

Blight Means Blight



REDEVELOPMENT POST GALLENTHIN REALTY DEVELOPMENT, INC. V. BOROUGH OF PAULSBORO

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This past June the New Jersey Supreme Court rendered a unanimous decision that will likely curb "redevelopment" in New Jersey. The case, captioned *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, is hailed as a victory for private property owners, and is particularly noteworthy for redevelopment developers. In New Jersey, the case marks the swinging of the pendulum against the use of eminent domain for economic development which has, over the past decade, swung widely in favor of economic development culminating with the 2005 United States Supreme Court decision, *Kelo v. New London*, which found that there is no federal constitutional prohibition to local government invoking its powers of eminent domain to enhance economic growth.

The *Gallenthin* decision is effectively a response to *Kelo* and limits the use of eminent domain in the redevelopment context except as expressly intended by the New Jersey Constitution and the enabling legislation. The decision sets forth the requirement that an area be found "blighted" before it can be designated in need of redevelopment and thus subject to eminent domain. Although the *Gallenthin* Court acknowledged that the meaning of "blight" has evolved over the years, the Court found that the term retains one essential characteristic, i.e., a condition of deterioration or stagnation that negatively affects surrounding properties. The *Gallenthin* case represents a clear change in direction by New Jersey courts when reviewing challenges to redevelopment designations. Prior to *Gallenthin*, courts routinely upheld a redevelopment designation. The *Gallenthin* decision may serve to reverse the increasing trend by municipalities to designate properties in need of redevelopment in furtherance of economic progress without the classic characteristics of "blight".



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The *Gallenthin* case involved a sixty-three (63) acre parcel of land zoned marine industrial business park and located along the Delaware River in the Borough of Paulsboro, Gloucester County, New Jersey. The property consisted of mostly open space including protected wetlands and was bounded by an inactive British Petroleum ("BP") storage site and the Dow/Essex Chemical industrial property. In 1999, the Paulsboro Governing Body began the investigation of whether the BP and Dow sites could be designated as "an area in need of redevelopment" in accordance with New Jersey's statutory criteria known as the Local Redevelopment and Housing Law. Although not initially included as part of Paulsboro's redevelopment plan, the Paulsboro Governing Body later designated the property in the redevelopment area in May 2003. The *Gallenthin* family sued claiming Paulsboro misused state law in designating its property "in need of redevelopment" and its use of eminent domain. Although the *Gallenthin* family was unsuccessful at the trial and appellate court levels, the Supreme Court in *Gallenthin* overruled the lower courts.

In rendering its decision, the Supreme Court conducted a thorough analysis of the historical meaning of "blight" and held that under N.J.S.A. 40A:12A-5(e) of the Local Redevelopment and Housing Law, a property must "as a whole, be stagnant and unproductive because of issues of title, diversity of ownership or other similar conditions." The fact that a property is not "fully productive" cannot be the sole basis for a designation of redevelopment under N.J.S.A. 40A:12A-5(e).

Under the Local Redevelopment and Housing Law, an area qualifies as being in need of redevelopment if it meets at least one (1) of the six (6) criteria set forth in Section 5 of that law. (Two (2) additional criteria are provided under subsections N.J.S.A. 40A:12A-5(g) and (h), however it would appear certain that at least one (1) of the other six (6) criteria under N.J.S.A. 40A:12A-5 would also have to apply.) The *Gallenthin* case limits the reliance by municipalities on the fifth of the six criteria, N.J.S.A. 40A:12A-5(e) which up until the *Gallenthin* decision, had become the "catchall" criteria if the proposed redevelopment area did not fall squarely within any of the other five (5) criteria. To appreciate the impact of the Court's requirement for a finding of "blight" under N.J.S.A. 40A:12-5(e), a review of the other five (5) statutory criteria under the Local Redevelopment and Housing Law, N.J.S.A. 40A:12-5 is useful. The "a" and "b" criteria

solely" criteria found under "d".

As the express requirements of criteria "a" and "b" require a finding of blight, absent the required conditions, municipalities seeking to designate an area in need of redevelopment will often only have criteria "d" and "e" to rely upon. Often municipalities use criteria "d" and "e" together and following the requirements set forth by the Court in *Gallenthin*, a showing of "blight" will have to be found by municipalities when relying upon either criteria. Further, *Gallenthin* makes clear that a finding of "blight" must be consistent with the historical meaning of that term as supported by a clear and convincing record and not just by a "net opinion" of an expert. The *Gallenthin* case leaves open for future litigation its impact on the inclusion of "infill" properties within a redevelopment designation.

Developers involved or contemplating involvement in redevelopment are urged to undertake due diligence of both the procedural and substantive actions taken by a municipality in connection with the redevelopment designation. This is particularly important where private property must be acquired as part of the redevelopment and the powers of eminent domain must be invoked. Heightened due diligence should be followed where the basis of the redevelopment designation is "underutilization" or "obsolescence". In all cases, an objective review of whether the evidence supports a finding of "blight" should be undertaken. ■



The Lennar Centre Place at Edison is a redevelopment of a former military arsenal in Edison, New Jersey.

are the classic "blight" criteria where buildings are abandoned, deteriorated or vacant to the extent that they are in such disrepair that they are a threat to the community. The "c" and "f" criteria apply to longstanding vacant public land and areas destroyed by natural disasters, respectively, and accordingly the use of these two (2) criteria is limited to those somewhat unique circumstances. The remaining two (2) criteria are the "underutilization" criteria found under "e" (which was the criteria used by Paulsboro), and the "ob-

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