RUTGERS LAW RECORD

The Internet Journal of Rutgers School of Law | Newark

www.lawrecord.com

Volume 39 **2011-2012**

MANDATE OR MYTH: IS THERE A 'HEIGHTENED STANDARD' FOR REDEVELOPMENT AREA DESIGNATIONS, AND IF SO, FROM WHERE DOES IT COME?

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INTRODUCTION

In 2012, New Jersey's Local Redevelopment and Housing Law (LRHL)[1] governing the use of eminent domain for redevelopment will turn twenty years old. In its first ten years, LRHL enabled virtually unchecked exercises of local government authority to declare "areas in need of redevelopment."[2] In the last ten years, however, a combination of factors—ranging from pushback against overzealous condemnations to doubts about the effectiveness of redevelopment—has led the judiciary to more strictly interpret the statute and its constitutional foundations. Ultimately, municipal use of the LRHL has become less unfettered. Generally speaking, this has been appropriate both legally and policy-wise.

The most crucial step in this judicial reappraisal of the LRHL was the *Gallenthin Realty Dev. v. Borough of Paulsboro* decision in 2007.[3] The New Jersey Supreme Court held that under the New Jersey Constitution, declaring an area "in need of redevelopment" and thereby subject to eminent domain requires a showing of blight by substantial evidence.[4] The Court defined blight as having the "essential characteristic [of] deterioration or stagnation that negatively affects surrounding properties."[5]

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[1] N.J. STAT. ANN. §§ 40A:12A (West 2009).

[2] N.J. STAT. ANN. § 40A:12A-7(a).

[3] 924 A.2d 447, 459 (2007).

[4] *Id.* at 465.

[5] *Id.*

New Jersey courts subsequently applying *Gallenthin* have routinely characterized its holding as creating a "heightened standard" for them to apply in assessing the sufficiency of a municipality's "in need of redevelopment" ("blight") designation.[6] Because *Gallenthin* did not use such terminology, some observers have criticized the courts for misinterpreting *Gallenthin*.[7] In members of the redevelopment bar, this alleged mischaracterization has only added insult to the injury that its clients suffered by *Gallenthin's* restriction of the LRHL's breadth.

While the courts may have developed their own vocabulary to characterize *Gallenthin*, and while on a few occasions they have misused *Gallenthin*,[8] this paper argues that the courts have mostly correctly understood the import and effect of *Gallenthin*; namely, that it in fact created a heightened standard for proving that an area is "in need of redevelopment." By stating that 1) blight is "deterioration or stagnation that negatively affects surrounding properties," and that 2) such blight must be shown to constitutionally condemn property on the basis of any grounds provided in the LRHL, the New Jersey Supreme Court was announcing that more evidence would be necessary to condemn an area.[9] Since *Gallenthin* asserted a universal requirement of showing blight by substantial evidence—which was not previously understood to have existed—it is fair to say that *Gallenthin* "heightened" what must be shown by the government to declare a redevelopment area.

Part I of this paper will analyze *Gallenthin* to show that it implicitly announced a heightened standard applying to all portions of Section 5 of the LRHL. It will peruse post-*Gallenthin* decisions to point out where the courts have properly understood and applied this standard, and where they have misunderstood *Gallenthin*. It will also look at pre-*Gallenthin* cases to note how a few judges harkened the coming of *Gallenthin* through their earnest reading of the LRHL. Indeed, *Gallenthin* was not without its precursors. Some pre-*Gallenthin* opinions required that municipalities show conditions actually constituting blight in order for their blight designations to pass statutory muster, but most did not. Interestingly, but not surprisingly, the infamous *Kelo*[10] case jarred some judges and led them to reassess the true meaning of the LRHL before *Gallenthin* put a spotlight on the Blighted Areas Clause of the New Jersey Constitution and what it means for Section 5 of the LRHL.

Part II of this paper will conclude that, while there are many myths about the effect of *Gallenthin*, the idea of a "heightened" standard is no myth, but rather, a mandate provided by *Gallenthin* and the LRHL itself. This paper seeks to clarify the effect of *Gallenthin*, while pointing out the troublesome areas of the post-*Gallenthin* landscape that require serious legislative reform of the LRHL.

I. The Local Redevelopment and Housing Law and its Interpretation in *Gallenthin*

A. The Statute and its Relevant Parts

In New Jersey, the LRHL empowers a local government to declare "areas in need of redevelopment," within which the government may take property through the power of eminent

[6] *See*, *e.g.*, Cottage Imporium Inc. v. Broadway Arts Center L.L.C. 2010 WL15266045.
[7] *See id.*
[8] For example, some courts have incorrectly stated that *Gallenthin* requires the blight indicia of Section 5 to be applied on a lot-by-lot basis, a notion which plainly contravenes of statutory language. *See infra* Part II.B.
[9] *Gallenthin*, 924 A.2d at 459.
[10] Kelo v. City of New London Conn., 545 U.S. 469 (2005).

domain.[11] This statute is permitted, but also limited by, the Blighted Areas Clause of the New Jersey Constitution.[12] The powers conferred are sweeping,[13] but they are not triggered unless there is a "determination of [a] need for redevelopment" in a municipal resolution concluding that one of the eight conditions listed in Section 5 of the LRHL exist in a "delineated area."[14]

The eight situations identified in Section 5 cast a wide net over historic cities, making the statute a powerful tool for municipalities. Subsection (a) describes familiar indicia of blight using general terms. It allows takings in areas where the "generality of buildings are substandard, unsafe…dilapidated, or obsolescent…or are so lacking in light, air, or space[ ] as to be conducive to unwholesome living or working conditions."[15] The next subsection covers abandoned or "untenantable" commercial and manufacturing buildings,[16] and subsection (d) includes areas "detrimental to the safety, health, morals, or welfare of the community" because of their "dilapidat[ed], obsolescen[t], overcrowd[ed]" or poorly "arrange[d] or design[ed]" buildings and improvements.[17] Section 5 is inclusive and highly susceptible to interpretation, and could theoretically include almost any old urban neighborhood.[18] In addition, the circumstances described in Section 5 are to be assessed on an *area*-wide basis.[19]

Without a doubt, these facets of the LRHL are not problematic under the federal or state constitutions given landmark cases old and new, from *Berman v. Parker*[20] to *Gallenthin.*[21] However, considering the sweeping and subjective nature of the Section 5 indicia, *Gallenthin's* announcement that a common constitutional limitation applies to link all eight of the subsections and their various grounds for taking property makes sense. *Gallenthin* gave structure to Section 5 in a manner consistent with the original spirit and intent of the statute. By indentifying the common thread that runs through Section 5, the Court set a clear standard for municipal redevelopment designations, which can fairly be called "heightened."

B. Standard-setting by the *Gallenthin* court

The common linkage underpinning Section 5 of the LRHL, according to the New Jersey Supreme Court, is conformity to the Blighted Areas Clause of the New Jersey Constitution that requires blight "negatively affect[ing] surrounding property."[22]

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[11] N.J. STAT. ANN. § 40A:12A (West 2009).
[12] N.J. CONST., art. VIII, § § III, para. 1; *see also Gallenthin*, 924 A.2d at 456.
[13] *See* N.J. STAT. ANN. § § 40A:12A-3 (stating definition of "redevelopment area," which may include properties that do not trigger the statute); §40A:12A- 8 (list of powers conferred by designation).
[14] *Id.* § 40A:12A-5.
[15] *Id.* § 40A:12A-5(a).
[16] *Id.* § 40A:12A-5(b)
[17] *Id.* § 40A:12A-5(d).
[18] *See id.*; Brian N. Biglin, *Toward Successful Urban Revitalization: Why New Jersey Should Relinquish Some of its Berman Power to Bulldoze for "Redevelopment"*, 63 RUTGERS L. REV. 275, 286 n. 64 (2010).
[19] *Id.* at 286. Further, the LRHL's definition of "redevelopment area" states: "a redevelopment area may include lands, buildings, or improvements which of themselves are not detrimental to the public health, safety or welfare, but the inclusion of which is found necessary…for the effective redevelopment of the area of which they are part." N.J. STAT. ANN. §§ 40A:12A-3. This power, rarely questioned in the past, is now being criticized. *See Biglin*, *supra* note 18.
[20] 348 U.S. 26, 32-35 (1954).
[21] *See Gallenthin*, 924 A.2d at 464.
[22] *Id.* at 459.

In *Gallenthin*, the meaning of subsection 5(e) was at issue: the New Jersey Supreme Court read the statute in conjunction with the Constitution and concluded that the conditions listed must perpetuate blight in order to trigger the powers conferred by the LRHL.[23] To be constitutional, each provision in Section 5 must be "reasonably susceptible" to an interpretation conforming to the Blighted Areas Clause of the Constitution.[24] Every triggering condition in section 5 must therefore have an "essential characteristic" of blight; that is, the condition must cause "deterioration or stagnation that negatively affects [or has a "decadent effect on"] surrounding properties."[25] Any lesser interpretation of a Section 5 indicia, such as the Borough of Paulsboro's belief that 5(e) permitted declaring an area "in need of redevelopment" based on its suboptimal economic use, is unconstitutional.[26] Thus, *Gallenthin* declared the standard for an "in need of redevelopment" finding required a showing of any Section 5 condition, plus a showing that this condition is causing blight in the neighborhood.[27]

Though *Gallenthin* makes perfect sense when considering the statute in light of the New Jersey Constitution and legislative history, a literal reading of the LRHL in isolation does not reveal the two-part standard that the court articulated. There is one exception to this, however. Subsection 5(d) describes grounds on which a redevelopment area can be designated and seemingly requires a *Gallenthin*-type showing of the "essential characteristic" of blight.[28] This provision, encompassing obsolescent and poorly designed buildings and districts, requires that such "buildings or improvements" be "detrimental to the safety, health, morals, or welfare or the community."[29] While this is not exactly the same as the somewhat more precise blight definition set out in *Gallenthin*, it aims at the same notion, and operates similarly to *Gallenthin's* test; subsection (d) is unique for explicitly requiring a municipality to show that there is both some superficial condition (here, "dilapidation" or "obsolescence," among many others) **in addition to** certain negative effects emanating therefrom.[30]

This "plus" factor, in the required showing under 5(d), may properly be called a heightened standard. Now, post-*Gallenthin*, all of Section 5's indicia are to be understood and utilized in a similar fashion.[31] Accordingly, courts asked to review redevelopment area designations are correct, at least as a general matter, to say that *Gallenthin* heightened the standard for what a municipality must demonstrate.

C. Precursors to the *Gallenthin* era

Subsection 5(d) was unique because, as written, it accomplished what *Gallenthin* found to be constitutionally required of all Section 5 subsections. Yet, only a few judges correctly applied its two-part standard. Those judges harkened the coming of the *Gallenthin* era.

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[23] *Id.* at 463.
[24] *Id.*
[25] *Id.* at 459.
[26] *Id.* at 460.
[27] *See id.*
[28] N.J. STAT. ANN. §§ 40A:12A-5(d).
[29] *Id.*
[30] *See id.*
[31] Again, because each condition listed as a trigger in Section 5 must have the "essential characteristic" of "deterioration or stagnation that negatively affects surrounding properties." *See Gallenthin*, 924 A.2d at 459.

1. The *Spruce Manor* decision

In 1998, the New Jersey Superior Court invalidated a planning board's redevelopment designation under 5(d) because the Board failed to show how the overcrowding cited within was detrimental to the community. After reciting the explicit text of 5(d), the court stated:

> There must be **substantial evidence** before the Board **that not only is there overcrowding but that the overcrowding is detrimental to the safety, health, morals or welfare of the community.** There was no evidence whatsoever before the board that any overcrowding imperiled the safety, health, morals or welfare of the community. Accordingly, any conclusion that Spruce Manor is in need of redevelopment based upon the finding of overcrowding by the Planning Board must be set aside.[32]

The court considered the designation to be arbitrary and capricious; the borough's main failure was its lack of a "thorough" investigation as seen in precedents upholding similar designations.[33]

2. Room for interpretation of "detriment:" *Concerned Citizens of Princeton* and *110 Washington Street Associates*

Spruce Manor's statement on how to apply 5(d) was not very helpful in describing exactly what was encompassed by "detriment to the safety, health, morals, or welfare of the community."[34] The clarifying impact of *Gallenthin* can be seen in the fact that, before it, courts often found 5(d)'s detrimental effect requirement to be satisfied by a demonstration of almost any negative condition, including the suboptimal economic use grounds rendered unconstitutional by *Gallenthin.*

An example of this approach is seen in *Concerned Citizens of Princeton v. Mayor and Council of Borough of Princeton*, where the Appellate Division cited *Spruce Manor* favorably but then held that both parts of 5(d) were satisfied by substantial evidence because the "obsolete" and "fault[ily] designed" surface parking lots at hand were detrimental to the welfare of the community.[35] The reasons they were detrimental according to the planners were: the lots were "not fully productive," and brought "no tax revenue to the Borough;" further, the lots "negatively affect[s] [Princeton's] economic vitality," by reducing the city's walkability for shoppers.[36]

As useful as the *Concerned Citizens* holding may be for those preferring more dense, walkable, and truly urban downtowns, its holding was trumped by *Gallenthin*. While it correctly understands that 5(d) requires something extra—that is, proof of how the condition detracts from the community—it fails to meet today's constitutional burden because it allows economic underperformance and not some true indicia of blight to satisfy the "detriment" prong.

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[32] Spruce Manor Enters. v. Borough of Bellmawr, 717 A.2d 1008, 1012 (N.J. Super. Ct. Law Div. 1998) (emphasis added).
[33] *See, e.g., id.* The court cited the blight designations in Lyons v. City of Camden, 243 A.2d 817 (1968) as examples of sufficient municipal investigation.
[34] N.J. STAT. ANN. §§ 40A:12A-5(d).
[35] Concerned Citizens of Princeton, Inc. v. Mayor and Council of Princeton, 851 A.2d 685, 703-4 (N.J. Super. Ct. App. Div. 2004).
[36] *Id.* at 704.

On the other hand, *Spruce Manor* was cited in an unpublished trial court opinion that presaged *Gallenthin*. In *Twp. of Bloomfield v. 110 Washington St. Assocs.,* esteemed law division Judge Patricia Costello[37] dismissed a condemnation suit brought by the Township of Bloomfield that cited subsection (d) and (e) as grounds for the condemnation of defendant's property.[38] The court stated that the municipality was required to prove detriment by substantial evidence for *both* of its stated grounds for condemnation:

> [A finding that the condition of the subject property is detrimental to the public health, safety and welfare within that meaning of the statute] is necessary in order to sustain [a municipality's] condemnation…In order to make a determination that a property is detrimental to the public health, safety and welfare within the meaning of the statute, there must be something more than a mere finding that it meets the description in NJSA 40A:12A-5(d) or is underutilized as required by NJSA 40A:12A-5(e). There must be **substantial evidence** that the condition noted "…is detrimental to the safety health, morals or welfare of the community."[39]

The Township of Bloomfield failed because "the record in this case is devoid of any finding" of the necessary detriment.[40] "In essence the municipality took the brief description of the property…and concluded without any further analysis that this condition equated to a detriment to the public health, safety, and welfare."[41] Judge Costello proceeded, "no analysis [by the municipality] is present in this case. The issue [of detriment] was not addressed in the Study…none of the criteria has been **connected to** health, safety, or welfare."[42]

The test that Judge Costello articulated began a march towards *Gallenthin*. The *110 Washington Street* opinion correctly applied the heightened standard explicit in 5(d), and correctly perceived that the same requirement of proof of detriment applied to all of Section 5. Furthermore, by applying the proof of detriment requirement to 5(e), the opinion implied that 5(e) could not be used to condemn property on the basis of mere underutilization. The New Jersey Supreme Court confirmed of all of this in *Gallenthin*.

The *110 Washington Street* opinion came at a pregnant moment in the development of redevelopment jurisprudence in New Jersey and nationwide. The decision was rendered six weeks after the controversial *Kelo v. City of New London* opinion was released.[43] The United State Supreme Court had just confirmed that the powers available to local governments were as enormous as previously practiced, and it refused to give the federal courts any ability to scrutinize procedurally-sound redevelopment designations; meanwhile, it also stated that "nothing in our opinion precludes

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[37] Costello received the 2010 Distinguished Alumna Award from the Rutgers School of Law, Newark, Alumni Association. Rutgers School of Law- Newark, *Three Outstanding Alums, Three Different Paths to Distinction* (2010), http://law.newark.rutgers.edu/home/three-outstanding-alums-three-different-paths-distinction.

[38] Twp. of Bloomfield v. 110 Washington St. Assocs., ESX-L-2318-05 at 6-7 (N.J. Law Div. Aug. 3, 2005) (Costello, J.) (citing *Spuce Manor*, 717 A.2d at 294 (1998)).

[39] *Id.* at 6 (emphasis added).

[40] *Id.*

[41] *Id.*

[42] *Id.* at 7 (emphasis added).

[43] *Kelo*, 545 U.S. 469 (2005).

any State from placing further restrictions on its exercise of the takings power."[44] The closing paragraphs of Justice Stevens' opinion seemingly called on states to reappraise their redevelopment laws and decide on their proper shape and scope.[45] While the New Jersey legislature tried,[46] and failed,[47] to take up Justice Stevens' call, the New Jersey judiciary seized the opportunity to change redevelopment law. *Gallenthin* was a constitutionally based culmination of this re-thinking about eminent domain for redevelopment, and *110 Washington Street* constitutes the judicial grassroots of this process.

3. A brief note on precedent to *Gallenthin*, post-*Kelo*

In November 2005, the Appellate Division spoke consistently with Judge Costello's *110 Washington Street* opinion. In *ERETC v. City of Perth Amboy,* the court articulated the interaction between the "substantial evidence of detriment" requirement and the norm of judicial deference to municipal redevelopment designations.[48] "[The courts] will defer to the local legislators if their decision to designate areas in need of redevelopment is supported by substantial evidence."[49] The court adopted the statement of the plaintiff's planning expert at trial to show how this standard is met: "[y]ou can't just say by reason of dilapidation you're in an area of redevelopment. You have to indicate how that's detrimental to the safety, health, morals, or welfare of a community. And in order to demonstrate that. . . that's where the evidence comes into play."[50]

In *ERETC*, the City included the plaintiff's 345-employee commercial building that is 65% occupied in its redevelopment area.[51] The court found the municipality's report to be conclusory, devoid of substantial evidence of any of the section 5(d) and/or (e) conditions and of any detriment to the community.[52] Therefore, the municipality could not "enjoy the deference generally accorded."[53]

Lastly, in *LBK Assocs. LLC v. Borough of Lodi*[54] the trial court adopted the same standard, stating blight designations are arbitrary and capricious when they are not established by substantial

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[44] *Id.* at 489.
[45] *See id.*
[46] *E.g.,* Assemb. 3257, 212th Leg. (N.J. 2006).
[47] "New Jersey remains as one of the few states to fail to adopt any meaningful eminent domain legislative reform since the 2005 landmark ruling of the United States Supreme Court in *Kelo v. City of New London*." Anthony F. Della Pelle, *Eminent Domain Reform Legislation Fails in NJ Senate,* NEW JERSEY CONDEMNATION LAW BLOG, Jan. 11, 2011, http://njcondemnationlaw.com/2011/01/11/eminent-domain-reform-legislation-fails-in-nj-senate/;This outcome is unsurprising considering the collective power of New Jersey's municipal and redevelopment lobby and its lawyers that continue to argue that 'redeveloping' the most densely populated state can only be accomplished through LRHL statutory redevelopment. *See, e.g.*, Robert S. Goldsmith & Robert Beckelman, *What Will Happen to Redevelopment in New Jersey When the Economy Recovers?,* 36 RUTGERS L. REC. 314, 323-325 (2009).
[48] *See* ERETC v. City of Perth Amboy, 885 A.2d 512 (N.J. App. Div. 2005).
[49] *Id.* at 519 (citing Levin v. Twp. Comm. of Bridgewater 274 A.2d 1, 18 (N.J. 1971)).
[50] *Id.* at 517, 520 ("Banyra correctly identified the type of analysis necessary").
[51] *Id.* at 515-16.
[52] *Id.* at 520.
[53] *Id.* In 2008, the Appellate Division made clear that this holding also applies when a municipality seeks to amend its redevelopment area. *See* St. Paul's Missionary Baptist Church v. City of Vineland, 2008 N.J. Super. LEXIS 839 (App. Div. July 15, 2008).
[54] BER-L-8768-03 (N.J. Law. Div. October 6, 2005), *aff'd* 2007 N.J. Super. Unpub. LEXIS 1792 (App. Div. July 24, 2007).

evidence.[55] "Each project is fact sensitive and must be so analyzed. The court's review is dependent on the substantial credible evidence being presented."[56] The court cited *Spruce Manor* favorably in two key regards. First, substantial evidence means evidence of the conditions described in Section 5 plus evidence of "detriment[ ] to the safety, health, morals or welfare of the community."[57] Second, as in *Spruce Manor,* "substantial evidence" is generated when a thorough investigation discovers indicia of blight.[58] Here, however, the "complete lack of detailed specific proofs as to why [the trailer park at issue] should be designated as in need of redevelopment" doomed the city's attempt to condemn the property.[59]

The *Lodi* opinion manifests the jarring effect of the *Kelo* decision on the New Jersey judiciary. Seemingly without warrant, Judge Richard J. Donohue launched into a discussion of the *Kelo* decision.[60] As unnecessary as this may seem, his opinion provides a window into the contemplations of an awestruck judiciary following that landmark decision.[61] Inspired by Justice Steven's reminder that "many States already impose 'public use' requirements that are stricter than the federal baseline," Judge Donohue called the New Jersey courts to their senses, imploring them to focus on the text and intent of the LRHL.[62] "[R]espect must be shown to the efforts and enactments of New Jersey's elected representative body…This court's role is not to determine whether the actions taken by Lodi are sound…but rather, if Lodi has acted in accordance with the law."[63] Surely this call to return to textual faithfulness was part of the same judicial movement as *110 Washington Street* and ultimately *Gallenthin.*

II. Many myths, yet one clear mandate

A. Courts are correct to view *Gallenthin* as heightening standards for Section 5 condemnations; applying this standard results in just and appropriate outcomes.

As demonstrated in Part I, *Gallenthin* clarified and codified the operation of Section 5 of the LHRL, making clear that there is a two-step process for proving *any* of the grounds in that Section 5, and that the New Jersey Constitution requires properties possessing Section 5 conditions to a cause certain type of 'detriment,' that is, the blighting of nearby areas. Thus, litigants and judges are not mistaken when they say that the evidentiary standards set by *Gallenthin* comprise a "heightened standard."[64] By constitutionally narrowing "detriment to community health, safety, and welfare" to mean "blight," and by announcing, once and for all, that showing this detriment by substantial evidence is required for all designations under Section 5, the court officially heightened the standards that municipalities must satisfy.[65]

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[55] *See id.* at 14-15.
[56] *Id.* at 15.
[57] *Id.* at 19-20. The court also favorably cited Judge Costello's similar statement on the two-part standard of Section 5 from *110 Washington Street.*
[58] *Id.* at 16-17.
[59] *Id.*
[60] *Id.* at 10.
[61] *Id.* at 10-12.
[62] *See id.* at 12.
[63] *Id.*
[64] *E.g.*, City of Long Branch v. Anzalone, 2008 N.J. Super. Unpub. LEXIS 2204, *4 (N.J App. Div. Aug. 7, 2008); Cottage Emporium, Inc. v. Broadway Arts Ctr., L.L.C., 2010 N.J. Super. LEXIS 835, *3 (N.J. App. Div. Apr. 16, 2010).
[65] *See Gallenthin,* 924 A.2d at 459.

This mandate was put into action in two cases originating in two of New Jersey's most prominent loci for redevelopment: *City of Long Branch v. Anzalone* and *Mulberry St. Area Property Owner's Grp. v. City of Newark*.[66]

Anzalone held that there was no substantial evidence to support a blight designation for a "well-established, stable" section of Long Branch comprising of 58 housing units, almost all of which "are occupied by year-round residents" that, on average, had owned their homes for 46 years.[67] The court applied its understanding of *Gallenthin's* two-part standard for the Section 5 criteria: "the conditions [that Section 5] describes do not establish blight by themselves, but rather are among the recognized paths for an area to reach the level of degradation that the Blighted Areas Clause requires."[68] The Section 5 criteria "share the "essential characteristic" of describing conditions of deterioration or reasons for deterioration by which an area can reach a level of degeneration that threatens to degrade other areas[.]"[69] Applied here, the City of Long Branch completely failed to provide grounds for condemnation under subsections 5(a), (c), (d), and (e) of the LRHL.[70] The City provided substantial evidence against defendant showing of the superficial conditions listed in those provisions and the requisite detriment— the blighting effect of such conditions.[71] Thus, the heightened standard was not met.[72]

Mulberry Street invalidated the City of Newark's attempted condemnation of a downtown neighborhood that relied on the same LRHL subsections as *Anzalone*.[73] The City was attempting to take several "three-story brick multi-family residential buildings on Elm Street…mixed use buildings on Mulberry Street…[a] commercial building occupied by the Lawyer's Diary and Manual…[and another] occupied by the New Jersey Law Journal…commercial parking lots…a convenience store [with] apartments above…the recently rehabilitated Caverna Bar and Restaurant [with] apartments above…[because they were either] in a stagnant and less than fully productive condition [or] necessary for inclusion in the redevelopment area."[74] The list of condemned properties included many more homes and businesses (from restaurants and a photo shop to brick storage yards, an auto body shop and a coffee distributor).[75] The City's planner even included City Hall in the City's attempted redevelopment area.[76] The City hoped that the many surface parking lots throughout the area would be sufficient to prove its need for redevelopment, though by its own estimate one-third of the targeted area did not meet any of the Section 5 criteria.[77]

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[66] No. ESX-L-9916-04 (N.J. Law Div. July 19, 2007).
[67] *Anzalone,* 2008 N.J. Super. Unpub. LEXIS 2204 at *4-7, *43.
[68] *Id.* at *56; *see also* Suburban Jewelers, Inc. v. City of Plainfield, 2010 N.J. Super. LEXIS 992, *24-25 (App. Div. May 6, 2010).
[69] *Anzalone*, 2008 N.J. Super. Unpub. LEXIS 2204 at *56-57 ("[T]he Court would have used the same analysis and applied the Blighted Areas Clause in the same manner if the municipality had relied on N.J.S.A. 40A:12A-5(a), (b), (c), or (d) instead of (e)").
[70] *Id.* at *66-69.
[71] *Id.*
[72] *See id.*
[73] *See Mulberry*, ESX-L-9916-04 at 17.
[74] *Id.* at 19-25.
[75] *Id.* at 27-52.
[76] *Id.* at 26-27. The plaintiff's planner expert "stated that [the City's expert] failed to recognize that the City Hall building located on Lot 1 has historic significance." *Id.* at 27.
[77] *Id.* at 54.

The City failed to meet *Gallenthin's* requirements: "there is no substantial evidence…that the Mulberry Street Area has reached a state of deterioration or stagnation that negatively affects surrounding areas."[78] There was not even substantial evidence of the superficial Section 5 criteria: "there is no evidence that the Mulberry Street Area is deteriorated or obsolete,"[79] and the inspector did not even search for such evidence by conducting a detailed inspection of the properties.[80]

The mandate is reflected in other opinions. *Evans v. Maplewood*, for example, dismissed the township's blight designation, noting that *Gallenthin* required substantial evidence of detrimental blight for each part of Section 5.[81]

Having established that the heightened standard for the Section 5 blight triggers is no myth, this paper will now close by discussing some of the unfortunate misunderstandings of *Gallenthin* that have developed in case law.

B. Courts have improperly characterized *Gallenthin* in certain respects

Though the courts' understanding of a heightened standard arising from *Gallenthin* is correct, some of the same opinions have erred in other statements about that landmark decision. This section will treat these statements briefly, urging the courts to read *Gallenthin* and the LRHL using the same precision with which they read these laws in finding a heightened standard.

First, all of the Section 5 blight indicia, like the entire statutory scheme, characterize conclusions that can be drawn about an *area*.[82] Any court that calls for these conclusions to be made on a lot-by-lot basis misconstrues the explicit text of Section 5,[83] the definitions in Section 3, and the holding of *Gallenthin*. The Appellate Division in *Anzalone* asserted without citation that "the legislature most likely intended the term 'diverse ownership' in NJSA 40A:12A-5(e) to cover only individual parcels with convoluted ownership."[84] Yet 5(e) reads: "[a] growing or total lack of property utilization of *areas* caused by…diverse ownership of the real property therein."[85] While

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[78] *Id.* at 67.
[79] *Id.* at 66.
[80] *Id.* at 64-65.
[81] "Maplewood and its Planning Board assert that N.J.S.A. 40A:12A-5(d) provides alternate support for the inclusion of Lots 5 and 6 in the redevelopment area. Not so. This subsection requires that the conditions listed be 'detrimental to the safety, health, morals or welfare of the community.'…While the observations and comments of the members of the Planning Board may suggest that the use of Lots 5 and 6 were obsolete, had faulty arrangements or designs, or had excessive lot coverage, **there is no substantial evidence** in the record that these conditions can be said to be 'detrimental to the safety, health, morals or welfare of the community.' Certainly, a decision based on these factors, without any showing of such detriment, cannot be **consistent with Gallenthin's restriction of the use of eminent domain for redevelopment to 'blighted areas**.'" Evans v. Township of Maplewood, 2007 N.J. Super. LEXIS 2982, *25-26 (Law Div. July 27, 2007) (citing *Gallenthin*, 924 A.2d at 460). The *Evans* court also took the occasion to apply Gallenthin to Section 3's definition of an "area in need of redevelopment," which allows some non-blighted properties to be taken to effectuate a city's plan. It held that "[t]o be included under Section 3, however, a property must be necessary to the successful redevelopment of an area of which it is a part. There would therefore have to be substantial evidence in the record that Lots 5 and 6 are a necessary part of the redevelopment area. Such substantial evidence is not in this record." *Id.* at 32.
[82] N.J. STAT. ANN. §§ 40A:12A-5.
[83] The entire section deals with "delineated area[s]." *Id.* Its conditions require assessment of "the generality of buildings," § 40A:12A-5(a), "the use of buildings," § 40A:12A-5(b), "areas…detrimental to the safety, health, morals, or welfare…," § 40A:12A-5(d), and the "utilization of areas," § 40A:12A-5(e).
[84] *Anzalone,* 2008 N.J. Super. Unpub. LEXIS 2204 at *58-59.
[85] N.J. STAT. ANN. § 40A:12A-5(e).

Gallenthin required substantial evidence that such a condition induces blight, it did *not* narrow the inquiry to a lot by lot basis.[86] In fact, *Gallenthin* explicitly noted that the *Berman*-esque[87] statutory scheme survived its holding.[88]

Accordingly, courts should remain faithful to the statute and to the Supreme Court's statements by applying the *Gallenthin* heightened blight standard to whatever "delineated area" a municipality chooses while judging whether that standard is met considering the totality of the area's contents. To the extent that this practice results in judicial invalidation of "in need of redevelopment" designations, cities will properly be forced to be less aggressive in their line-drawing; to the extent it still permits non-blighted parcels to so unfairly be taken if located within a generally blighted area, the dire need for legislative reform of Section 3 and 5 will be further accentuated.

Second, it is not likely that the Court in *Gallenthin* meant for its requirement of showing substantial evidence of the blighting effects of the Section 5 indicia to mean that a city must show negative effects that extend beyond the redevelopment area. *Anzalone* read *Gallenthin* to "require[ ] a municipality to find that the physical condition of the properties at issue was contributing to social problems not only within the redevelopment area, but also in nearby areas."[89] This is too bold a statement at this point. *Gallenthin* held that "'blight' includes deterioration or stagnation that has a decadent effect **on surrounding property**."[90] While most courts have correctly applied this somewhat vague standard,[91] *Anzalone* stated a new rule that is unduly restrictive at this point.

Lastly, some courts have failed to understand the total import of *Gallenthin*. The Appellate Division in *Land Plus LLC v. Mayor and Council of the City of Hackensack* indicated a belief that the *Gallenthin* heightened standard, though based on the constitutional foundations of the LRHL, applied only to 5(e).[92] In scrutinizing the city's 5(e) grounds for condemnation, it stated that the conditions listed must be shown to have the effect of blight.[93] Then, in assessing the 5(d) grounds, the court simply assessed the text of the statute and correctly determined that there was a two-part test that required showing the statutory condition plus detriment to the community, but failing to equate this detriment to the new constitutional definition of blight.[94] Furthermore, the court did not mention the city's obligation to enter 'substantial evidence,' though it nevertheless overturned the blight designation at issue.

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[86] *Gallenthin*, 924 A.2d at 462 ("…subsection (e) was meant to apply to areas . . .").
[87] Section 3 defines "area in need of redevelopment" as being an *area*, which may include property not meeting Section 5 criteria but nonetheless "necessary . . . for the effective redevelopment of the area." N.J. STAT. ANN. § 40A:12A-3. *Cf.* Berman v. Parker, 348 U.S. 26, 34-35 (1954). However, this power desperately needs to be eliminated from the statute. *See* Biglin, *supra* note 11.
[88] *Gallenthin,* 924 A.2d at 464 ("[N]on-blighted parcels may be included in a redevelopment plan if necessary for rehabilitation of a larger blighted area."). Of course, an "area in need of redevelopment," does not have to include multiple parcels. Maglies v. Planning Board of Twp. of East Brunswick, 414 A.2d 570, 571 (N.J. App. Div. 1980) ("[T]he Blighted Area Act may apply to a single lot.").
[89] *Anzalone,* 2008 N.J. Super. Unpub. LEXIS 2204 at *57.
[90] *Gallenthin*, 924 A.2d at 460.
[91] *E.g.,* Cottage Emporium, Inc. v. Broadway Arts Ctr., 2010 N.J. Super. LEXIS 835, *39.
[92] N.J. STAT. ANN. § 40A:12A-5(e).
[93] Land Plus, L.L.C. v. Mayor and Council of Hackensack, 2008 N.J. Super. LEXIS 1888, *4-6 (App. Div. Oct. 10, 2008).
[94] *See id.* at *6-8.

Land Plus is not an acceptable statement of post-*Gallenthin* law. Rather, it is roughly equivalent to the inchoate understandings of Section 5 seen in the days of *110 Washington Street* and *Concerned Citizens of Princeton*, where the courts understood that Section 5 required a two-part standard but did not yet comprehend that substantial evidence *of blight* was constitutionally required in the second prong. [95]

CONCLUSION

The landmark *Gallenthin Realty Development v. Borough of Paulsboro* decision is still being digested by the New Jersey judiciary. In a state with such strong views for and against the broad use of eminent domain for redevelopment, the courts are inundated with arguments by advocates on either side that attempt to cast a light on *Gallenthin* that is unduly favorable to their side. The politics embedded within this issue cannot help the situation. Yet the answers to any questions lie in the core texts of New Jersey redevelopment law, which *Gallenthin* authoritatively interpreted. Just as many judges recommitted themselves to a faithful reading of the LRHL when *Kelo* sent shockwaves in New Jersey's direction, so too should judges and attorneys remain focused on the actual text of the LRHL and on its interpretation in *Gallenthin*. That opinion imbued the statute with the constitutional meaning it was meant to have all along, and it is deserving of due respect. To the extent it has failed to accomplish certain goals desirable from a policy standpoint, the need for crucial amendments to the LRHL has been further highlighted.[96]

[95] *See supra* Part I.C.2.

[96] Simply looking at the urban landscape of New Jersey following a decade of aggressive eminent domain for redevelopment should highlight the need for statutory reform. A walk along Lafayette Street and Mulberry Street in the southeast quadrant of downtown Newark supplements this article well.