeal the designation of blight to an impartial third party;
- allow for vague redevelopment plans that are not developed in conjunction with the community and can be unlimited in their duration;
- permit compensation for taken property that is so low that it does not allow a homeowner to ever own a home in their town again;
- do not require sufficient relocation planning, and
- are governed by ethics rules not strong enough to engender confidence in the redevelopment process.

The system for using eminent domain for private redevelopment in New Jersey needs to be reformed.

After conducting extensive research and fact finding, the Department of the Public Advocate has arrived at a set of clear principles that we believe must guide such reforms. Each of these principles is supported by a series of policy recommendations that the Public Advocate believes are necessary to uphold those principles. Key reform recommendations contained in this report include the following:

- **Revise the statutory criteria for designating an area as 'blighted,' which triggers the ability to use eminent domain:** These statutory criteria must provide real limitations on the ability to use eminent domain for private redevelopment, as the Constitution requires. For example, under current law an area can be deemed blighted if it is found to be "not fully productive," which could apply to virtually any property. Such broad criteria must be removed. Other criteria, such as property that is

"underutilized," are too vague, particularly when applied to residential property. The revised criteria for designating an area as blighted should be as objective as possible, and must be based on an assessment of the *current* state of an area, not its potential future use. As a means of making the criteria more objective and specific, the Legislature should consider making certain criteria applicable only to commercial properties.

- **Promote rehabilitation:** The criteria used to designate an area "in need of rehabilitation," should be expanded. This would allow municipalities to retain the powers and benefits that come from designating an area as blighted (or 'in need of redevelopment'), but without gaining the power to use eminent domain.
- **Require meaningful notice to residents:** All tenants and property owners in a proposed redevelopment area should receive notice via certified or regular mail, at least 60 days prior to the public hearing, indicating that their municipality is considering designating their property as part of a "blighted area." Such notice should make explicitly clear that a consequence of this designation is that their property can be taken using eminent domain.
- **Offer property owners a meaningful opportunity to appeal the blight designation:** The hearing to determine the blight designation should be recorded, testimony should be provided under oath, and affected citizens should have the opportunity to bring their own witnesses. The window of opportunity for appealing the blight designation should be expanded to at least 120 days. And if the matter ends up in court, the municipality should be required to present 'clear and convincing evidence' that the area has been properly designated as blighted, thus putting the burden of proof on the municipality.
- **Create more specific, comprehensive and community-driven redevelopment plans**: A fully-noticed community meeting should be an early requirement of the redevelopment planning process, and all meetings about the development of the plan should be public with recorded meeting minutes. The plan itself should be required to provide more detail, including more specific timeframes, a detailed relocation plan, an assessment of the impact on affordable housing, and specific justification as to why it is absolutely necessary to acquire each property.
- **Add protections to help ensure that eminent domain is used as a last resort:** Property owners should be offered the chance to rehabilitate or redevelop their own properties in accordance with the goals of the redevelopment plan, where feasible.
- **Protect the rights of tenants:** Tenants should be given adequate notice and provided opportunities to participate in the redevelopment process, just like property owners. Detailed relocation plans should be required to address the concerns of displaced tenants. Low-income displaced tenants should also receive up to five years of rental assistance if comparable and affordable replacement apartments are not available within the municipality. Finally, redevelopment should trigger an obligation to complete a municipal affordable housing plan, which will increase the availability of affordable apartments and homes.
- **Require that homeowners are compensated with at least the 'replacement value' of their home:** Replacement value should be defined as enough to buy a home of similar size and quality within the municipality under comparable conditions. Tenants and property owners should also be offered first right of refusal for comparably sized

homes in the new development, where applicable. Finally, relocation assistance levels should be increased.

- **Strengthen ethics rules for the redevelopment process:** Enact pay-to-play reforms that apply to all local redevelopment projects and contractors, including consultants hired as part of the project. Redevelopment contracts should be required to be competitively procured. Government officials, and those working on their behalf, should not be allowed to directly financially benefit from a redevelopment project with which they are involved.

Reforming the Use of Eminent Domain for Private Redevelopment in New Jersey

Eminent domain is the power of government to take private property for public use. Land taken by eminent domain is used for public purposes such as schools, parks and roads. In almost all states, including New Jersey, eminent domain can also be used, under certain circumstances, to take private property and transfer it to another private party for the purpose of redevelopment.

Eminent domain is one of the most awesome powers that Americans have entrusted to their government. When this power is invoked, citizens lose their home and their business. More importantly, they can also lose their place in their community, and their sense of comfort, stability and security.

The greater the power entrusted to government officials the more safeguards that should exist to ensure that it is used with care and discretion. It is therefore crucial that the laws governing the use of eminent domain ensure a just and transparent process in which the rights of tenants and property owners are fully protected and eminent domain is used rarely and only in very specific circumstances. This is particularly important in situations where eminent domain is used for private redevelopment because, in these cases, the opportunities for misuse, abuse and injustice are often even greater.

Some contend that eminent domain should never be used for the purpose of redevelopment. In reaction to the U.S. Supreme Court's recent *Kelo* decision affirming the constitutionality of using eminent domain for redevelopment, many states have been moved to restrict this power.[1] South Dakota, for example, recently outlawed the use of eminent domain for private redevelopment under any circumstances. The Department of the Public Advocate believes, however, that redevelopment of truly blighted areas is a legitimate public purpose that serves the greater good by helping revitalize communities and create more opportunities for residents. The power to use eminent domain for private redevelopment is specifically enshrined in New Jersey's constitution. Moreover, it would be a mistake to draw simple parallels between New Jersey and other states such as South Dakota on this issue, because of New Jersey's unique need for redevelopment.

New Jersey is the most densely populated state in America.[2] New Jersey also has some of the most aggressive land preservation and smart growth policies in the nation, with large areas such as the Highlands and Pinelands protected from overdevelopment and a range of programs designed to channel growth into cities and towns that have already been developed. As a result, the prosperity of New Jersey's communities is more reliant on redevelopment than perhaps any state in the nation. Good community redevelopment projects can be particularly important to low- and moderate-income families in need of increased opportunities. Redevelopment almost always requires public-private

[1] *Kelo. v. City of New London, Connecticut, et al.*, 125 S. Ct. 2655 (2005).
[2] U.S. Census Bureau, Census 2000 Summary File 1: GCT-PH1-R. Population, Housing Units, Area, and Density (geographies ranked by total population): 2000.

partnerships that leverage tax dollars and bring private investment into our communities. And when used appropriately, eminent domain can be an important tool in making redevelopment possible in blighted areas.

Imagine a New Jersey town in need of revitalization, with a broadly supported plan to redevelop a truly blighted area. Imagine further that a property owner in an area crucial to that redevelopment plan is refusing to sell his or her property for any reasonable offer. Perhaps it is an absentee landlord who has let his or her building fall into disrepair and has little invested in the community. Or perhaps the property is home to an abandoned building with contaminated soil and the owner will not sell because he or she does not want to pay to clean up the land. In rare circumstances, eminent domain can be necessary as a last resort to advance redevelopment projects, provided that the rights of tenants and property owners are protected.

Unfortunately, in New Jersey the current laws do not adequately protect the rights of tenants and property owners. The system for using eminent domain for private redevelopment in New Jersey needs to be reformed.

SCOPE OF WORK

When the new Department of the Public Advocate opened on March 27, 2006, Public Advocate Ronald Chen announced that its first major initiative would be to examine the use of eminent domain for private redevelopment in New Jersey. This examination has included extensive research and fact finding (detailed below). While some of this research will continue beyond this report and will help further illuminate this issue, our considerable research and fact finding to date leaves little doubt that immediate reforms are necessary.

What follows are a set of principles for reform that the Public Advocate believes must be adhered to in order to protect the rights of tenants and property owners. These principles are accompanied by recommended policy reforms that are necessary to uphold the principles. Please note that the scope of this investigation and these reform recommendations are limited to the use of eminent domain for private redevelopment and are not intended to apply to the use of eminent domain for other public purposes.

Much of the recent debate nationwide on eminent domain has been fueled by the 2005 U.S. Supreme Court case *Kelo v. City of New London*. In *Kelo*, the Court ruled that under the Federal Constitution it is permissible to use the power of eminent domain for private redevelopment, even if an area is not blighted. But the *Kelo* decision specifically notes that states may adopt further restrictions on eminent domain for private redevelopment. The New Jersey State Constitution does just that, allowing eminent domain for private redevelopment only in blighted areas. Thus, the taking that was upheld in the *Kelo* case would not be permissible under the New Jersey Constitution. New Jersey's right to restrict the use of eminent domain for private redevelopment to blighted areas was upheld by the U.S. Supreme Court more than 50 years ago.

The Department of the Public Advocate will continue to gather data and conduct additional research on the use of eminent domain for private redevelopment subsequent to this report. As we continue to gain perspective on this important issue, we will keep the public informed of the Department's views, and will not foreclose other means provided to our Department under the statute to ensure that the rights of tenants and property owners are protected.

RESEARCH FOR THIS REPORT

In preparing this report, the Public Advocate and his staff have conducted extensive meetings with a range of interested parties. This included meetings with:

- government officials, including legislators, mayors, planners, and commissioners and staff from various state agencies;
- state and national experts on eminent domain, planning, economic development and property rights, and
- a wide range of interest groups representing environmentalists, housing advocates, transportation advocates, smart growth advocates, small and medium businesses, large businesses, small developers, large developers, community developers, apartment owners, realtors, planners, tenants, homeowners and, most importantly, a diverse range of local communities impacted by eminent domain.

The Public Advocate and his staff also visited some communities impacted by the use of eminent domain for private redevelopment. Sites we visited included redevelopment areas in Camden, Long Branch, Lodi and Collingswood. The Department also conducted numerous interviews with both government officials and individual citizens in these communities.

In addition, the Department received extensive information and feedback via letters, emails and phone calls from individual homeowners, tenants, business owners, religious leaders and other private citizens whose communities have been impacted by eminent domain.

The Department also gathered as much data as possible on redevelopment and the use of eminent domain for redevelopment. Unfortunately, the data that exists in New Jersey is quite limited. With the help of the Department of Community Affairs, we were able to compile some basic data on redevelopment projects that have been started since mid-2003. In addition, we relied on interest groups, national experts and community residents to provide us with additional data and anecdotal information about how eminent domain is used in New Jersey for redevelopment.

Finally, the Department conducted extensive legal and policy research relating to eminent domain for redevelopment in New Jersey and in other states.

CURRENT LAWS AND REGULATIONS GOVERNING THE USE OF EMINENT DOMAIN FOR PRIVATE REDEVELOPMENT IN NEW JERSEY

Before discussing eminent domain reforms, it is useful to understand the current laws governing eminent domain and private redevelopment in New Jersey.

The New Jersey constitution authorizes the use of eminent domain for private redevelopment, stating that "(t)he 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."[3] In 1949, the Legislature authored statutes to govern this redevelopment process. These statutes have been updated several times, most recently in 2002. It is from this legal framework that redevelopment in New Jersey is governed.

Designating an Area as Blighted

To use eminent domain for private redevelopment in New Jersey a municipality must first find that an area is "blighted," as required by the Constitution. The Legislature has established that for the purposes of using eminent domain for private redevelopment any one of the following seven criteria would make an area blighted:

a. The generality of buildings are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living or working conditions.
b. The discontinuance of the use of buildings previously used for commercial, manufacturing, or industrial purposes; the abandonment of such buildings; or the same being allowed to fall into so great a state of disrepair as to be untenantable.
c. Land that is owned by the municipality, the county, a local housing authority, redevelopment agency or redevelopment entity, or unimproved vacant land that has remained so for a period of ten years prior to adoption of the resolution, and that by reason of its location, remoteness, lack of means of access to developed sections or portions of the municipality, or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital.
d. 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.
e. A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.
f. Areas, in excess of five contiguous acres, whereon buildings or improvements have been destroyed, consumed by fire, demolished or altered by the action of storm, fire, cyclone, tornado, earthquake or other casualty in such a way that the aggregate assessed value of the area has been materially depreciated.
[g. *Criterion (g) only applies to the use of tax abatements and specifically indicates that it is not a basis for a blight declaration for eminent domain purposes.*]
h. The designation of the delineated area is consistent with smart growth planning principles adopted pursuant to law or regulation.[4]

[3] New Jersey Constitution, Art. 8, § 3, ¶1.
[4] N.J.S.A. § 40A:12A-5.

To begin redevelopment, the governing body, typically the town council, adopts a resolution directing the planning board to conduct a preliminary investigation assessing whether or not an area meets one of these seven criteria of blight. During this investigation, the planning board sends notice to all property owners in the proposed redevelopment area notifying them of a public hearing on the blight designation. This notice, however, does not need to specify that this blight designation could mean that a person's home could be taken using eminent domain. The notice also does not need to be sent to tenants, and must only be sent 10 days in advance of the hearing. This hearing represents the only required public hearing before the designation of blight.

Once the planning board has completed its research it submits its report back to the town council. This report includes a map outlining the boundaries of the area, and an analysis describing whether or not the area meets the statutory criteria for a blighted area. After receiving the planning board's recommendation, the town council may pass a resolution designating the area as blighted.

This resolution must be sent to the Department of Community Affairs (DCA) for review. DCA's review, however, is not to determine whether the blight designation was appropriate, but only to assess the smart growth implications of designating the redevelopment area. If the proposed redevelopment is in an area designated for growth, DCA's approval is automatic upon receipt of the resolution.[5] If not, DCA's review must be completed within 30 days, or the blight designation automatically takes effect. Once DCA approval is granted the blight designation is official. There is no time limit as to how long the blight designation can last.

Within ten days of the blight determination, the governing body must serve notice to residents who filed written objections at the planning board's public hearing. Those that did not file written objections are not required to receive notice of the blight designation. After the resolution is passed, property owners have only a 45-day window to appeal the blight designation in court. If no appeals have been filed with the court after 45 days, the governing body may begin taking action to acquire or condemn any property in the redevelopment area.

Writing the Redevelopment Plan

After designating the blighted area (the statute uses the term area "in need of redevelopment"), the governing body directs the planning board, the redevelopment agency, or governing body itself to prepare the redevelopment plan. The redevelopment plan must contain several elements, including:

- the relationship of the redevelopment plan to the municipal, county and state land use plans;
- the proposed land uses and building requirements in the redevelopment area;
- "adequate provisions" for the temporary and permanent relocation of citizens within the redevelopment area, and

[5] DCA has interpreted the statute to mean that any redevelopment in State Planning Areas 1 and 2 or designated centers does not require DCA review.

- an identification of any property in the redevelopment area that is proposed to be acquired.

The redevelopment plan is currently not required to include elements such as specific justifications as to why properties need to be acquired, timeframes for redevelopment, or an assessment of the impact on affordable housing in the municipality.

Once the plan is complete, the governing body approves the plan by ordinance, which requires a public hearing. The governing body may alter any recommendations in the proposed redevelopment plan so long as it has a majority vote.

The governing body can select a redeveloper at any point in this process. The redeveloper is often chosen early in the process so it can assist with the drafting of the redevelopment plan. The town can also select multiple redevelopers.

Implementing the Redevelopment Plan and Using Eminent Domain

After the redevelopment plan has been adopted, the governing body designates 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. These powers include the ability to issue bonds, grant tax abatements, install or construct streets and utilities, and condemn homes using the power of eminent domain. The redevelopment entity can be the governing body, a separate redevelopment agency, the local housing authority, or a county improvement authority. There may also be more than one redevelopment entity for a given redevelopment area.

The redevelopment entity has the power to condemn any property in the redevelopment area. Before taking a property, the redevelopment entity must only prove to a court that the property owner was unwilling to sell. Sufficient proof of the property owner's unwillingness to sell is his or her rejection of a single written offer that is no less than the appraised value of the house, as appraised by the governing body's appraiser.

Once the court authorizes the taking, a panel of three commissioners is appointed to determine the appropriate compensation for the property owner. The commissioners hold hearings at which list of similar sales can be introduced as evidence and then issue a ruling on the appropriate compensation. The property owner can appeal the decision by the commissioners and demand a jury trial for that appeal.

Once the issue of compensation is settled, the property can be taken. The property owner will also receive from the governing body compensation for applicable costs such as moving expenses, business discontinuance or temporary rental expenses.

RECOMMENDED REFORMS

After undertaking the extensive research described earlier in this report, the Department of the Public Advocate has arrived at a set of clear principles that we believe must guide any efforts to reform the current laws governing the use of eminent domain for private redevelopment. These principles are based in part on what we believe are just, fair and appropriate policies to serve the public interest, and in part on the state and federal constitutional rights that the Public Advocate believes are not adequately protected under the current laws governing eminent domain.

Listed below each of these principles are policy reforms that the Public Advocate believes are necessary to uphold these principles. The policy recommendations are not exhaustive but each represents an important step toward protecting the rights of tenants and property owners.

The Criteria for Designating an Area 'Blighted'

Principle: The statutory criteria for designating an area as 'in need of redevelopment' must be consistent with the constitutional requirement that an area be 'blighted' and must provide meaningful limitations on the use of eminent domain for redevelopment.

The New Jersey Constitution provides that 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." The term "blighted area" is a Constitutional limitation on the power of the state to use eminent domain for private redevelopment.

Although the Constitution does not further define "blighted area," the term had a widely accepted definition when applied to land redevelopment in 1947, at the time the Constitution was enacted. In 1949, the Legislature first attempted to define the term, outlining criteria for determining whether an area was blighted. In subsequent years, the Legislature has continued to expand those criteria.

The 1949 Blighted Area Act defined blight as an area in which there exists, "to a large extent," one of four criteria.[6] In 1951, the Legislature reworded the first four criteria, and added a fifth criterion.[7] In 1986, a sixth category of blight was added.[8]

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[6] The 1949 statute provides that "the term 'blighted area' shall mean an area in any municipality wherein there exists to a large extent:

a) Buildings and structures on the property are unfit, unsanitary and unsafe for human use and habitation by reason of age, physical deterioration, dilapidation or obsolescence;

b) Buildings and structures which are so situated and used as to have therein more inhabitants than can be fitly and safely housed;

c) Buildings and structures which have economically deteriorated and where there is a disproportion between the cost of municipal services rendered to the area as compared with the tax revenue derived therefrom; or

d) A prevalence of factors conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, crime and poverty."

In 1992, the Legislature enacted the Local Redevelopment and Housing Law (LRHL). The LRHL made some modifications to criteria (a) through (d) and to criterion (f).[9] The most

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[7] The 1951 statute provides that "the term blighted area shall mean an area in any municipality where there exists any of the conditions hereinafter enumerated:
a) The generality of buildings used as dwellings or the dwelling accommodations therein are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air or space, as to be conducive to unwholesome living;
b) The discontinuance of the use of buildings previously used for manufacturing or industrial purposes, the abandonment of such buildings or the same being allowed to fall into so great a state of disrepair as to be untenantable;
c) Unimproved vacant land, which has remained so for a period of ten years prior to the determination hereinafter referred to, and which land by reason of its location, or remoteness from developed sections or portions of such municipality, or lack of means of access to such other parts thereof, or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital;
d) Areas (including slum 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;
e) A growing lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein and other conditions, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare."

[8] The 1986 statute added the following language:
"(f) Areas, in excess of 10 contiguous acres, whereon buildings or improvements have been destroyed, consumed by fire, demolished or altered by the action of storm, fire, cyclone, tornado, earthquake or other casualty in such a way that the aggregate assessed value of the area has been materially depreciated."

[9] Under the 1992 statute, an area may be designated as "in need of redevelopment" (and thus "blighted," permitting the use of eminent domain) if the municipality enacts a resolution concluding that "any of the following conditions is found" (new language is underlined and deleted language is stricken):
a) The generality of buildings ~~used as dwellings or the dwelling accommodations therein~~ are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air or space, as to be conducive to unwholesome living or working conditions;
b) The discontinuance of the use of buildings previously used for commercial, manufacturing or industrial purposes, the abandonment of such buildings or the same being allowed to fall into so great a state of disrepair as to be untenantable;
c) Land that is owned by the municipality, the county, a local housing authority, redevelopment agency or redevelopment entity, or unimproved vacant land, which has remained so for a period of ten years prior to adoption of the resolution ~~the determination hereinafter referred to, and which land~~ and that by reason of its location, ~~or~~ remoteness ~~from developed sections or portions of such municipality, or~~ lack of means of access to developed sections or portions of the municipality, ~~such other parts thereof,~~ or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital;
d) Areas ~~(including slum 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;
e) A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or ~~and~~ other conditions, resulting in a stagnant ~~and unproductive~~ or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

noteworthy difference in the LRHL, however, is the substantial change made to criterion (e).

Prior to 1992, blight could be found if the conditions of the land made it both "stagnant and unproductive." But in 1992, the Legislature effectively made the stagnancy requirement meaningless by replacing that language with a provision that an area could meet the requirements of blight if the conditions or use of the land were either "stagnant or not fully productive."

As a result, a mere finding that land is "not fully productive" now empowers a governing body to use eminent domain. Not only does this go well beyond any reasonable definition of blight, but this language puts virtually no limitation on the finding of blight, given that any property could plausibly be more productive (e.g., add one more floor to any building or one more housing unit to any development).

The 1992 legislation also makes an important language change by deleting the word "blight" from the beginning of the statute, burying the word deep within the statute, and deeming that blight exists when an area is determined to be "in need of redevelopment." While such a change in wording may have little legal importance, it has helped change the perception of what this designation means. Clearly, "in need of redevelopment" could describe almost any older neighborhood or business district in a way that "blight" could not.

Finally, in 2003, the Legislature enacted a seventh criterion for establishing that an area is blighted. Under the new section (h), an area is in need of redevelopment, and thus blighted, if "the designation of the delineated area is consistent with smart growth planning principles adopted pursuant to law or regulation." [10]

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f) Areas, in excess of five ~~10~~ contiguous acres, whereon buildings or improvements have been destroyed, consumed by fire, demolished or altered by the action of storm, fire, cyclone, tornado, earthquake or other casualty in such a way that the aggregate assessed value of the area has been materially depreciated."

[10] It should also be noted that in 1985 the Legislature added a criterion giving municipalities access to tax exemptions as a redevelopment tool in those areas that have already been designated urban enterprise zones. But this provision explicitly prohibits local governments from using eminent domain in these areas, unless one of the first six criterion is met and the area has been designated as an area in redevelopment. This seventh criteria states:

g) In any municipality in which an enterprise zone has been designated pursuant to the "New Jersey Urban Enterprise Zones Act," P.L. 1983, c.303 (C.52:27H-60 et seq.) the execution of the actions prescribed in that act for the adoption by the municipality and approval by the New Jersey Urban Enterprise Zone Authority of the zone development plan for the area of the enterprise zone shall be considered sufficient for the determination that the area is in need of redevelopment pursuant to sections 5 and 6 of P.L. 1992, c. 79 (C.40A:12A-5 and 40A:12A-6) for the purpose of granting tax exemptions within the enterprise zone district pursuant to the provisions of P.L. 1991, c.431 (C.40A:20-1 et seq.) or the adoption of a tax abatement and exemption ordinance pursuant to the provisions of P.L. 1991, c. 441 (C.40A:21-1 et seq.). The municipality *shall not utilize any other redevelopment powers within the urban enterprise zone* unless the municipal governing body and planning board have also taken the actions and fulfilled the requirements prescribed in P.L. 1992, c. 79 (C.40A:12A-1 et al.) for determining that the area is in need of redevelopment or an area in need of rehabilitation and the municipal governing body has adopted a redevelopment plan ordinance including the area of the enterprise zone. L.1992, c. 79 sec. 5. (Emphasis added).

Thus, over the course of some 40 years, the Legislature shifted from four narrowly drawn definitions of blight to seven broad definitions of blight. In doing so, the Legislature's interpretation of the Constitution's "blighted area" clause has expanded to the point where it provides virtually no limitation on taking private property for redevelopment, in apparent violation of the constitutional intent to limit this power (*see attached Appendix for additional legal analysis*).

If the Legislature revised the blight criteria to make them more specific, objective and limiting, it would reconcile the statutory language with the constitutional requirements and prevent the use of eminent domain in areas that are by no reasonable definition blighted. Such revised criteria would also facilitate a more meaningful judicial review of the initial blight designation, and help create more certainty for all parties involved in the redevelopment process.

Policy Recommendations

- Revise the statutory criteria for blight so that they provide real limitations on the ability of a governing body to designate an area as blighted. For example, as discussed above, criterion (e), stating that land that is "not fully productive" can be considered blighted, removes almost any meaningful limitation on the blight designation. Similarly, criterion (h), stating that an area consistent with smart growth principles meets the definition of blighted, essentially means that all of State Planning Areas 1 and 2 and designated centers are blighted. Criterion (h) should be removed.
- Restrict the statutory criteria for blight so that, as best as possible, they describe objective conditions, and eliminate criteria that are so vague as to be nearly impossible to subject to meaningful third party review. For example, criterion (e) notes that blight stems from "a growing lack or total lack of proper utilization." "Proper utilization" is a highly subjective term, particularly when applied to residential properties.
- Revise the statutory language to ensure that the determination of blight is based on an assessment of the current state of the property and is independent of any potential or future use of the property. For example, criterion (e) describes "land potentially useful and valuable for contributing to and serving the public health, safety and welfare." This criterion assesses the property relative to its potential or future use, and not based solely on its current condition. Therefore, such language should be removed.
- Consider applying different criteria to residential and commercial properties. Certain criteria are easier to assess and can be applied more objectively when used to evaluate a commercial entity rather than a person's home.
- State explicitly in the statute that a designation of blight must be based on the functionality of an area, and not simply on its appearance. For example, a safe, well-functioning residential neighborhood is not blighted simply because the front lawns have no grass or the homes are unattractive in the opinion of the governing body.
- Establish in the statute some criteria for including smaller non-blighted areas within a larger area that is designated as blighted. For example, the statute could state that a certain percentage of an area must be blighted for the entire area to be designated as blighted.

Principle: Efforts to "rehabilitate" communities should be prioritized and promoted so that municipalities can take advantage of tools to revitalize their communities without the threat of eminent domain.

Some argue that restricting the statutory criteria for blight will hurt New Jersey's communities by restricting their access to the many benefits and powers aside from eminent domain that come from designating an area as blighted or "in need of redevelopment." The Department of the Public Advocate shares this concern, but does not believe the answer is to allow the nearly unimpeded use of eminent domain – the criteria for blight must be restricted to be consistent with constitutional requirements and to protect the rights of tenants and property owners. However, designating an area "in need of rehabilitation" provides a municipality with the same powers and benefits as declaring an area "in need of redevelopment," with the exception of the power of eminent domain and the power to grant long-term tax abatements. Therefore, the effort to rehabilitate communities should be promoted.

Policy Recommendations

- Expand the criteria needed to designate an area "in need of rehabilitation." The Legislature may want to move language removed from the blight criteria for purposes of declaring an area "in need of redevelopment" to the statutory criteria for declaring an area "in need of rehabilitation."
- Require that before designating an area "in need of redevelopment" the governing body must first establish that the goals of redevelopment could not be met in a fiscally prudent manner by designating the area "in need of rehabilitation."

Principle: Eminent domain for private redevelopment must not have the intent or the effect of causing protected classes of residents to permanently relocate involuntarily outside the municipality.

It is the opinion of the Department of the Public Advocate that redevelopment that systematically forces protected classes to relocate outside the municipality would violate protections provided by both our state and federal constitutions. Protected classes include racial, ethnic and cultural minorities. Redevelopment should also not have the effect of systematically relocating low-income populations outside of the municipality.

Policy Recommendations

- Explicitly state in the statute that the income or racial, ethnic and cultural backgrounds of neighborhood residents cannot be considered in designating an area as blighted.
- Improve the process of declaring an area as blighted to ensure more meaningful public participation by all tenants and property owners, including protected classes (*described in more detail below*).

The Process for Designating an Area as Blighted

Principle: The process by which a municipality declares an area as blighted must be transparent and fully noticed, and must provide a meaningful opportunity for affected persons to participate early in the process.

Current laws governing the process by which an area is designated as blighted are insufficient to ensure meaningful public participation. While many municipalities do voluntarily engage in an open, transparent and participatory redevelopment process, there are currently not adequate requirements to ensure that all municipalities engage in such a process. A number of citizens, for example, reported to the Department that they were never made fully aware that being designated an area "in need of redevelopment" meant their home could be taken through the use of eminent domain until long after the designation had already occurred. This lack of effective and early communication with affected citizens often leads to prolonged legal battles well into the redevelopment process, which is a bad outcome for all parties involved.

Policy Recommendations

- Require that notice of public hearings on the proposed blight designation be sent not only to property owners within the redevelopment area, but also to tenants and those living within 200 feet of the redevelopment area.
- Require that notice to tenants and property owners be sent via certified and regular mail.
- Require that such notice be written in plain language and clearly indicate that a possible consequence of such a designation is that their property can be taken using eminent domain.
- Require that such notice use the constitutional terminology "blighted" rather than the more euphemistic statutory language "in need of redevelopment."
- Require that such notice be provided at least 60 days in advance of the hearing, rather than the current 10-day requirement. This will allow property owners and tenants time to prepare for the hearing so that they can build a record against the designation if they choose.
- Require that such notice be advertised on the municipal website, if one exists.
- Require that such notice inform property owners as to the specific criteria under which the area has been found to be blighted.
- Guarantee affected tenants and property owners the ability to access relevant documents, such as the preliminary investigation report, in advance of the hearing so that they can understand the case that the governing body is making. A hard copy of such documents should be available for inspection at the municipal building and public library. Such documents should also be available electronically, where feasible.

Principle: A proceeding to declare an area blighted must be an impartial fact-based inquiry that focuses, at a minimum, on the statutory criteria for a blighted area; the record adduced in such a proceeding must be sufficiently developed to be capable of meaningful review.

Because of the serious implications of the blight designation, the proceeding to establish that an area is blighted must be thorough and well-documented. Citizens have reported that some of these proceedings have been cursory formalities, rather than serious discussions about the validity of the blight designation. In other instances, citizens have made credible claims that they were misled about the implications of the blight designation for their property and the future of their community. Such insufficient proceedings do little to contribute to the public discourse about these important policy choices, and serve to undermine the entire redevelopment process.

Policy Recommendations

- Mandate that public hearings on the blight designation be recorded, and require that transcripts be made available to the public.
- Require that testimony at the public hearings regarding the blight designation be given under oath.
- Guarantee the right of citizens impacted by the potential blight designation to bring their own witnesses and submit written questions to be asked of the municipality's witnesses.
- Require that the governing body pass an ordinance to declare an area as blighted, rather than simply passing a resolution as is required under current law. In comparison to a resolution, an ordinance requires more notice and transparency, and requires a public hearing.
- Require that the record of blight determination, including the contents of the preliminary investigation report, document that a large enough percentage of the individual properties within the redevelopment area exhibit conditions of blight so as to meet the statutory standard (presuming the Legislature adopts such a standard).

Principle: Property owners must have a meaningful opportunity to appeal the designation of their property as blighted to an impartial third party.

To protect the rights of property owners, it is crucial that they have a meaningful opportunity to appeal the blight designation to a third party that does not have any interest in the redevelopment project. The Department of the Public Advocate does not believe that the creation or expansion of a state-level bureaucracy is an efficient or effective means of providing this third-party appeal. The Department believes the judiciary is a more appropriate mechanism, but only if a heightened burden of proof is required of the municipality, and if affected citizens have a realistic opportunity to initiate such an appeal. Historically, courts have given great deference to municipal declarations of blight, meaning that property owners challenging the designation bore the burden of proving that the blight designation was incorrect.

Policy Recommendations

- Increase the burden of proof on the governing body to defend the blight designation in court. The governing body should be required to present 'clear and convincing evidence' that an area has been properly designated as blighted, as opposed to the burden being on the property owners to prove that the blight designation was improper.
- Require that notice be sent to all tenants and property owners in the redevelopment area once the governing body has accepted the planning board's recommendation and passed a resolution designating an area as blighted. Currently notice is only required to be sent to those who filed written objections to the designation of blight. Such notice should inform citizens that they have a right to an appeal, and should provide the relevant deadlines for filing that appeal.
- Extend the 45-day window in which property owners can dispute the blight designation to at least 120 days in order to provide a more realistic opportunity to contest the designation.

The Process of Creating a Redevelopment Plan

Principle: Community members must have meaningful opportunities to participate in the redevelopment planning process.

Redevelopment should be about revitalizing a community. The redevelopment planning process should reflect those priorities by making community members a direct and integral part of the process.

Policy Recommendations

- Require at least one community meeting at an early stage in the redevelopment planning process. Citizens in and near the redevelopment area should receive notice of this meeting in the same manner in which notice is provided for the original blight designation. Such hearings should be community discussions about desired outcomes, rather than technical or procedural in nature.
- Require that when the governing body is holding its hearing on the final adoption of the redevelopment plan, tenants and property owners receive notice in the same manner in which notice is provided for the original blight designation. Any citizen whose property is proposed to be acquired under the plan should be notified as to the specific criteria under which their property has been designated as blighted or, if the property is not blighted, the reason why acquiring this property is vital for the redevelopment project.
- Require that all meetings about the redevelopment plan at which there is a quorum of the body charged with creating the plan be public, and that the content of those public meetings be recorded, transcribed, and made available to the public.

Principle: Redevelopment plans must be more specific and comprehensive, and must create more certainty and understanding among all parties affected by eminent domain.

The quality and specificity of redevelopment plans in New Jersey varies widely. Good plans outline clear community-supported redevelopment objectives and provide all interested parties with a degree of certainty about the redevelopment project. The worst examples of redevelopment plans are vague and legalistic documents that essentially amount to an assertion that the town plans to plan a redevelopment project. Such vague plans leave tenants and property owners very much in the dark about the future of their homes, their businesses, and their communities. Moreover, without time limits or more specificity in the plans, the potential for redevelopment and eminent domain can hang over the heads of homeowners and businesses for years, discouraging investment and undermining their ability to sell their properties.

Redevelopment plans should not leave members of the community in such a state of uncertainty. Average citizens should be able to read a redevelopment plan and understand the direction their community is going and how the redevelopment plan will impact their apartment, home or business.

Policy Recommendations

- Require that redevelopment plans include the following elements, in addition to current statutory requirements:
    a) An explanation of how this redevelopment project will benefit the community.
    b) An outline of the scale, character and intensity of proposed redevelopment.
    c) An explanation as to why there is no other reasonable alternative to acquiring or condemning each property that is proposed to be acquired.
    d) Timeframes for the major stages of redevelopment plan implementation, including an estimate as to when parcels will be acquired; time limits for the redevelopment project must also be included in the governing body's contract with the redeveloper.
    e) A detailed permanent and temporary relocation plan that documents the availability of comparable replacement housing for displaced residents (under the current statutory requirements many plans only offer very vague and general assessments of the availability of temporary and permanent housing for displaced residents).
    f) An assessment of the impact on the community's supply of affordable housing.

  If at the time the redevelopment plan is adopted it is implausible for it to have the degree of specificity necessary to outline items (d) through (f), then the plan must be amended with these details within six months of its initial adoption.
- Mandate that amending the redevelopment plan require the same public process as the original plan adoption, including adequate public notice, hearings and adoption by the governing body.
- Establish a statutory time limit on the number of years that an area can be designated as blighted without full implementation of the redevelopment plan. If an area is still not redeveloped after that time limit, the municipality should have an opportunity to renew

the blight designation, but it would need to go through the same public process required for the original designation and, in addition, explain why the redevelopment plan is not complete and how it will be completed within the timeframe of the renewed blight designation.

Using Eminent Domain for Private Redevelopment

Principle: Eminent domain should be an absolute last resort, used only in truly blighted areas after every other option has been exhausted and the inability to acquire a property is putting the community redevelopment project in jeopardy.

The designation of an area as blighted should not trigger the widespread use of eminent domain, nor is it intended to allow a developer or governing entity to acquire properties at cut-rate prices by wielding the threat of eminent domain. Eminent domain must be used only as a last resort, and only after a small number of property owners have refused all reasonable offers to sell their property and are putting the redevelopment of a truly blighted area in jeopardy.

Policy recommendations

- Mandate that property owners be offered the chance to rehabilitate or redevelop their own property in accordance with the goals of the redevelopment plan in instances in which such a scenario is feasible given the goals of the plan.
- Require that when a governing body begins condemnation proceedings on a home, the notice to the property owner includes a record of the acquisition prices paid by the redeveloper for similar properties in the redevelopment area. This will increase the transparency of the process.

Compensation and Relocation for Tenants and Property Owners

Principle: When a homeowner loses their home through the use of eminent domain, they should be compensated such that they are able to afford a home of similar size and quality within the municipality under comparable conditions.

The term "just compensation" as used Article I, paragraph 20 of the New Jersey Constitution should be construed to "make whole" someone displaced by eminent domain for redevelopment, and thus should go beyond "fair market value" when necessary, and include replacement value and temporary relocation costs. It is unjust for a homeowner to lose their home through eminent domain and receive compensation too low for them to ever own a home in their town again. And yet, under New Jersey's current redevelopment laws, such a scenario happens all too frequently.

Requiring increased compensation may have the effect of making some redevelopment projects in New Jersey financially untenable, and some would argue that this is reason not to require full replacement value for taken properties. The Public Advocate believes, however, that the financial viability of a redevelopment project should not rest on paying

homeowners less than it would take for them to replace their current property. Such a project is essentially being financed on the backs of current homeowners, which is unjust.

Policy Recommendations

- Require that compensation for a taken home be based on the highest value among the following options:
    - the fair market value of the property at the time it is designated as blighted;
    - the fair market value of the property at the time of the taking, under the new zoning proposed in the redevelopment plan, or
    - the 'replacement value' of the property, which is the cost of a home of similar size and quality under comparable conditions, within a reasonable distance of the current property.
- Require that the municipality or developer offer temporary rental assistance to displaced low-income tenants if a comparable and affordable replacement apartment within the municipality is not available. This assistance would be enough to make the new rental costs affordable (i.e., no more than 30% of the family's gross income), after factoring in any public subsidies the tenant already receives, such as Section 8 vouchers. Such temporary rental assistance should be provided for 5 years, or until the tenant moves from the apartment to which he or she was originally displaced.
- Offer existing tenants and homeowners the right of first refusal for a comparably sized apartment or property in the new development, if applicable.
- Increase the statutory maximum levels for all types of relocation assistance, which include assistance for moving expenses, temporary rent payments, and business discontinuance. In the current statute, these maximum levels are specific dollar amounts that were set decades ago; these amounts should be adjusted to current dollars and indexed to increase automatically with inflation.

Affordable Housing

Principle: Redevelopment should increase the availability of affordable housing in a municipality.

Redevelopment offers a tremendous opportunity for a municipality to improve the quality of life for its citizens. This includes expanding the availability of safe, affordable housing. With New Jersey already suffering from a severe lack of affordable housing, redevelopment and eminent domain should be tools that help increase its availability.

Policy Recommendations

- Require any municipality that designates an area in need of redevelopment to develop an affordable housing plan to submit to the Council on Affordable Housing (COAH) for certification.
- Require that all units of COAH-certified affordable housing or publicly funded housing (such as project-based Section 8 housing or housing built with state subsidies) that are demolished as part of a redevelopment project be replaced within or near the redevelopment area.

Data Collection and Public Information

Principle: State and local governments should collect and make readily available complete information on redevelopment areas and the use of eminent domain for redevelopment in New Jersey.

Policymakers and citizens alike need complete data and public information about redevelopment and the use of eminent domain to ensure that this process is transparent and to fully understand this important issue.

Policy Recommendations

- Require all municipalities to send documentation of any current or future redevelopment areas to the Department of Community Affairs (DCA). This documentation should include a map outlining the physical boundaries of the redevelopment area, the preliminary investigation report used to justify the designation of blight (including the criteria under which an area qualifies as blighted), the resolution declaring the area in need of redevelopment, and the redevelopment plan.
- Require all municipalities to notify DCA of any future takings for private redevelopment within two weeks of the taking, for record keeping purposes.
- Require DCA to produce an annual report, compiling information submitted by municipalities, that outlines the following information:
    - The number of redevelopment areas that currently exist in New Jersey and basic data about their features, such as size, population, and the length of time the area has been designated as blighted.
    - The number of times eminent domain has been used in each redevelopment area.
    - Data on compensation received by property owners, where available.

  The completed report should be made available to citizens upon request and on the DCA website.
- Require each municipality to provide easy access – via the Internet and in response to direct citizen requests – to information about whether a specific property is part of a blighted area.

Ethics Reforms

Principle: Ethics rules around the redevelopment process must be strengthened to prevent perceived or actual corruption and conflicts of interest.

Perceived or actual corruption and conflicts of interest have undermined citizens' trust in all levels of New Jersey government. This is of particular concern when it comes to the use of eminent domain for private redevelopment because in such instances the power of government is so great, the power of citizens is comparatively limited, and the direct involvement of for-profit entities heightens the potential for perceived or actual corruption. Until we strengthen ethics laws and increase the transparency of the redevelopment

process, even the best and most ethical redevelopment projects will fall prey to public skepticism about ethical transgressions.

Policy Recommendations

- Enact pay-to-play reforms that apply to all local redevelopment projects and contractors, including consultants hired as part of the project.
- Require redeveloper contracts to be awarded through a competitive process, such as the issuance of a Request for Proposals (RFP). A waiver for this RFP requirement could be granted to very small projects or projects in which a single property owner already owns a large percentage of the redevelopment area.
- Bar any officials working for the governing body, or consultants or lawyers working on behalf of the governing body, from participating in the redevelopment process if they have a direct personal financial interest in the redevelopment project.
- Prohibit redevelopers or any other private entity from funding the preliminary investigation report, and require that the determination of blight be based solely on a publicly funded investigation.
- Provide support to the Department of Community Affairs to expand planning grants and improve technical assistance offered to municipalities to help them navigate the redevelopment process without relying on the assistance of developers.
- Require full disclosure of public benefits provided to developers in redevelopment projects. In order to create incentives for redevelopment, governing bodies often make investments or provide incentives that benefit developers, such as paying for public infrastructure upgrades, offering density bonuses or granting tax abatements. To ensure that the redevelopment process is transparent, such benefits should be publicly disclosed in a single document.

APPENDIX:
LEGAL ANALYSIS OF LIMITATIONS ON USE OF EMINENT DOMAIN

I. The Power of Eminent Domain

The notion that an essential aspect of individual freedom is the right to enjoy one's property – and especially one's home – is one of obvious and deeply felt resonance. Indeed, the Third, Fourth and Fifth Amendments in the federal Bill of Rights all deal in one way or another with the guarantee that one may be secure in one's own home against government intrusion. And Article I, paragraph 1 of the New Jersey Constitution provides that "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of . . . acquiring, possessing, and protecting property. . . ."

On the other hand, in common law legal systems there has long existed a power of the State to expropriate private property without the owner's consent. In 1795, Justice William Patterson, who had been a member of the constitutional convention, described eminent domain, as that power is called in the United States, as the "despotic power," but nevertheless recognized that such authority was an essential element of government.[1] The New Jersey State Supreme Court noted long ago that "[t]he power of eminent domain is a high sovereign power that has been allotted to the legislative branch of the government since the Magna Carta." *Abbott v. Beth Israel Cemetery Ass'n*, 13 N.J. 528, 543 (1953). The 1947 New Jersey Constitution "continued the legislative authority to provide for the exercise of the sovereign power of eminent domain, restricted only by the pertinent clauses of that Constitution." *Id.*

Traditionally, the power of eminent domain has been used to acquire real property when necessary for the completion of a public project such as a road or public building, and when the owner of the required property is unwilling to negotiate a price for its sale. Its more recent and controversial application, however, has been in the context in which a government entity ostensibly exercises its power to expropriate the property of one private person, and then delivers that property to another private party for the purpose of privately sponsored redevelopment, albeit with the hope that such redevelopment will improve conditions for the public as a whole. Although the recent case of *Kelo v. City of New London*,[2] has focused public awareness on the use of eminent domain to acquire property for private redevelopment, it was by no means the first judicial decision to approve the practice. Indeed, use of eminent domain for private redevelopment was found constitutional by the United States Supreme Court over fifty years ago,[3] and, as a

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

[2] 125 S. Ct. 2655 (2005).

[3] *Berman v. Parker*, 348 U.S. 26 (1954) (permitting use of eminent domain for private redevelopment of slums and blighted areas). *See also Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (holding that a State statute which permitted condemnation of property and its redistribution to alleviate the concentrated property ownership of the State was a legitimate public purpose and a rational power by the State Legislature).

matter of history, the mechanism of using eminent domain for private redevelopment of slums or blighted areas was well established in the early twentieth century.

In response to *Kelo*, there has been an understandable adverse reaction to the use of eminent domain for private redevelopment. Some contend that eminent domain should never be used for the purpose of private redevelopment. South Dakota, for example, recently effectively banned use of eminent domain for private development altogether.[4] While of course any State legislature is free to adopt such a position as an affirmative policy for its own citizens, a complete ban on eminent domain for redevelopment would be a departure from New Jersey's legal and social history.

As indicated more fully below, in the opinion of the Public Advocate: (1) the term "blighted area" as used in our Constitution provides a substantive limitation on the power of the legislature or its delegates to exercise eminent domain for redevelopment; (2) the term "blighted area" is informed by not only the facial text but by the prevailing usage of the term, and can be given a judicially manageable interpretation by the courts; and (3) some aspects of the 1992 Local Redevelopment and Housing Law extend beyond what any reasonable interpretation of "blighted area" would allow.

II. The "Blighted Area" Limitation on Eminent Domain for Redevelopment

As the New Jersey Supreme Court observed, "[i]t has been held that constitutions do not give, but merely place limitations upon, the power of eminent domain which otherwise would be without limitation." *Abbott*, 13 N.J. at 543. Among the most fundamental of rights arising from the constitutions of both the United States and the State of New Jersey are the right to be free from deprivation of property without due process of law,[5] the right of acquiring, possessing, and protecting property,[6] and the right to be free from government appropriation of private property unless for a "public use" and with "just compensation."[7]

With respect to eminent domain generally, the New Jersey Constitution states:

> Private property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners.

N.J. CONST. Art. I, ¶ 20.

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[4] 2006 S.D. H.B. 1080 (forbidding transfer of property taken by eminent domain to private entity for seven years. unless resale offer made to original owner).

[5] U.S. CONST., amend. xiv.

[6] N.J. CONST. Art. I, ¶ 1.

[7] U.S. CONST., amend. v; N.J. CONST. Art. I, ¶ 20.

But after first defining the use of eminent domain generally, the 1947 Constitution then addresses government condemnation of property specifically for private redevelopment:

> 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 ….

N.J. CONST. Art. VIII, § III, ¶ 1 (emphasis added). Thus, while making clear that eminent domain can be used for private redevelopment, the New Jersey Constitution also places strict limits on such use. Specifically, the Constitution first requires a finding that the area in which eminent domain is sought to be used for private redevelopment is a "blighted area," a term which the Constitution does not expressly define. *See*, *e.g.*, *Forbes v. Bd. of Trustees of South Orange Tp.*, 312 N.J. Super. 519, 528 (App. Div. 1998)(holding that "blighted area" determination is constitutionally-mandated precondition for taking property for purposes of private redevelopment). Article VIII's "blighted area" clause thus places a substantive limitation on Article I's takings clause by restricting the government's eminent domain power when the condemnation is specifically for private redevelopment purposes.

Although, pursuant to *Kelo*, the federal constitution does not limit use of eminent domain for redevelopment to blighted areas, *Kelo* itself reaffirmed a basic principle of federalism:

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

See id. at 2668 (noting that "[u]nder California law, for instance, a city may only take land for economic development purposes in blighted areas."). Such a state imposed limitation is precisely what New Jersey (and several other States) enacted in the 1947 Constitution, by making clear that private redevelopment only satisfies Article I's "public use" clause if the area in question is "blighted."

That the constitutional framers intended to impose a blight requirement upon the Legislature's power to authorize use of eminent domain is also clear from the record of the 1947 convention proceedings. Prior to the adoption of the proposal that became

Article VII, § III, ¶1,[8] a member of the Montclair Planning Board proposed that the framers adopt more open-ended language that would have given the Legislature the full power to determine the boundaries of redevelopment of any area. The text of that proposal stated:

> The acquisition of real property for development or redevelopment of *any area* in accordance with a plan duly adopted in a manner prescribed by the Legislature, whether the uses to which such area is to be devoted be public or private uses or both, is hereby declared to be a public use. The Legislature shall make laws governing acquisition, use and disposal of such property by an agency of the State or a political subdivision thereof. The Legislature may authorize the organization of corporations or authorities to undertake such development or redevelopment of any part thereof and may authorize municipalities to exempt their improvements from taxation, in whole or in part, for a limited period of time, under condition as to special public regulations to be specified by law or by contract between any such corporation or authority and the municipality, provided that during the period of such tax exemption the profits of the corporation and the dividends paid by it shall be limited by law.

PROCEEDINGS OF THE NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, Vol. III, at 544 (emphasis added). One of the delegates noted that because the proposal did not provide guidelines for determining whether an area needed redevelopment, it could "lead to a great deal of possible abuse." *Id.* at 545-546. In response, the proponent of the amendment stated "I think that any enabling law the Legislature might pass would *undoubtedly restrict* the right of these towns in certain definite neighborhoods. We feel that that would be a detail the Legislature should place in the laws and that it *should not be restricted in the Constitution*." *Id*. at 546 (emphasis added). The framers did not adopt this proposal. Instead of giving the Legislature unfettered discretion to define when eminent domain may be used for redevelopment purposes, the framers affirmatively placed a "blighted area" requirement in the Constitution precisely to restrict the use of eminent domain for private redevelopment. Thus the framers inclusion of the "blighted area" clause in the New Jersey Constitution provides additional support for the proposition that the clause was intended to limit the ability of the Legislature to broadly define the scope of the takings power in the private redevelopment arena.

The 1947 Constitution did not expressly define the term "blighted area." Nevertheless, examination of both the facial meaning of those words, and the meaning attached to them in common usage at the time of the 1947 Convention, is instructive. The earliest use of the term "blight" for real estate purposes was by University of Chicago sociologists. Starting in the 1920s, they applied the term previously used in the plant disease field to describe changes to society that did not meet the definition of a slum. *See* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the*

[8] *See infra* pages vii-viii.

Private Uses of Eminent Domain, 21 YALE L. & POL'Y REV. 1, 16 (2003). According to the Chicago school, a blighted area was one comprised of properties in a state of decline. *See, e.g.*, Homer Hoyt, ONE HUNDRED YEARS OF LAND VALUES IN CHICAGO 364 (1936). *See also* Ernest Burgess, *The Growth of the City: An Introduction to a Research Project*, in THE CITY 47 (Robert E. Park et al. eds., 1925) (arguing that a blighted area is marked by a "speeding up of the junking process in the area of deterioration"); Pritchett, *The "Public Menace" of Blight*, at 16-17 ("Blight arose around the central business district, in areas that were formerly residential. As cities expanded, these areas became mixed use districts, with industry and commerce. The formerly attractive housing was divided into smaller units for the poor, and 'parasitic and transitory services' such as flophouses proliferated.")(citing Roderick D. McKenzie, *The Ecological Approach to the Study of the Human Community*, in THE CITY 76 (Ernest Burgess et al. eds., 1925)).

Other scholars and planners echoed the "blight" definition first employed by the Chicago sociologists. *See*, *e.g.*, Edith Elmer Wood, SLUMS AND BLIGHTED AREAS IN THE UNITED STATES 3 (1935)("A blighted residential area is one on the down grade, which has not reached the slum stage.");[9] PRESIDENT'S CONFERENCE ON HOME BUILDING AND

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[9] Historically, a slum was defined as:

> a residential area with an extreme condition of blight. The slum is relatively easy to locate and define. There seems to be a general agreement that it is an area in which the housing is so unfit as to constitute a menace to the health and morals of the community, and that the slum is essentially of social significance.

Mabel L. Walker, URBAN BLIGHT AND SLUMS 3 (1938). *See also* NATIONAL ASSOCIATION OF HOUSING OFFICIALS, HOUSING OFFICIALS YEARBOOK 1936, at 243 ("Slum – an area in which predominate dwellings that either because of dilapidation, obsolescence, overcrowding, poor arrangement or design, lack of ventilation, light or sanitary facilities, or a combination of these factors, are detrimental to the safety, health, morals and comfort of the inhabitants thereof."); Walker at 3 ("A slum district is defined as an area or neighborhood, the buildings in which are used predominantly, though not necessarily exclusively, for habitation and residence and in which, owing to the age, design and character of the buildings, the inadequacy of open spaces in proportion to built-upon spaces or the poor distribution of open and built-upon spaces, the existing plan and arrangement of lots and streets and utilities, the types of business or industries which have invaded or surround the district, or other causes and factors, the physical conditions are not conducive to the physical and moral health of the inhabitants and residents, and present difficulties and handicaps to the attainment of sanitary hygienic and moral standards, which difficulties and handicaps may be removed or lessened by the replanning and rebuilding of the area or neighborhood.")(quoting Model City Charter of the National Municipal League); *id.* ("The term 'slum' means any area where dwellings predominate which by reason of dilapidation, overcrowding, faulty arrangement or design, lack of ventilation, light or sanitation facilities, or any combination of these factors, are detrimental to safety, health, or morals.")(quoting United States Housing Act of 1937, 42 U.S.C. § 1437 *et seq.*, known as Wagner-Steagall bill).

It should be noted that a slum was not always a blighted area; the two concepts could be distinct. A slum, as long as it was an economically productive area (e.g., landlords profiting precisely because of overcrowding) would not be classified as being in a blighted condition as that term was historically understood. *See*, *e.g.*, PRESIDENT'S CONFERENCE ON HOME BUILDING AND HOME OWNERSHIP, 3 SLUMS, LARGE SCALE HOUSING AND DECENTRALIZATION 2 (John M. Gries & James Ford eds., 1932 (noting that in some circumstances "a slum has become economically profitable because of the high rents that can be

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HOME OWNERSHIP, 3 SLUMS, LARGE SCALE HOUSING AND DECENTRALIZATION 41 (John M. Gries & James Ford eds., 1932)("A blighted area is an area where, due either to the lack of a vitalizing factor or to the presence of a devitalizing factor, the life of the area has been sapped."); Walker, URBAN BLIGHT, at 6 ("Old buildings are neglected and new ones are not erected and the whole section becomes *stale* and unprofitable. In other words, blight is a condition where it is not profitable to make or maintain improvements.")(emphasis added) *id*. at 7 ("Instead of being improved in an appropriate manner, buildings are allowed to rot and let out to the most economically helpless of the city's inhabitants."); *id*. at 17 ("[A]ll the visible manifestations of blight appear. Structures become shabby and obsolete. The entire district takes on a down-at-the-heel appearance. The exodus of the more prosperous groups is accelerated. Rents fall. Poorer classes move in. The poverty of the tenants contributes further to the general air of shabbiness. The realty owner becomes less and less inclined or able to make repairs. … At length the worst sections become slums with high disease and high crime rates."); C. Louis Knight, *Blighted Areas and Their Affects Upon Land Utilization*, in THE ANNALS OF THE AMERICAN ACADEMY 134 (1930)("We may define the term 'blighted area,' therefore, as any area in which *economic development has been considerably retarded*, as compared with the economic development in the larger area, of which the area under consideration is a part.")(emphasis added).

Crucial to the historical understanding of blight was that the current condition of the area in question was one of deterioration, decay and stagnation. *See* Walker, URBAN BLIGHT, at 4 ("Practically the one point on which all writers seem in agreements is that a blighted area is one which is deteriorating, and this is the point most emphasized in the … definitions."); CLARENCE ARTHUR PERRY, THE REBUILDING OF BLIGHTED AREAS: A STUDY OF THE NEIGHBORHOOD UNIT IN REPLANNING AND PLOT ASSEMBLAGE 8 (1933)("Blight [is] an insidious malady that attacks urban residential districts. It appears first as a barely noticeable deterioration and then progresses gradually through many stages toward a final condition known as the slum."); NATIONAL ASSOCIATION OF HOUSING OFFICIALS, HOUSING OFFICIALS YEARBOOK 1936, at 241 (defining "[b]lighted

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obtained for improper use, and is no longer blighted according to the definition."). WALKER, URBAN BLIGHT, at 6 ("A blighted area is generally unprofitable, but the opposite may be true of certain slums," noting that because slums tend to be overcrowded, they are therefore profitable). As a leading scholar commented in explaining the difference between a "blighted area" and a "slum", "the term 'blight' is used in an economic sense, while the designation 'slum' is essentially of social significance," such that a blighted area is

> one which has deteriorated from an economic standpoint and therefore becomes less profitable to the city, the general public and the owners of its real estate. Depreciation has set in and the area is rapidly becoming a liability rather than an asset. Its characteristics are changing and its future is indefinite. When 'blight' has progressed far enough to seriously affect social conditions, such as health, morality and standards of living, then the 'slum' stage is reached and the section becomes not only uneconomic but also socially undesirable.

Walker, URBAN BLIGHT, AT 5, 6 (quoting Regional Plan Association, Information Bulletin No. 16).

[a]rea as "[a]n area in which deteriorating forces have obviously reduced economic and social values to such a degree that widespread rehabilitation is necessary to forestall the development of an actual slum condition."); JAMES FORD, SLUMS AND HOUSING 11 (1936)("Any area of deteriorated housing in which there is a poor upkeep of houses and premises is a blighted district and a potential slum.").[10]

Courts too have long echoed the notion that blight was predicated on a present, stagnant condition of the land. *See, e.g., Berman v. Parker*, 348 U.S. 26, 35 (1954)(stating that "blight" refers to an area "possessed of a congenital disease" and containing a "cycle of decay," and that blight removal is intended to eliminate conditions such as the lack of adequate streets and alleys, the absence of recreational areas, the lack of parks, and the presence of outmoded street patterns); *Levin v. Tp. Committee of Tp. of Bridgewater*, 57 N.J. 506, 538 (1971)(stating that a blighted area refers to a situation where "potentially useful land reaches a stage of stagnation and unproductiveness through one or more causes"); *id*. at 540 (noting that "removing the decadent effect of blight" can "make the difference between continued stagnation and decline and a resurgence of healthy growth")(quoting *Wilson v. City of Long Branch*, 27 N.J. 360, 370 (1958).

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

> Amend page 3, Section I, by adding a new paragraph 7 to read as follows:
>
> 7. The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired. Municipal, public or private corporations may be authorized by law to undertake such clearance, replanning, development or redevelopment, and improvements made for these purposes and uses, or for any of them, may be exempted from taxation, in

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[10] *See also* Walker at 5 (quoting National Municipal League, Model City Charter (1937)):

> A blighted area is defined as an area in which, owing to the obsolescent condition and character of the buildings therein, the existing division or arrangement of lots and ownerships and street and other open spaces, the mixed character and used of the buildings, and other factors and causes, values have depreciated with consequent decline or stagnation of development and damage and loss to community prosperity and taxable values, and where a restoration of the economic vigor of the area and of its attainable contribution to the economic strength and prosperity of the community may require a replanning of the area, and, for the accomplishment of such replanning, a concentration or redistribution of ownership or developmental control is requisite.

> whole or in part, for a limited period of time during which the profits of and dividends payable by any private corporation enjoying such tax exemption shall be limited by law. The conditions of use, ownership, management and control of such improvements shall be regulated by law.

PROCEEDINGS OF THE NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, Vol. II, at 1245.

In support of her amendment, Ms. Barus stated:

> The older cities in the State, in common with most older cities everywhere, I imagine, have been facing an increasingly difficult situation as the years advance. Certain sections of those cities have fallen in value, and have became what is known as 'blighted' or 'depressed' areas. This has happened, sometimes, because the population has shifted from one part of the town to another, or one section has become overcrowded. Sometimes it has happened because the district has turned to business instead of residential, or partly to business; and sometimes simply because the buildings themselves, although they were originally good and may have been fine homes, have become so outdated and obsolescent that they are no longer desirable, and hence, no longer profitable.
>
> These depressed areas go steadily down hill. The original occupants move away, the rents fall, landlords lose income and they make up for it by taking in more families per house. It's impossible to keep the properties in good condition, the houses deteriorate more and more, and what was once a good section of town is on the way to becoming a slum.

PROCEEDINGS OF THE NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, Vol. I, at 742. *See also id*. at 743 (Ms. Barus stating that a "blighted area … cannot turn the tide of deterioration"). The Constitutional delegates approved Ms. Barus's "blighted area" proposal, *id*. at 745. Thus, although they did not adopt a specific textual definition of "blighted area," the framers of the 1947 New Jersey Constitution were in agreement with scholars and urban planners that blight, when applied to land redevelopment, necessarily included a current characteristic of decay and deterioration.

III. Portions of the 1992 Local Redevelopment and Housing Law Exceed the Constitutional Meaning of "Blighted Area"

In a series of laws enacted over the last 50 plus years the Legislature has attempted to define the crucial, limiting, constitutional term "blighted area." As explained in the Public Advocate's Report, *Reforming the Use of Eminent Domain for Private Redevelopment in New Jersey* (hereinafter "*Reforming the Use of Eminent Domain*"), it is the opinion of the Public Advocate that the most recent legislative enactments have far exceeded the constitutional understanding of "blighted area," raising

concerns that eminent domain is being used for private redevelopment in an unconstitutional fashion.

The 1992 Local Redevelopment and Housing Law (hereinafter "LRHL"), the broadest legislative attempt to define "blighted area," listed six criteria permitting private redevelopment via eminent domain. A 2003 amendment to the LRHL added a seventh "blighted area" criterion. *See Reforming the Use of Eminent Domain* at 11-12. Each of these seven criteria must satisfy the constitutional understanding of "blighted area" in order to pass muster.[11] The most constitutionally problematic of the criteria is (e), which permits a blight finding simply if a lack of "proper utilization leads to the area being "not fully productive." *See* N.J.S.A. § 40A:12A-5.e. Criterion (h), addressed to smart growth planning, is also beyond the constitutional understanding of blight. Applying the analysis from Sections I and II above to criteria (e) and (h) leads to the conclusion that the LRHL exceeds constitutional bounds.[12]

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[11] Technically speaking, the LRHL criteria refer to an "area in need of redevelopment" and not the constitutional term "blighted area." Despite this attempt to eliminate the constitutional language, caselaw and the LRHL itself make clear that the seven criteria must comport with the constitutional "blighted area" clause. *See Forbes*, 312 N.J.Super., at 529 (Because the"[d]efinitional standards were not changed in any material respect" between the 1992 LRHL and the 1951 Blighted Area Act, an area cannot qualify as area in need of redevelopment unless "it meets exactly the same standards of blight required by the Blighted Area Act."); *id*. ("The word 'blight' may have been left out of the LRHL but the concept and long-standing definition of blight remain firmly fixed therein . . . [Thus] [t]he area must be found to be blighted in conformance with the same standards as theretofore even though we no longer call it a blighted area but rather an area in need of redevelopment."). *See also* N.J.S.A. § 40A:12A-6.c ("An area determined to be in need of redevelopment 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. If an area is determined to be a redevelopment area and a redevelopment plan is adopted for that area in accordance with the provisions of this act, the municipality is authorized to utilize all those powers provided in section 8 of P.L. 1992, c.79 (C.40A:12A-8)"); N.J.S.A. § 40A:12A-3 ("Redevelopment area" or "area in need of redevelopment" means an area determined to be in need of redevelopment pursuant to sections 5 and 6 of P.L.1992, c. 79 (C.40A:12A-5 and 40A:12A-6) or determined heretofore to be a "blighted area" pursuant to P.L.1949, c. 187 (C.40:55-21.1 et seq.) repealed by this act, both determinations as made pursuant to the authority of Article VIII, Section III, paragraph 1 of the Constitution.").

Thus each redevelopment criterion of the LRHL must satisfy the constitutional "blighted area" requirement before they can legally be sustained. The term "area in need of redevelopment" is simply a semantics change that cannot obscure constitutional considerations applicable to the "blighted area" clause. *See, e.g., Concerned Citizens of Princeton, Inc. v. Mayor and Council of Borough of Princeton*, 370 N.J.Super. 429, 456 (App. Div. 2004)(concluding that "change in verbiage [from "blight" to "in need of redevelopment"] was 'cosmetic only' since the definitional standards for such a designation remained virtually unchanged.")(quoting *Forbes*, 312 N.J. Super, at 528-529).

[12] This section of the Appendix is only intended to provide legal support for the Report's conclusion that criteria (e) and (h) are unconstitutional. This section is not in any way intended to imply that other criterion are therefore constitutional as a full analysis of the remaining criteria is beyond the scope of the Appendix. It should be noted, however, that LRHL criteria (a)-(d) may withstand constitutional scrutiny even though criteria (a) and (d) are more analogous to the traditional definition of a "slum," which can be distinct from a "blighted area" as discussed above, *see supra* note 1. This may be because criteria (a)-(d) are very similar to the criteria (a)-(d) in the 1951 Blighted Area Act that were found by the State Supreme Court to be constitutional. In sustaining the statutory definition of blight in the 1951 Blighted Area Act, the *Wilson* Court in 1958 stated:

(continued)

A. *Criterion (h) is Facially Unconstitutional*

Under LRHL criterion (h), an area is blighted if "[t]he designation of the delineated area is consistent with smart growth planning principles adopted pursuant to law or regulation." N.J.S.A. § 40A:12A-5.h. This criterion violates the constitutional limitation.

Smart growth speaks to future change and alternative uses for land. By comparison, as discussed above, the term "blighted area" historically and constitutionally focuses on the present state of the land and not possible future uses for the land. Indeed, the word "blighted," by plain meaning, implies that the deleterious condition has already occurred. Thus there is no logical connection relation between an area designated for smart growth and a blighted area; on its face, criterion (h) exceeds constitutional bounds. Whether an area's current use is consistent with smart growth planning principles simply has nothing at all to do with determining whether the area is presently in a blighted condition.

If eminent domain can be used for areas that are targets of smart growth then numerous non-blighted areas would be at risk. The reference to smart growth areas in criterion (h) *de facto* categorizes all State Planning Areas 1 and 2 – which include both metropolitan and suburban areas – as "blighted areas." *See* N.J.S.A. § 13:1D-144. While there may certainly be smart growth areas that are also blighted, there can also be smart growth areas that in no way qualify as blighted areas; thus to categorically designate all smart growth areas as blighted exceeds constitutional limits. An area could meet none of

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> Manifestly, the grant of power [accorded by the Constitution] contemplated development and implementation by the Legislature. Definition of blight was the ordinary and expected incident of the exercise of that power and no reasonable argument can be made that the connotation ascribed to it overreaches the public purpose sought to be promoted by the Constitution.

Wilson, 27 N.J. at, 381-82. *See also Forbes*, 312 N.J.Super, at 528-529 (stating that "[t]he 1951 statutory definition, moreover, clearly constituted and came to constitute a community consensus and expressed a common understanding of what is meant by blight subject to public remediation.")(citing, *Wilson*, 27 N.J., at 370)). The *Forbes* Court noted the similarities between criteria (a)-(d) in the 1951 Act and the LRHL:

> The only change made by paragraph (a) of the 1992 Act in its 1951 counterpart was the elimination of the reference to dwellings and the addition of unwholesome working as well as living conditions, making clear that the described conditions were not to be limited to residential properties only. The only change made by paragraph (b), which addresses discontinuance of use, was the addition of commercial as well as manufacturing or industrial purposes to which the property had originally been put. The only change made by paragraph (c) was the addition of public lands. The only change made by paragraph (d), one of the provisions at the heart of this controversy, was the elimination of the parenthetical reference to "slum areas."

Id. at 526. It should also be noted that *Wilson's* approval of criterion (e) in the 1951 Blighted Area Act is of no import to the constitutionality of criterion (e) in the LRHL given the radical changes to the 1951 version of criterion (e) made by the LRHL.

the traditional requirements of a "blighted area" but because it fell within a swath targeted for smart growth, it would be blighted. The potential for abuse is apparent and the Constitutional limitation must be enforced.

B. *Criterion (e) Violates the Constitution's "Blighted Area" Requirement*

1. Criterion (e) Ignores the Present Condition of the Land, an Integral Part of Defining a "Blighted Area"

From 1951 to 1992, the precursor to the LRHL's criterion (e) permitted a finding of blight for a delineated area where there was

> [a] growing or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein and other conditions, resulting in a *stagnant and unproductive* condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

Blighted Area Act of 1951, *codified at* N.J.S.A. § 40:55-21.1.e, *repealed by* P.L. 1992, c.79, § 59 (emphasis added).

As the Public Advocate's Report makes clear, the LRHL made a significant and constitutionally unsupportable change in this definition of "blighted area." *See Reforming the Use of Eminent Domain* at 12-13. The LRHL replaced the long-standing criterion of "stagnant *and* unproductive condition" with the standard of "stagnant *or not fully productive* condition." N.J.S.A. § 40A:12A-5.e. (emphasis added). Unlike the substitution of "area in need of redevelopment" for the term "blighted area," the change in criterion (e) from *and* to *or* is important for purposes of constitutional compliance. *But see Forbes*, 312 N.J.Super., at 526-527 (claiming that "paragraph (e) of N.J.S.A. 40A:12A-5 … made virtually no change in its N.J.S.A. 40:55-21.1 counterpart," which was constitutional).

Under the current criterion (e), stagnancy is no longer a requirement, in direct contravention of the deep-rooted understanding and definition of blight as discussed above. Furthermore, an area need not be "unproductive" either. Instead, under criterion (e), an area can be deemed blighted if it simply is "not fully productive," which by definition must focus on alternative, future uses of the land. As discussed above, however, blight by definition requires an examination of the current condition of the land and a present finding of deterioration and stagnation.

Additionally, the term "not fully productive" implies that there can be non-deteriorated areas that fall within its ambit. For instance, Drumthwacket, the Governor's official residence, is a "stately home" that is "one of the most fabled and elegant of America's executive residences," *see* http://www.drumthwacket.org/history.html, yet the property could also be considered "not fully productive" because a hotel or apartment house catering to hundreds, for instance, would be a more productive use of the property.

This "not fully productive" usage thus directly contradicts "*the one point* on which all writers seem in agreement … that a blighted area is one which is deteriorating. . .." WALKER, URBAN BLIGHT, at 4 (emphasis added).

Thus this shift from an examination of whether the current state of the land is deteriorated to consideration of some alternative, prospective use does not comport with the constitutional understanding of "blighted area" and therefore violates N.J. CONST. Art. VIII, § III, ¶ 1. Simply put, if the criterion only requires that an area be "not fully productive," then eminent domain can be used to seize non-blighted areas, in direct violation of the limitation the New Jersey Constitution places on eminent domain for private redevelopment purposes.

A clear example of how the LRHL's removal of the stagnancy requirement from criterion (e) can lead to the taking of non-blighted areas, and thus violate the State Constitution, can be seen in the recent United States Supreme Court case *Kelo v. City of New London.* In that case, as part of a larger redevelopment project, the city of New London, Connecticut sought to take the specific homes in question to "support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina." *Kelo*, 125 S.Ct. at 2659. The Court noted that "[*t]here is no allegation that any of these properties* [within the area designated for redevelopment via eminent domain] *is blighted* or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area." *Id*. at 2660 (emphasis added). The Court described an area that hardly could be considered stagnant, as it found that many of the properties in question had undergone "extensive improvements" and that some were being used as "investment properties." *Id.* Thus the question was whether an area that all acknowledged was in no way blighted could nonetheless be seized for private redevelopment to create a "small urban village," with a hotel, restaurants, shopping and other commercial uses. *Id*. at 2659. Certainly, by comparison to the use envisioned, the residential area in question was "not fully productive." The Supreme Court upheld New London's proposed taking as appropriate under the federal "public use" doctrine. *Id*. at 2668 (approving taking because "[t]his Court's authority, however, extends only to determining whether the City's proposed condemnations are for a 'public use' within the meaning of the Fifth Amendment to the Federal Constitution.").

Similarly, under criterion (e) of the LRHL, an area of well-maintained homes could be seized for private redevelopment because there is a more economically valuable use of the land. Such a scenario was permissible in Connecticut because, unlike New Jersey, that State does not have a constitutional "blighted area" limitation, so the *Kelo* scenario was only analyzed under the Federal Constitution. *Id*. at 2656 ("The question presented is whether the city's proposed disposition of this property qualifies as a 'public use' within the meaning of the Takings Clause of the Fifth Amendment to the Constitution."). The exact opposite, however, should be true in New Jersey because the State Constitution imposes a clear limitation on such takings by requiring that they first meet the "blighted area" test. *See Kelo* at 2668 (holding that a State can have stricter requirements than the federal "public use" doctrine by enacting constitutional prohibitions that "plac[e] further restrictions on [a State's] exercise of the takings

power").[13] By removing any consideration of what condition the land currently is in and instead imposing a test of what the land could be, the LRHL's criterion (e) can lead to unconstitutional takings. There is simply no constitutional support for criterion (e)'s premise that a blight finding can be made based only on a forward-looking approach without any consideration of the current conditions of land use.

The New Jersey Courts have long-recognized that stagnancy, i.e., the present use of the land, is integral to a finding of blight. *See Levin*, 57 N.J. at 540 (governing principle of State law was that "[s]oundly planned redevelopment [of blighted areas] [would] make the difference between continued stagnation and decline and a resurgence of healthy growth."). *Cf. Spruce Manor Enterprises v. Borough of Bellmawr*, 315 N.J.Super. 286, 294 (Super. Ct. 1998)("Before [a declaration of blight can occur], there must be evidence that the characteristics of the complex lead to unwholesome living conditions or are detrimental to the safety, health, morals or welfare of the community.")(invalidating "area in need of redevelopment" finding made on basis of criterion (a) and (d)).[14]

Other State courts have similarly focused on the current use of the area and not the possible, imaginable uses when determining whether a "blighted area" finding is appropriate. For instance, as the California Supreme Court made clear, a "determination of blight [should] be made – not on the basis of potential alternative use of the proposed area – but on the basis of the area's existing use." *Sweetwater Valley Civic Ass'n v. City of National City*, 555 P.2d 1099, 1103-04 (Cal. 1976). *See also Redevelopment Agency v. Hayes*, 266 P.2d 105, 127 (Cal. App. 1954)(holding that eminent domain powers "never can be used just because the public agency considers that it can make a better use or planning of an area than its present use or plan."); *id*. at 116 (holding that "[o]ne man's land cannot be seized by the Government and sold to another man merely in order that

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[13] A *Kelo*-type taking of property for private redevelopment purposes without a prior finding of blight should not be permissible in New Jersey precisely because New Jersey has the heightened constitutional protections that *Kelo* acknowledges would impose limitations on the eminent domain power. Yet, as it currently stands, criterion (e) vitiates the "blighted area" clause's restriction on takings for private redevelopment.

[14] Nonetheless, the New Jersey Courts have not adequately addressed the constitutionality of the LRHL's criterion (e). Since passage of the LRHL in 1992, the only reported New Jersey court decision that all analyzes criterion (e) from a constitutional perspective is *Forbes*, in which the only discussion states in full that, "[m]oreover, paragraph (e) of N.J.S.A. 40A:12A-5, here implicated as well, also made virtually no change in its N.J.S.A. 40:55-21.1 counterpart." *Forbes*, 312 N.J. Super. 526-527. Moreover, even though the *Forbes* Court seemingly found criterion (e) constitutional, upon application of that criterion the Court noted the ample evidence that the area in question was truly a "blighted area" as that should properly be understood for purposes of the New Jersey Constitution:

> There was certainly 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.

Forbes, 312 N.J. Super., at 530 (citing evidence of "unproductive and inaccessible rear areas of commercial properties" and "functionally obsolescent structures.")

the purchaser may build upon it a better house or a house which better meets the Government's idea of what is appropriate or well-designed."). *But see Tierney v. Planned Industrial Expansion Authority*, 742 S.W.2d 146, 151 (Mo. 1987)(approving "the concept of 'economic underutilization' as a basis for condemnation" for urban redevelopment purposes.).[15]

In addition, from a historical standpoint, an area would not be considered blighted by scholars and urban planners if it merely was not being utilized in the most economically productive manner, yet criterion (e) would permit a blight finding under such circumstances. *See, e.g.*, WALKER, URBAN BLIGHT, at 4 ("[T]he mere fact that taxes received from a section of the community are less than the governmental expenditures made in that section is no proof of blight. Otherwise many counties of every state and many states of the Union could be characterized as blighted."); *id*. (noting that attempts to define "blighted area" as one that is not economically self-supporting or that "has become an economic liability to the community" are "entirely on the wrong track.").

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[15] It is unclear why the Missouri Court discussed "economic underutilization" as a basis for upholding a "blighted area" designation because that concept does not appear to be a criterion for making a "blighted area" determination under Missouri's redevelopment statute. *See* MO. ANN. STAT. § 100.310(2) ("'Blighted area' [means] an area which, by reason of the predominance of defective or inadequate street layout, insanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, retards the provision of housing accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals or welfare in its present condition and use."). *See also* MO. ANN. STAT. § 99.020 (3)("Blighted" shall mean any area where dwellings predominate which, by reason of dilapidation, overcrowding, lack of ventilation, light or sanitary facilities or any combination of these factors are detrimental to safety, health and morals.").

Missouri's Constitution does contain a "blighted area" clause similar to New Jersey's:

> Laws may be enacted, and any city or county operating under a constitutional charter may enact ordinances, providing for the clearance, replanning, reconstruction, redevelopment and rehabilitation of blighted, substandard or insanitary areas, and for recreational and other facilities incidental or appurtenant thereto, and for taking or permitting the taking, by eminent domain, of property for such purposes, and when so taken the fee simple title to the property shall vest in the owner, who may sell or otherwise dispose of the property subject to such restrictions as may be deemed in the public interest.

MO. CONST Art. VI, § 21.

2. The Legislative History of Various Statutory Interpretations of "Blighted Area" Indicates that Criterion (e) Is Beyond the Constitutional Meaning of "Blighted Area".

The legislative history of both the LRHL and its predecessor statutes provide strong support for the conclusion that criterion (e) exceeds the constitutional boundaries of Article VIII, § III, ¶ 1. According to the statement attached to the 1951 Blighted Area Act, the subsection (e) declaration of blight was added as an amendment to the 1949 law for the following purpose:

> to make uniform the definition of 'blighted area' as given in the act which this bill amends, in the Local Housing Authorities Law (P.L. 1949, c. 300), and in the Redevelopment Agencies Law (P.L. 1949, c. 306).

Rev. Stat. Cum. Supp. § 40:55-21.1 (1951). The New Jersey Supreme Court has ruled that subsection (e) in the 1951 Blighted Area Act was "undoubtedly based" on the "legislative determination[s]" in the Local Housing Authorities Law of 1949 and the Redevelopment Agencies Law of 1949. *See Levin*, 57 N.J. at 510-511. Both of those statutes define "blighted area." The findings in both of those statutes call into question the constitutionality of the current definition of "blighted area" in criterion (e).

The Local Housing Authorities Law, L. 1949, c. 300, *codified at* N.J.S.A. § 55:14A-31, *repealed by* P.L. 1992, c.79, § 59, contained the following relevant legislative determination:

> It is hereby found and declared (a) that there exist in many communities within this State blighted areas (as herein defined) or areas in the process of becoming blighted; (b) that such areas impair economic values and tax revenues; that such areas cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the residents of the State, that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident protection, and other public services and facilities; (c) that the clearance, replanning and preparation for rebuilding of these areas, and the prevention or the reduction of blight and its causes, are public uses and purposes for which money may be spent and private property acquired and area governmental functions of State concern; (d) that there are also *certain areas* where the condition of the title, the diverse ownership of the land to be assembled, the street or lot layouts, or other conditions prevent a proper development of the land, and that it is in the public interest that such areas, *as well as blighted areas*, be acquired by eminent domain and made available for sound and wholesome development in accordance with a redevelopment plan, and that the exercise of the power of eminent domain and the

> financing of the acquisition and preparation of land by a public agency for such redevelopment is likewise a public use and purpose….

L. 1949, c.300, ¶ 1 (emphasis added). The legislative determination thus distinguished "blighted areas" from "certain areas where the condition of the title, the diverse ownership of the land to be assembled, the street or lot layouts, or other conditions prevent a proper development of the land." *Id.* Importantly the "certain areas" that were distinguished by the Local Housing Authorities Law were those areas contained in the Act's "blighted area" definition (e), since repealed, which stated:

> The term 'blighted area' is defined to be that portion of a municipality which by reason of, or because of, any of the conditions hereinafter enumerated is found and determined as provided by law to be a social or economic liability to such municipality: A growing or total lack of *proper utilization* of areas caused by *the condition of the title, diverse ownership of the real property therein and other conditions*, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

N.J.S.A. 40:55C-3(e), *repealed by* P.L. 1992, c.79, § 59 (emphasis added). The definition is repeated verbatim in the 1951 Blighted Area Act, which is consistent with the stated goal of wanting a uniform definition of "blighted area." The understanding of blight in the Local Housing Authorities Law thus informs the understanding in the Blighted Areas Act. At the time definition (e) was added to the 1951 Blighted Areas Act it was admittedly beyond the constitutional understanding of "blighted areas" because it was addressed to "certain areas" that were specifically *not* blighted areas. Thus even prior to the LRHL, subsection (e)'s definition of blight did not conform with constitutional standards. Because, as noted above, LRHL criterion (e) simply expanded for the worse the already questionable 1951 Blighted Areas Act definition (e), criterion (e) in the current law is constitutionally deficient.

Additionally, the legislative history of the LRHL itself supports the conclusion that criterion (e) is unconstitutional. In January 1987, a New Jersey Commission recommended abolishing the Local Housing Authorities Law, the Redevelopment Agencies Law, and the Blighted Areas Act and consolidating their principles "into a single Local Housing and Redevelopment Law in Title 40A of the Revised Statutes." State of New Jersey County and Municipal Government Study Commission, *Local Redevelopment in New Jersey: Structuring a New Partnership* xiii (1987). The Commission's report became the basis for the 1992 LRHL. *See* Senate Community Affairs Committee Statement to Assembly Bill No. 1138 (1992)("This bill, entitled the "Local Redevelopment and Housing Law, revises, consolidates and clarifies the various statutes related to the exercise of redevelopment and housing powers by local governments into a modern and comprehensive statute. The revision was recommended by the County and Municipal Government Study Commission in its report, *Local*

Redevelopment in New Jersey."). In recommending changes to the determination of whether an area is blighted, the Commission stated:

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

State of New Jersey County and Municipal Government Study Commission, *Local Redevelopment in New Jersey: Structuring a New Partnership* 58 (1987)(emphasis added). The Commission then recommended that "a new local housing and redevelopment law allow municipalities to designate an area as either being an 'area in need of redevelopment' or an 'area in need of rehabilitation.'" *Id.* The Committee suggested that "[t]he definition of an area in need of redevelopment should be *adapted from* the current definition of a blighted area, *broadening it* to include the *under-utilization of existing commercial and industrial properties in the community*." *Id.* The Legislature followed the Commission's recommendation by defining a "blighted area" based on the underutilization of the land.[16]

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[16] The new criterion (e), however, exceeds even the Commission's recommendation because it does not limit the underutilization-based definition of "blighted areas" to commercial and industrial properties. There is simply nothing in criterion (e) that would exclude private redevelopment of residential properties, such as the Drumthwacket example discussed above. While the New Jersey Constitution does not distinguish between commercial and non-commercial blight, caselaw does provide support for the contention that criterion (e) should not be used, at the very least, to support a taking of a residential area for private redevelopment. Discussing the predecessor to LRHL criterion (e), the Supreme Court in *Levin* noted that:

> Sensibly, then it must be said that the Legislature intended by means of (e) to encourage the proper and sound growth of suburban and rural land, *particularly open areas* which because of the conditions described therein were stagnant and unproductive but which, in the judgment of the municipal authorities, were potentially useful and valuable.

Levin, 57 N.J. at 515 (emphasis added); *id*. at 537-538 (finding that the in enacting subsection (e) of the Blighted Area Act, the Legislature "declared that where parcels of *vacant land* are characterized by lack of proper utilization, . . . the area is blighted")(emphasis added). *See also Forbes*, 312 N.J. Super. at 259 (stating that "concept of blight also embraced the total unproductivity of *unimproved vacant land*")(emphasis added); *id*. at 259-60 (noting that commercial blight "embraced … all the adverse physical conditions of property that individually or in combination impeded its reasonable productivity and resulted in its negative impact upon the general welfare and economic well-being of the community").

The constitutional term "blighted area" and its concomitant limitation on the use of eminent domain for private redevelopment is not a fluid and evolving concept tied to shifts in the "focus of public action" and the desires of "municipalities that are considering the redevelopment of parts of their communities."[17] Nor is the constitutional meaning of "blighted area" one that can be adapted and broadened beyond "the current definition." To the contrary, as discussed above, the "blighted area" clause was intended and understood as a fixed limitation on the Legislature's power. By expanding the "current definition of a blighted area," the LRHL criterion (e) exceeds constitutional bounds.

3. The Expansive Scope of Criterion (e) is Unique Among the States

The conclusion that the LRHL's criterion (e) is unconstitutional is bolstered by the fact that no other State gives local government as expansive an authority as contained in criterion (e). All 50 States, the District of Columbia, Guam, Puerto Rico and the Virgin Islands have redevelopment statutes defining "blighted areas." Only eight of these statutes would permit a blight finding based on the economic use of the land.[18] Of these few statutes, none contains language as permissive as New Jersey's LRHL criterion (e).

Four of the eight jurisdictions permitting such "economic use" takings also require a stagnancy finding – as New Jersey did prior to the enactment of the LRHL – if the blight determination is sought based on economic use.[19] Of the remaining four

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[17] Were "blighted area" simply a statutory construct, then the Legislature would certainly be free to amend the definition to fit shifts in public perception and municipal needs. However, as is clear in New Jersey, "blighted area" is a constitutional limitation which any statutory interpretations cannot ignore or exceed.

[18] "Economic use of the land" includes arrested economic development, stagnant and/or unproductive character of the land, loss of population, and improvement in value of land by placement of development. *See* Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389, 396 (2000) As of 2000, 10 of the 54 jurisdictions would have permitted a blight finding based on the economic use of the land. *See id*., at 401. Since that time, the District of Columbia, Indiana, and Massachusetts have eliminated this criterion and Minnesota has added the criterion, leaving eight jurisdictions that permit a "blighted area" determination to be based on economic use of the land. Missouri is not considered by the Department to be a jurisdiction that statutorily authorizes a blight finding based on economic use of the land because the permission for such taking in that State appears to be based only on caselaw. *See supra* note 15.

[19] These jurisdictions are Delaware, Minnesota, Nevada, and Oregon. In Delaware:

> 'Blighted area' means that portion of a municipality or community which is found and determined to be a social or economic liability to such municipality or community because of any of the following conditions **…** A growing or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein, tax or special assessment delinquency exceeding the fair value of the land, or the existence of conditions which endanger life or property by fire or other causes and other conditions, *stagnant and unproductive* condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

DEL. CODE ANN. tit. 31, § 4501 (3)(e)(emphasis added).

(continued)

jurisdictions that do not require stagnancy and thus would permit sole consideration of future use and not present condition in making an "economic use" blight finding,[20] just

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In Nevada:

> [e]xcept as otherwise provided [if the subject of the redevelopment is an eligible railroad or facilities related to an eligible railroad], 'blighted area' means an area which is characterized by at least four of the following factors … A growing or total lack of proper utilization of some parts of the area, *resulting in a stagnant and unproductive* condition of land which is potentially useful and valuable for contributing to the public health, safety and welfare.

NEV. REV. STAT. § 279.388.1(h)(emphasis added).

In Oregon:

> 'Blighted areas' means areas that, by reason of deterioration, faulty planning, inadequate or improper facilities, deleterious land use or the existence of unsafe structures, or any combination of these factors, are detrimental to the safety, health or welfare of the community. A blighted area is characterized by the existence of one or more of the following conditions . . . A growing or total lack of proper utilization of areas, *resulting in a stagnant and unproductive* condition of land potentially useful and valuable for contributing to the public health, safety and welfare.

OR. REV. STAT. § 457.010 (1)(h)(emphasis added).

In Minnesota:

> A redevelopment project may include any work or undertaking to acquire open or undeveloped land determined to be blighted by virtue of the following conditions: a combination of these or other conditions which have prevented normal development of the land by private enterprise and *have resulted in a stagnant and unproductive* condition of land potentially useful and valuable for contributing to the public health, safety, and welfare. Acquisition of such land shall be a redevelopment project only if a redevelopment plan has been adopted which provides for the elimination of these conditions, thereby making the land useful and valuable for contributing to the public health, safety, and welfare and the acquisition of the land is necessary to carry out the redevelopment plan.

MINN. STAT. ANN. **§** 469.028 Subd.3(3)(emphasis added)**.**

[20] In addition to New Jersey, these jurisdictions are New York, Oklahoma and Virginia.

In New York:

> 'Blighted area' means an area within a municipality in which one or more of the following conditions exist … (ii) a predominance of economically unproductive lands, buildings or structures, the redevelopment of which is needed to prevent further deterioration which would jeopardize the economic well being of the people.

N.Y. GEN. MUN. LAW §970-c(a)(ii)**.**

(continued)

two jurisdictions – New Jersey and New York – have a constitutional "blighted area" clause. *See* N.Y. CONST. Art. XVI, § 6.

As compared to New York, New Jersey's constitutional "blighted area" clause is far more restrictive. As discussed above, New Jersey's Constitution permits the use of eminent domain for private redevelopment only if a "blighted area" determination is first made. The New York Constitution permits takings for private development under far broader circumstances because it does not impose a "blighted area" requirement. Rather, New York authorizes the use of eminent domain for redeveloping "economically unproductive, blighted *or* deteriorated areas." N.Y. CONST. Art. XVI, § 6. Whereas New Jersey's Constitution mandates that blight be found before private redevelopment can proceed via eminent domain, New York's Constitution permits such takings for areas that are, for instance, simply "deteriorated." *Id*.

Yet, although New Jersey's Constitution is far more restrictive than the New York counterpart, New Jersey's redevelopment statute is far more permissive than New York's statute in allowing takings without a traditional blight finding. New York's redevelopment statute permits redevelopment to "prevent further deterioration," *see* N.Y. GEN. MUN. LAW §970-c(a)(ii), which necessarily implies that some deterioration must have already occurred before eminent domain power can be used for private redevelopment, in contrast to the LRHL's criterion (e). Additionally, New York's statute requires a finding that an area is "economically unproductive," *see id*., which also implies

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In Oklahoma, there are multiple eminent domain statutes, the broadest of which states that:

> 'Blighted area' shall mean an area in which there are properties, buildings, or improvements, whether occupied or vacant, whether residential or nonresidential, which by reason of … arrested economic development … any one or combination of such conditions which substantially impair or arrest the sound growth of municipalities, or constitutes an economic or social liability, or which endangers life or property by fire or other causes, or is conducive to ill health, transmission of disease, mortality, juvenile delinquency, or crime and by reason thereof, is detrimental to the public health, safety, morals or welfare.

OKLA. STAT. ANN. tit. 11, §38-101 (8). As compared to the LRHL's "not fully productive" standard, Oklahoma's "arrested economic development" criterion appears in plain meaning to be much more restrictive. Further, while not having been directly addressed by the Oklahoma courts, the Oklahoma term suggests some finding of traditional blight criteria such as stagnation or deterioration before a taking would be permissible under this ground. *See City of Midwest City v. House of Realty, Inc*., 100 P.3d 678, 686 (Okla. 2004)(noting that there is "a distinction between removal of blight and economic redevelopment. The former is the public purpose that constitutionally justifies the subsequent sale of the property for private use. [Here,] efforts at redevelopment are best understood in the context of how the Legislature has linked the removal of blight with economic development."). Additionally, Oklahoma does not have a constitutional limitation requiring a "blighted area" finding before eminent domain can be used for private redevelopment. *Id*. at 683 n.6.

In Virginia, " '[b]lighted area' means any area within the borders of a development project area which impairs economic values and tax revenues." VA. CODE ANN. § 58.1-3245.

a notion of stagnation and present condition evaluation, whereas the LRHL's "not fully productive" standard just suggests a more profitable alternative use.[21]

Finally, as a practical matter, even if the LRHL's criterion (e) somehow satisfies constitutional norms, reliance on that criterion alone to support the use of eminent domain for private redevelopment may place New Jersey in an anomalous position.[22] *Cf.* Colin Gordon, *Blighting The Way: Urban Renewal, Economic Development, And The Elusive Definition Of Blight*, 31 FORDHAM URB. L.J. 305, 314 (2004)(arguing that language in redevelopment statutes that "graft[ed] economic considerations, such as underutilization of land," onto the traditional notion of blight constituted an "almost complete debasement and deregulation of 'blight' as a guiding designation for urban renewal and redevelopment.").

[21] While the distinction may not be capable of precise quantification, there is some difference between "unproductive" and "fully productive." That New Jersey had an "unproductive" standard in criterion (e) for over 40 years until the LRHL rejected it for the "not fully productive" measure is proof alone that there is some difference between the two terms and ample reason to believe, given the constitutional deficiencies in LRHL criterion (e), that "unproductive" is a more restrictive measure.

[22] The LRHL permits seizure if only one of the seven criteria for use of eminent domain is satisfied. *See* N.J.S.A. § 40A:12-5. Courts nationwide, however, have loathed approving takings for private redevelopment if the sole ground is economic use of the area. *See* Luce, *The Meaning of Blight*, at 464 ("[F]or states in which [redevelopment authorities have attempted to base a finding of blight on the economic use of land], if this is the sole factor (or one of only two factors) cited, the courts tend not to find blight."); *id*. at 468 (stating that "[o]nly the Missouri courts have found blight where economic use was the sole factor."). Although the article was published in 2000, at this point, to the best of the Department's knowledge, Missouri courts remain the only ones to have approved what are essentially non-blighted takings. As noted above, Missouri's redevelopment statute does not have an "economic use" criterion but the State Constitution does have a "blighted area" clause. *See supra* note 15.