

GALLENTHIN REALTY DEVELOPMENT,
INC., a New Jersey Corporation,
and/or GEORGE A. GALLENTHIN,
III and CINDY GALLENTHIN,
husband/wife, both jointly and
severally,

Plaintiff,

v.

THE BOROUGH OF PAULSBORO,
PLANNING BOARD OF THE BOROUGH
OF PAULSBORO, and THE PAULSBORO
REDEVELOPMENT AGENCY,

Defendant.

SUPREME COURT OF NEW JERSEY

DOCKET NO. 59,982

CIVIL ACTION

On Certification from the Final
Judgment of the Superior Court
of New Jersey, Appellate
Division,

Docket Nos. A-006941-03T1
and A-000222-04T1

Sat Below:

Hon. Robert A. Fall
Hon. Clarkson S. Fisher, Jr.
Hon. Richard Newman

**BRIEF OF AMICI CURIAE NEW JERSEY STATE LEAGUE OF MUNICIPALITIES,
DOWNTOWN NEW JERSEY, INC. AND NEW JERSEY CHAPTER-AMERICAN
PLANNING ASSOCIATION**

GREENBAUM, ROWE, SMITH AND DAVIS LLP
Metro Corporate Campus One
P.O. Box 5600
Woodbridge, New Jersey 07095
(732) 549-5600
Attorneys for Amici Curiae New Jersey
State League of Municipalities,
Downtown New Jersey, Inc. and New
Jersey Chapter-American Planning
Association

Of Counsel:
ROBERT S. GOLDSMITH

On the Brief:
ROBERT BECKELMAN

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PRELIMINARY STATEMENT

This Court has been asked by Petitioner as well as Amicus Public Advocate of New Jersey ("Public Advocate"), and Amici New Jersey Audubon Society and New Jersey Conservation Foundation ("Environmental Amicus") (the foregoing parties collectively referred to herein as "Petitioner Amicus") to accept this case as a vehicle to re-write the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1, et seq. ("LRHL") in a strict manner that would strip the State's municipalities of essential an tool for revitalization and sustainability of their ailing and economically distressed communities. Such request, however, is an unwarranted invitation for this Court to engage in judicial legislation that would not only reverse decades of sound, firmly-established judicial precedent of this Court, but would have drastic and dire consequences upon the ability of the State's municipalities to effectuate redevelopment.

For New Jersey in particular, redevelopment has for fifty years been, and continues to be, recognized as a crucial element in the State's balanced growth, social and economic well-being, and community revitalization, as evidenced by the State's economic development and smart growth policies expressed and adopted through actions of both the legislative and executive branches of the State.

Petitioner Amicus' arguments essentially boil Dow/Essex Chemicaln to a proclamation that Section 5(e) of the LRHL is unconstitutional on its face because the Legislature changed the word "and" to "or", thereby rendering every property in the State fair game for the unbridled and unfettered taking by local municipal officials. In advancing this argument, Petitioner Amicus ignore all relevant principles of constitutional construction and devote countless pages to academic, hypothetical tautologies that strain to read the LRHL unconstitutionally. The Court, however, need not strain to find Section 5(e) constitutional.

Moreover, the language challenged by Petitioner Amicus in Section 5(e) was enacted in 1992 and, presumably, has been unconstitutional since the time of its adoption. Notably, however, in addition to the fact that the Appellate Division has twice upheld the constitutionality of the current language of Section 5(e) under the LRHL, this Court denying certification in both cases, Petitioner Amicus do not cite to one example in the fifteen years since the adoption of the LRHL of an exercise of the type of unbounded and limitless application of Section 5(e) that it warns is inevitable. Petitioner Amicus' arguments are specious slippery slopes and their academic hypotheticals are not historically supported, nor plausible in any real world context.

Petitioner Amicus also urge this Court to abandon the long-standing judicial principle of presuming the validity of municipal action and heighten the burden of proof to the governing body to demonstrate by clear and convincing evidence that an area qualifies as blighted. This position ignores not only a maxim of juris prudence entrenched in our judicial system as long as the memory of man, but that the Legislature has properly exercised its authority to expressly provide that a municipality's decision shall be upheld if it is supported by substantial evidence, already a heightened burden from the general arbitrary and capricious standard applicable to review of virtually all other municipal decisions.

Finally, all of Petitioner Amicus' arguments rely upon numerous unsubstantiated assumptions, including 1) Paulsboro will acquire the Property through eminent domain, 2) Petitioner will not be permitted to develop the Property, 3) there is a private developer to whom Paulsboro intends to transfer the development rights, and 4) the Property will be fully-developed. None of these assertions are supported by the record and, in fact, Paulsboro has not sought to condemn the Property or selected a developer for the Property and there is no plan to fully build-out the Property. Accordingly, the entirety of the claims raised by Petitioner Amicus are improper as they are completely hypothetical and not based in the facts of this case.

STATEMENT OF FACTS/PROCEDURAL HISTORY

This brief is filed on behalf of Amici Curiae the New Jersey State League Of Municipalities, Downtown New Jersey, Inc. and New Jersey Chapter-American Planning Association (collectively "New Jersey Amicus"). Because New Jersey Amicus did not participate in the proceedings below, it relies upon the procedural history and facts as set forth in the Appellate Division decision and in the briefs filed by Respondent and Petitioner. New Jersey Amicus notes, however, that certain facts are alleged in the briefs of Public Advocate and Environmental Amicus that are not established or fully-supported.

Specifically, Public Advocate and Environmental Amicus assert that it is a matter of public record that most of the Property is protected wetlands under the Freshwater Wetlands Act, N.J.S.A. 13:9B-1 to 30. As noted in the Respondent's Brief in Response to Amicus (at p.3), however, the evidence purporting to demonstrate the Property is in protected wetlands is unreliable, according to the New Jersey Department of Environmental Protection ("NJDEP") disclaimer as to the accuracy of the information provided. New Jersey Amicus also attempted to confirm this information and located only a diagram of the entire State that roughly delineated the State's wetlands by color-coding, from which it would be impossible to determine

whether, in fact, the Property was included in such wetlands. Additionally, attached to the map is the following disclaimer: "The freshwater wetlands delineations in these data are for screening purposes only and are **not** regulatory. The Land Use Regulatory Program (LURP) of the NJDEP determines the extent and final determination of freshwater wetlands in the State of New Jersey." See <http://www.state.nj.us/dep/gis/lulc02shp.html> (emphasis in original)

In any event, such references are outside the scope of the record on review and assert new issues never raised below. In fact, the arguments supported by this evidence directly contradict the arguments made by Petitioner to support its claims made to the courts below. Moreover, even if the Property was delineated as freshwater wetlands, as claimed by Public Advocate and Environmental Amicus, this has no bearing upon whether the Property may meet the criteria for redevelopment designation under the LRHL. Even if the Property was, in fact, designated as wetlands or even "protected", designation as a redevelopment area has no impact upon such State regulations, to which the Property remains subject.

LEGAL ARGUMENT

POINT I

DEFINING BLIGHTED AREA IS NOT A JUDICIAL FUNCTION, BUT IS THE PROVINCE OF THE LEGISLATURE

It cannot seriously be disputed that the Legislature is vested with the authority to interpret and implement Article VIII, Section 3, Paragraph 1 of the Constitution by legislative enactments empowering municipal government to carry out redevelopment. Nor can it seriously be disputed that defining blight, as an incident to such authority, was also intended to be the province of the Legislature. The Court stated this unequivocally in Wilson v. City of Long Branch, 27 N.J. 360, 381-82 (1958):

Finally, plaintiffs urge that because Art. VIII, Sec. III, par. 1 of the Constitution refers to 'blighted' areas without defining the word, the authority to do so resides in the judicial and not the legislative branch of the government. This is entirely specious. The article declares that redevelopment of 'blighted' areas shall be a public purpose and authorizes the Legislature to empower municipal governments to undertake such redevelopment. **Manifestly, the grant of power 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. (emphasis added)

In an attempt to circumvent this unambiguous proclamation and persuade the Court to redefine blight for the Legislature, Public Advocate notes that the Court in Wilson further states that "the issue of whether the property acquisition is for a public purpose is a judicial question ..." Id. at 385. The remainder of the sentence not quoted by Public Advocate reads **"the necessity for the taking and the extent of the area to be taken are legislative matters** for which no trial type hearing is required." Id. (emphasis added) In fact, the statement was made in the context of discussing redevelopment procedures, which the Court stated are more legislative than judicial in nature and the judicial question in an eminent domain proceeding was whether the taking is for a public purpose. Id.

The significant error in Petitioner Amicus' reasoning is the treatment of this case, a redevelopment designation, as an eminent domain proceeding. This is exemplified by Petitioner Amicus' arbitrary distinction between what they deem "private" economic development as a public purpose from "traditional" public purposes, such as roads and schools. What Petitioner Amicus presumably means by "private" redevelopment is that the end result of what is constructed might be privately owned. Such a distinction cannot reasonably be made based upon the fact that the redevelopment will be carried out by a private entity, as even takings for what Petitioner Amicus deem are

"traditional" purposes will almost certainly be developed by private entities that will derive a benefit.

Public Advocate acknowledges that the power of eminent domain is allotted to the legislative branch, which power was continued in the 1947 constitution specifically for redevelopment purposes "restricted only by pertinent clauses of the constitution." Abbott v. Beth Israel Cemetery Ass'n, 13 N.J. 528, 543 (1953). The next sentence of the Court in the above case reads:

[t]he restrictions (other than such as relate to general rights) are **concerned solely with the matter of compensation to persons whose property is taken under an exercise of this legislative power.** In both the New Jersey Constitution of 1844 and the New Jersey Constitution of 1947 these references to compensation, coupled with the clear mandate continuing existing common law principles, constitute **recognition of the broad common law authority of the Legislature to control resort to the sovereign power of eminent domain."**

Id. (emphasis added) See also, 769 Assoc., LLC v. Twp. of West Orange, 162 N.J. 574, 576-77 (2002) (noting further that "a determination whether a taking is for a 'public use' is largely a legislative question beyond the reach of judicial review except in the most egregious circumstances.").

It is evident from the above citations that the relevant restrictions upon eminent domain for redevelopment purposes referred to above continue to be the same restrictions that are

applicable to all exercises of eminent domain, namely, that "private property shall not be taken for public use without just compensation." N.J. Const., Article 1, Section 20 (the "Takings clause"). In any event, as stated previously above, the Takings clause is not at issue in this case as there has been no taking, no eminent action has been commenced (nor is it certain to follow, as Petitioner suggests), there is no plan in place requiring acquisition of the Property, and there has been no developer selected to develop the Property for whose purported benefit the taking power was employed.

A. The Purpose of Article VIII, Section 3, Paragraph 1 of the New Jersey Constitution is to Authorize Power To the Legislature to Effectuate Redevelopment of Blight Conditions, Not to Place a Limitation Upon Such Power and Create a Private Constitutional Right.

Public Advocate argues that the purpose of Article VIII, Section 3, Paragraph 1 is to place limitations upon the exercise of eminent domain for redevelopment and create an affirmative and enforceable constitutional right of private property ownership.¹ On the contrary, based upon a reading of its clear language, the express purpose of Article VIII, Section 3, Paragraph 1 is to establish that redevelopment of blighted areas

¹ Such right already exists, pursuant to Article I, Section 1, of the Constitution. Public Advocate's fleeting reference to this Article without analysis demonstrates how contrived his argument that Article VIII, Section 3, Paragraph 1 creates such a right, as it is clear that the right to acquire and possess property is subject to the Takings clause.

is a public purpose and public use for which private property may be acquired consistent with the requirements of the takings clause. It is not intended to create an affirmative and enforceable constitutional protection to property owners.

Where the Constitution intends to place a limitation upon legislative power rather than grant legislative power, the "limitation upon the exercise of the legislative function must be clear and imperative." Behnke v. New Jersey Hwy. Auth., 13 N.J. 14, 25 (1953). "'The constitutional limitation upon the exercise of legislative power must be clear and imperative'; there is to be 'no forced or unnatural construction'; the limitation upon the general legislative power is to be 'established and defined by words that are found written in that instrument,' and not by reference to 'some spirit that is supposed to pervade it or to underlie it ...'". Gangemi v. Berry, 25 N.J. 1, 10 (1957).

Therefore, Article VIII, Section 3, Paragraph 1 established that redevelopment of blighted areas was a public purpose and public use for which private property may be acquired; further defining and implementation was vested with the Legislature. Pursuant to Article VIII, Section 3, Paragraph 1, the Legislature enacted the Blighted Areas Act and the LRHL, through which the Legislature has appropriately defined the parameters of the application of the Constitution's Article and such

parameters have been consistently upheld by this Court and the Appellate Division as a constitutional exercise of such legislative power. See Wilson, supra, Lyons v. City of Camden, 68 N.J. 89 (1968), Levin, supra, Forbes v. Village of South Orange, 312 N.J. Super. 519 (App. Div.), certif. denied, 156 N.J. 411 (1998), and Concerned Citizens v. Borough of Princeton, 370 N.J. Super. 429 (App. Div.), certif. denied, 182 N.J. 139.

Accordingly, Article VIII, Section 3, Paragraph 1 provides an express grant of power to the Legislature to effectuate the remediation of blight conditions through enactments enabling local government to implement redevelopment for such purposes. The Constitution specifically states that the exercise of eminent domain may be used to carry out such purposes, which purposes were therein declared a valid public purpose and public use for which property may be acquired pursuant to the Takings clause. This Court and the lower courts have consistently upheld such legislative enactments adopted pursuant to this constitutional grant of power for the past forty years. There is no basis raised by Petitioner Amicus upon which this Court should reverse its forty years of sound, carefully-reasoned, and firmly-established precedent.

POINT II

THERE IS NO REQUIREMENT OF A FINDING OF A DETRIMENT TO THE HEALTH, SAFETY OR WELFARE OF THE COMMUNITY TO SUPPORT A REDEVELOPMENT AREAS DESIGNATION UNDER SECTION 5(e) AND NO BASIS FOR THE COURT TO JUDICALLY LEGISLATE BY READING IN SUCH A REQUIREMENT.

Petitioner Amicus assert that Section 5(e) is unconstitutional because it contains no specific requirement that a redevelopment designation be supported by an affirmative finding that the conditions upon which the designation are based result in a detriment to the community health, safety or welfare.² Petitioner Amicus' arguments are based on the erroneous assumption that the term blight as used in Article VIII, Section 3, Paragraph 1 is rigid and inflexible and must be read in the strictest sense. Finally, Petitioner Amicus argue that a finding of a current detriment is necessary to a blight designation because to hold otherwise allows a blight designation to impermissibly be based on future potential.

The Appellate Division in Princeton held that the replacement of the term "blighted" with "area in need of redevelopment" did not substantively affect the redevelopment laws and that "the designation of an area in need of

² The LRHL requires such a finding in connection with a redevelopment designation under Section 5(d) of the statute. Therefore, the Court can only reasonably conclude that the Legislature specifically did not intend to require a specific detriment finding under Section 5(e) and to hold otherwise would usurp the Legislature's law-making province.

redevelopment under the LRHL is the equivalent of a blight designation." Id. at See also, Forbes, 312 N.J. Super. at 529. Indeed, the Appellate Division further noted that the "legislative history of the LRHL reflects the intent of the Legislature that the LRHL encompass a broad range of circumstances in determining whether an area is in need of redevelopment." Id. at 436.

Public Advocate selectively quotes various literature discussing blight that predates the 1947 Constitutional Convention. Even though Public Advocate selectively chose literature to support the interpretation he wishes to advance, there is language in the Public Advocate citations that is supportive of Section 5(e). For example, these citations include in their descriptions of blight "areas where, due to either the lack of a vitalizing factor or to the presence of a devitalizing factor, the life of the area has been sapped (citation omitted). 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." (citation omitted). Public Advocate Brief, p.15, n.9.

These descriptions exactly fit the conditions in Paulsboro. Despite the fact that Petitioner's Property, in and of itself, may not be the direct cause of the conditions, its continued

stagnancy is unquestionably a result of such conditions in surrounding properties. The effect of the closure and abandonment of the British Petroleum and Dow/Essex Chemical sites are not only evident throughout Paulsboro's business and residential districts, which show a continued state of decline and deterioration, but have also resulted in further rendering Petitioner's Property unprofitable, unmarketable and clearly not likely to be improved through private market forces (as evidenced by over forty years of little or no investment or utilization). It is not surprising that at least since the 1980s and 90s when these plants closed, there has been no meaningful investment or activity on Petitioner's Property given the surrounding conditions.

Petitioner itself made statements that support this description of the general conditions of the area and the interrelationship of the properties constituting the area, when stating that any redevelopment of the BP and Dow/Essex Chemical sites would necessarily rely upon the inclusion of its Property. Petitioner recounted to the trial court discussions with the owners of the BP and Dow/Essex Chemical sites, in which Petitioner stated that "you need this property under contract in order to do the restoration of the 190 acres. If you don't use my property, you cannot proceed forward with development." (Pa182)

What Petitioner describes here is the necessity of treating areas as an inter-related whole and how redevelopment cannot proceed in a piecemeal, property-by-property fashion.³ This Court has recognized that the "patent purpose [of redevelopment laws] is to deal with substantial areas as distinguished from individual properties." Wilson, 27 N.J. at 378. "[C]ommunity redevelopment programs need not, by force of the Constitution, be on a piecemeal basis--lot by lot, building by building." Id. at 380. "[T]he process contemplated by the law cannot be accomplished by means of individual selection of property. It must proceed in terms of redevelopment of areas. Lyons, 52 N.J. at 99 (quoting Wilson). This Court also noted in Levin that the redevelopment laws "are concerned with areas and not with individual properties" and held that "[s]o long as the area designated as blighted is the portion of the municipality which, in the judgment of the appropriate local body, falls within the broad terms of the definition laid down by the Legislature, the courts will not interfere in the absence of palpable abuse of discretion or bad faith." 57 N.J. at 539.

Another telling citation by Public Advocate notes with respect to blight that it "appears first as a barely noticeable

³ Petitioner's recognition of the necessity of inclusion of the Property to the redevelopment is also addressed in the LRHL, which provides that a redevelopment area may include lands deemed necessary to include, regardless of its condition, for the effective redevelopment of the area. N.J.S.A. 40A:12A-3.

deterioration and then progresses gradually through many stages to final condition known as the slum". Public Advocate Brief at p.16 (citation omitted). This notion is echoed in the principal that municipalities do not have to wait until areas reach full and unquestionable blight before taking remedial action, but must plan for the future and take proactive steps to prevent blight before it occurs. "Sound planning and zoning look beyond the present into what lies ahead in the hopes of the planners. 'It requires as much official watchfulness to anticipate and prevent suburban blight as it does to eradicate city slums.'" Vickers v. Gloucester Twp. 37 N.J. 232, 242 (1962) (citation omitted). Thus, even the Public Advocate's carefully selected citations note that what is contemplated is a deteriorating condition not deteriorated.

These concepts are not inconsistent with the notion that blight is predicated on a present stagnant or not fully productive condition. In upholding Section 5(e), which, significantly, does not contain a requirement of a finding of affirmative detriment to the welfare of the community, this Court stated that a blighted area refers to a situation where "potentially useful land reaches a stage of stagnation and unproductiveness through one or more causes." Levin at 538. Thus, this Court has recognized that "underutilized" and "not fully productive" are current conditions of a property. The

fact that this analysis may to some extent (but not exclusively as implied by Petitioner Amicus) require the municipality to consider future potential does not render it unconstitutional.

Indeed, the United States Supreme Court recently acknowledged that it is not only appropriate, but necessary to consider future potential usefulness in planning for redevelopment.

It is a misreading of *Berman* to suggest that the only public use upheld in that case was the initial removal of blight. (citation omitted) The public use described in *Berman* extended beyond that to encompass the purpose of *developing* that area to create conditions that would prevent a reversion to blight in the future. See 348 U.S. at 34-35, 75 S.Ct. 98 ('It was not enough, [the experts] believed, to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums....').

Kelo v. City of New London, 545 U.S. 469, 485, n.13 (2005).

That remediation of blight requires some forward-looking analysis is an obvious element of the powers under Article VIII, Section 3, Paragraph 1, of the Constitution, as well as the LRHL. A finding of blight does not require a specific implementation of a plan as to how to remediate or address those conditions, but such action is certainly anticipated to follow. Neither the courts nor the Legislature rationally understand that the remediation of blight contemplated the mere removal of

such conditions without some type of improvement in its place. The mere removal of blighted conditions, without its subsequent redevelopment, would serve no purpose and would only perpetuate further blight. The constitutional and legislative objectives of remediating blight are only properly accomplished through the sound planning and effective implementation of a redevelopment plan, which cannot sensibly be accomplished without considering future potential.

Petitioner Amicus' arguments that any forward-looking analysis is improper, indeed, unconstitutional, are based solely on academic hypotheticals inviting the Court into the inevitable slippery slope. Consider the example of the Motel 6 that will be replaced by a Ritz Carlton simply because the latter will generate greater tax revenue. Just as the arguments in Petitioner Amicus' briefs are inherently flawed because they present all of the issues hypothetically and ignore all reference to context, the propriety of any such statement cannot be analyzed in a vacuum.

It is simply not true that any Motel 6 could be replaced by a Ritz Carlton under the existing language of Section 5(e), as any such analysis must take into account the context and conditions of the area generally. Such factors would include permitted uses under appropriate zoning, extent and type of use

of that particular hotel, the condition of the hotel, as well as any other factors deemed relevant to a particular circumstance.

For example, if the Motel 6 in question typically maintained an 80% vacancy, was in a visually and aesthetically unappealing condition that, from the community's perspective, detracted from the community or neighboring properties or areas, was inconsistent and incompatible with surrounding uses (although possibly permitted under a zoning), and let rooms by the hour, then it might likely be appropriately considered in need of redevelopment under Section 5(e). If, on the other hand, a particular Motel 6 was on the average 80% occupied, consistent with and complimentary to surrounding uses, and in reasonably maintained condition, it is unlikely that any court would uphold such application of Section 5(e), as such action would likely be deemed arbitrary and capricious.

Thus, the LRHL as written and the existing review standard would prevent such an arbitrary and capricious application of the LRHL. The hyperbolic proposition that every property is now subject to unfettered takings is simply not based in reality and can only be supported by an absurd, wholly-abstract reading of the LRHL.

What Petitioner Amicus overlook is that the courts can, have, and no doubt will continue to review municipal redevelopment decisions in such a manner as to adequately

protect from its improper application. The fact that a law may be susceptible to abuses (indeed, what law can be said to be free of all potential for abuse?) does not render such law invalid on its face, as the courts stand as the gatekeeper to prevent such abuse. Justice Holmes eloquently stated this concept in a dissenting opinion in Panhandle Oil Co. v. State of Mississippi, 277 U.S. 218, 223 (1928). Referencing Justice Marshall's "often quoted proposition that the power to tax is the power to destroy," Justice Holmes stated: "But this Court which has so often defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. **The power to tax is not the power to destroy while this Court sits.**" Id. (emphasis added)

The mere fact of potential for abuse does not render a law facially invalid. If such were the case, few legislative enactments could survive. It is the role of the courts to protect from such abuse, which this Court and the lower courts have consistently and properly done in the context of redevelopment actions. Notably, Petitioner Amicus cite several examples where courts have overturned municipal decisions under the redevelopment law. While Petitioner Amicus refer to these decisions as evidence of abuses of the LRHL that support a need to re-write the LRHL, Petitioner Amicus overlook the obvious

import of these decisions: that the courts are properly performing their function of protecting from improper and arbitrary use of the LRHL. In short, the courts are able to successfully uphold municipal application of the LRHL when it is properly applied and overturn municipal actions under the LRHL when their application is improper, arbitrary or capricious.

POINT III

**THE APPLICATION OF SECTION 5(e) IN THIS CASE
DOES NOT EXCEED CONSTITUTIONAL LIMITS**

Public Advocate argues that "Subsection E is so infected with the concept of underutilization and the allure of more attractive prospective uses for non-blighted property that it cannot survive constitutional scrutiny." Public Advocate Brief page 19. Remarkably, Public Advocate ignores the fact that this Court specifically upheld the former Section 5(e) in Levin, and the existing Section 5(e) of the LRHL has survived the exact constitutional attacks made by Petitioner Amicus herein twice before the Appellate Division.

In Forbes, in which the Appellate Division addressed a challenge that the current Section 5(e) under the LRHL "was in derogation of the constitutional 'blight' imperative," the court held that the "blight definition of the Blighted Area Act was virtually unchanged by the LRHL ... [and] the definitional standards were not changed in any material respect." 312 N.J. Super. at 529. In Princeton, addressing a similar challenge that the LHRL did not meet the "negative connotation" elements of blight (an argument specifically advanced by Petitioner), the Appellate Division re-affirmed the validity of the definitional provisions of the LRHL. 370 N.J. Super. at 454-57. Notably, in

both cases the Appellate Division engaged in substantial analysis of the legislative history of Section 5(e) and, despite the existence of these constitutional challenges, this Court denied certification in both cases.

Public Advocate characterizes the relevant determinations to be made under Section 5(e) as subjective assessments of someone's view that any land that can be more productive. Therefore, virtually any property meets the redevelopment criteria of Section 5(e) and every parcel of land in the State is subject to an unfettered taking. First, some level of subjectivity is inherent with regard to local decisions of the State's 566 municipalities with distinct circumstances, needs and objectives. These determinations are not based on just anyone's view but the view of the particular governing body entrusted to act in the interest of the public by which they were elected.

Public Advocate has been known to often claim that Drumthwackett Mansion is probably underutilized or not fully productive and, therefore, would meet the blight criteria under Section 5(e). As Petitioner Amicus have done consistently throughout their briefs, they argue in the abstract without any context and erroneously presume that the courts' long-standing policy of deference to legislative determinations equates to rendering the courts' role a nullity. The courts, however, do

not deal in abstract hypotheticals, but deal in real-world contexts from which it has the power to determine whether a particular application of the LRHL is overreaching, arbitrary or capricious.

Interestingly, in the Drumthwackett example, it may well be that, from a solely economic standpoint, it could be "better utilized." If we look at this example in context, however, as a reviewing court would, it is apparent that neither this Court nor any other reviewing court would have any difficulty in finding such an application of Section 5(e) arbitrary and capricious.

Pubic Advocate's hypothetical assumes first that the municipality would attempt to take and support such action (and further erroneously assumes that municipalities do not look beyond the economic value of property in considering redevelopment). Such brazen action is unlikely considering the inevitable negative reaction from the community and, in this case, the State, the Governor, and numerous historical societies. The hypothetical also assumes that the courts will read Section 5(e) in the absurd manner as read by Petitioner Amicus; that as long as it produces greater revenue, it is blighted. Petitioner Amicus cite to no examples of such an application by any municipality and, it is submitted, that such an overreaching application would be reversed by any court.

Despite Petitioner Amicus' abstract hypotheticals, the reality is that municipalities have reasonably applied the LRHL with the valid public purpose of addressing current conditions and soundly planning for the improvement of such conditions. In the rare cases where there has been overreaching, the courts have nullified such action. Municipalities simply do not view areas solely in terms of economic enhancement, but weigh the various factors and elements of the current condition of an area and whether such area is being utilized in a manner that benefits or detracts from the community. Long-established principles of judicial review recognize that these are local community decisions that municipalities must be granted the discretion to make and, absent an erroneous or irrational application, should not be second-guessed by the courts, nor should the court substitute its own judgment for what is in the best interest of such community. See Lyons v. City of Camden, 52 N.J. 89, 98 (1968) (the "courts realize that the Legislature has conferred on the local authorities the power to make the [redevelopment] determination. If their decision is supported by substantial evidence, the fact that the question is debatable does not justify substitution of the judicial judgment for that of the local legislators.")

A. Section 5(e) is Consistent With the Intent of Article VIII, Section 3, Paragraph 1 of the Constitution.

Public Advocate states that the history of Section 5(e) demonstrates that it has progressed beyond the intent of Article VIII, Section 3, Paragraph 1 of the Constitution. In effect, Public Advocate argues that the amendments to Section 5(e) in 1992 lead to the inevitable conclusion that a mere finding that a property is not fully productive is sufficient to support a redevelopment designation.

The inaccuracy of this statement is evident from a simple review of the language of Section 5(e), which first requires a finding of a growing or total lack of proper utilization resulting in a stagnant or not fully productive condition. N.J.S.A. 40A:12A-5(e). Thus, Public Advocate's concern that "any property" can be deemed blighted based solely on a determination that it is not fully productive (as stated by Petitioner Amicus, not put to its highest and best use) is unfounded, as there must be a determination of a growing or total lack of proper utilization leading to such condition.

The determination of proper utilization must necessarily be made in context and cannot be evaluated in the abstract, as Petitioner Amicus do throughout their briefs. In this case, for example, the location of the Property in relation to its surrounding area cannot be ignored and the determination that

the Property is not being properly utilized, under the circumstances, is rationally supported by the record. Conversely, Public Advocate analyzes this language in a vacuum to conclude that any property may be deemed not fully productive. It is simply impossible to perform such an analysis without consideration of the relevant facts and circumstances. The requirement that any such determination be supported by substantial evidence will necessarily result in an analysis of the specific details relating to any particular property and the context of such redevelopment designation.

Additionally, the Appellate Division twice engaged in a thorough analysis of the legislative history and development of Section 5(e) in concluding that the current language of Section 5(e) of the LRHL is consistent with the intent of Article VIII, Section 3, Paragraph 1 of the Constitution. See Forbes and Princeton, supra. Public Advocate claims that the Appellate Division's analysis of Section 5(e) is erroneous because it did not find that by changing the word "and" to "or" and changing "unproductive" to not "fully productive", the Legislature exceeded the permissible bounds of Article VIII, Section 3, Paragraph 1 by removing any requirement that there be an evaluation of the current condition of the property.

What the Appellate Division recognized in the above cases, and what Petitioner Amicus ignore, is that the Constitution is a

living document that must be adaptable to modern conditions, issues and challenges. This firmly-established constitutional principle was aptly stated by Justice Marshall in discussing the federal Constitution's provision which authorizes congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government:

This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared, that the best means shall not be used, but those alone, **without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.**

McCulloch v. Maryland, 4 Wheaton 316, 415 (1819) (emphasis added).

This principle of constitutional construction is no less true in this State. "When the delegates met in 1947 they sought to create a living document embodying their high concepts of democratic government for themselves and oncoming generations. They generally avoided the pitfalls which had resulted from the

inflexible provisions in the State's earlier Constitution by replacing them with general expressions of modern governmental principles." Kervick v. Bontempo, 29 N.J. 469, 479 (1959). This Court has recognized that the Constitution must be flexibly construed consistent with "social and economic needs arising from the complexities of modern life" and that "the Constitution would not serve its essential purpose were it insensitive to the demands of a changing society and economy." Behnke v. New Jersey Hwy. Auth., 13 N.J. 14, 25 (1953).

Petitioner Amicus' arguments that the Court should read the term blight in the strictest sense, limited to what the concept of blight was at the time of the 1947 convention and the prior twenty years leading up to the enactment of Article VIII, Section 3, Paragraph 1 are contrary to well-settled principles of constitutional construction of both this Court and the United State Supreme Court. This Court and the Appellate Division have properly given credence to this principle of construction by affirming the constitutionally appropriate amendments to the redevelopment laws adopted by the Legislature to meet changing needs and objectives of our society and have consistently upheld the legislative enactments adopted pursuant to Article VIII, Section 3, Paragraph 1, including Section 5(e) specifically. No reasonable basis is suggested by Petitioner Amicus herein for

the Court to reverse these sound rulings and established precedent.

In order to accept Petitioner Amicus' arguments and analysis of Section 5(e), the Court must ignore another firmly-established principle of judicial review and constitutional construction that courts have a duty when reviewing legislative enactments "to so construe the statute as to render it constitutional if it is reasonably susceptible to such interpretation." State v. Miller, 170 N.J. 417, 433 (2002). "Our courts have demonstrated a steadfast adherence to the principle 'that every possible presumption favors the validity of an act of the Legislature (citations omitted) [and] exercise 'extreme self restraint' before using 'the judicial power to invalidate a legislative act[,] and we will not declare a legislative act void 'unless its repugnancy to the Constitution is clear beyond a reasonable doubt.'" LaManna v. Pro Forma Ins. Co., 184 N.J. 214, 223 (2005). Courts have "a duty, when confronted with alternative interpretations which are equally plausible, to adopt the construction which avoids the constitutional issue and sustains the legislative enactment." Morass v. Forbes, 24 N.J. 341, 355-56 (1957). These principles are grounded in the "constitutional doubt" doctrine, which presumes that the legislative enactments are constitutionally valid and "when possible, a statute will be interpreted so that

it does not conflict with the Constitution." State v. Stanton, 176 N.J. 75, 92 (2003).

Although Public Advocate references the constitutional doubt doctrine in a footnote in a later section of his brief, the concept is noticeably absent from his arguments essentially asking this Court to apply the constitutional doubt doctrine in reverse and engage in a strained effort to read the LRHL unconstitutionally. Public Advocate asks the Court not only to presume the Legislature acted unconstitutionally in enacting Section 5(e) of the LRHL, but to further assume a reading of Section 5(e) that was not relied upon by the lower courts in this case, was not advanced by any party in this case, and in a manner in which Petitioner Amicus can cite to no example of any municipality ever attempting to apply. If this principle is properly applied, however, the Court need not strain to find Section 5(e) constitutional, as set forth below.

B. The Appellate Division Properly Construed Section 5(e) of the LRHL Consistent With Article VIII, Section 3 of the Constitution.

The application of Section 5(e) to the Property herein was not unconstitutional. Notably, the purported unconstitutional element of Section 5(e) (that the property need only be determined to be not fully productive) is not implicated in this case because Paulsboro found the Property to be both unproductive and stagnant. Slip Opinion, p.39. Thus,

Paulsboro's determination was consistent not only with Section 5(e) of the LRHL, but the former Section 5(e) under the Blighted Areas Act, the constitutionality of which is not questioned, as its constitutionality was upheld by this Court prior to the 1992 LRHL amendment challenged herein.

Additionally, Paulsboro appropriately considered the Property in the context of its historical use and in context of the surrounding area in determining that the Property, and the area of which it is a part, demonstrated a growing or total lack of proper underutilization resulting in a stagnant and not fully productive condition. Petitioner's Property is a commercial property surrounded by some 200 acres of abandoned industrial sites in the immediate vicinity of a deteriorating downtown. Slip Opinion, at pp. 14-16. As this Court has long recognized the "patent purpose [of redevelopment laws] is to deal with substantial areas as distinguished from individual properties." Wilson, 27 N.J. at 378. "[T]he process contemplated by the law cannot be accomplished by means of individual selection of property. It must proceed in terms of redevelopment of areas." Lyons, 52 N.J. at 99 (quoting Wilson). Redevelopment laws "are concerned with areas and not with individual properties." Levin, 57 N.J. at 539. "So long as the area designated as blighted is the portion of the municipality which, in the judgment of the appropriate local body, falls within the broad

terms of the definition laid down by the Legislature, the courts will not interfere in the absence of palpable abuse of discretion or bad faith." Id.

Moreover, in considering the redevelopment designation of the Property in context, Paulsboro not only appropriately considered future potential in determining that the Property may be potentially valuable in contributing to the public welfare, but also considered the past historical uses of the Property in determining that the Property currently demonstrates a growing or total lack of proper utilization and a stagnant and not fully productive condition. Slip Opinion, at pp. 14-16. In this case, the record demonstrated that utilization of the Property had deteriorated from its prior uses. Id. Similarly, the area generally in which the Property is located has clearly become stagnant and not fully productive considering the historical uses of those properties. Id.

Contrary to Petitioner Amicus' abstract hypotheticals, a redevelopment analysis must necessarily be considered within the given context. For example, a factory that employs thirty individuals cannot be deemed not fully productive on its face. However, if that factory had previously employed 300 individuals such a finding may be warranted.

Petitioner Amicus' claims that the Appellate Division's interpretation of Section 5(e) is unconstitutional because it

relied on nothing more than the fact that the property was under utilized is an inaccurate description of the court's decision. Based on this misinterpretation, Petitioner Amicus proceed to argue that the Appellate Division decision stands for the proposition that any unimproved land is blighted under Section 5(e).

Again, Petitioner Amicus attempt to present this case to the Court in a vacuum and ignore the context and the voluminous record before the trial court and Appellate Division, based upon which the court concluded "there was substantial credible evidence in the record from which it could have been reasonably concluded that there was a growing lack of proper utilization of plaintiff's property resulting in a stagnant and not a fully productive condition of land potentially useful and valuable for contributing to and serving the public health safety and welfare". Slip opinion at 38-39 (emphasis added). The court did not hold that land in its natural state is inherently blighted, nor can such a proclamation reasonably be inferred from the decision below.

POINT IV

**THERE IS NO BASIS FOR THIS COURT TO DISCARD
ESTABLISHED PRINCIPLES OF JUDICIAL REVIEW
AND APPLY A HEIGHTENED SCRUTINY REVIEW OF
MUNICIPALITIES' APPLICATION OF THE LRHL.**

Petitioner Amicus urge this Court to adopt a heightened scrutiny review of municipal redevelopment determinations under the LRHL and, thus, distinguish this one particular area of local government discretion from the countless other discretionary exercises of decision-making by municipal bodies that are subject to the same longstanding presumption of validity and reviewed by the courts under the arbitrary and capricious standard. There is simply no sound basis for this Court to carve out a unique exception to the long-settled principles of review of municipal action for this limited area of local government's exercise of powers. A brief review of the rationale behind the proper standard of review is warranted.

The concept underlying the presumption of validity concept with respect to land use decisions of local government was first enunciated by the United States Supreme Court in Euclid v. Ambler Realty Co., 272 U.S. 365, 387-88 (1926):

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. ... Thus the question whether the power exists to forbid the erection of a

building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, **is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality.** (citation omitted) ... **If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.** (emphasis added)

The principles underlying this concept of due discretion to local government land use decisions which form the basis of the presumption of validity and arbitrary and capricious review standard were first clearly enunciated in Justice Heher's dissenting opinion in Brookdale Homes v. Johnson, 19 A.2d 868, 871 (N.J. Err. & App. 1941):

Where the action taken serves the good and welfare of the community at large, and is not so unreasonable as to be arbitrary or confiscatory, the ensuing interference with the use of private property is *damnum absque injuria*. The sweep of the police power is generally coextensive with the public need. It embraces such measures as are reasonably necessary to secure the essential, common, material and moral needs; and the correlative restrictions upon individual rights--either of person or of property--are mere incidents of the social order, considered a negligible loss compared with the benefits accruing to the community as a unit. Indeed, it is to be presumed that a wholly compensating individual advantage flows from the general betterment. While some of the earlier cases seem to confine the authority to such regulations as are needful for the public health, the public safety, and the public morals, such measures as are fairly requisite for the 'public convenience' and the 'general prosperity' are now considered as within the category. This reserve element of sovereignty embraces the measures essential to the general well being.

The reasoning of Justice Heher's dissent was thereafter clearly adopted by this Court in Reingold v. Harper, 6 N.J. 182, 194 (1951), in which this Court addressed a challenge that a particular use restriction unconstitutionally interfered with the challenger's right of private property. The Court stated:

The lawmaking body is the sole judge of what is adequate to meet the particular public requirement; judicial interposition is justifiable only where the action taken is arbitrary. The police power is an attribute of sovereignty to serve all the great public needs; and its exercise does not constitute a denial of due process or the equal protection of the law within the concept of the Fifth and Fourteenth Amendments of the Federal Constitution or the due process clauses of our own Constitution, unless it be palpably unreasonable or unduly discriminatory. ... Every reasonable presumption is to be made in favor of the validity of the legislative act. Fairly debatable questions as to need and the propriety of the means employed to meet the exigency are within the legislative province.

Reingold v. Harper, 6 N.J. 182, 194-95 , (N.J. 1951). The arbitrary and capricious review standard and presumption of validity to municipal actions has subsequently been consistently applied by New Jersey's courts in review of local government decisions and is firmly-established in the State's jurisprudence. "To the traditional presumption with respect to the validity of every legislative act there has been added, moreover, the constitutional mandate to construe such legislation liberally in favor of the municipalities. These constitutional and statutory changes have in effect adopted the reasoning of the dissenting opinion in Brookdale Homes [citation omitted]..." Lionshead Lake, Inc. v. Wayne Tp., 10 N.J. 165, 172 (N.J. 1952).

This Court thereafter appropriately adopted this standard of review to municipal redevelopment decisions in Lyons v. Camden, 48 N.J. 524, 533 (1967): "The function of the Law Division as prescribed by the statute is to decide whether the determination of the public body is supported by substantial evidence. (citation omitted) Absence of such support would indicate arbitrary or capricious action. As is usual, however, the determination of the public body would come to the Law Division accompanied by a presumption of validity, and the burden would be upon the attacker to demonstrate lack of the required substantial evidence support." New Jersey courts have continued to consistently (Petitioner Amicus' assertions to the contrary) apply this standard of review in challenges to municipal redevelopment actions. See. e.g., ERETC, L.L.C. v. City of Perth Amboy, 381 N.J. Super. 268, 277 (App. Div. 2005) ("Redevelopment designations, like all municipal actions, are vested with a presumption of validity. ... Thus, judicial review of a redevelopment designation is limited solely to whether the designation is supported by substantial credible evidence.") (applying appropriate standard in overturning municipal redevelopment determination).

The important underlying principle of the presumption of validity and discretion due to local municipal determinations is to avoid substituting independent evaluation by the judiciary, thus, usurping the legislative powers of the municipality. This concept was most succinctly stated in Lyons v. City of Camden, 52 N.J. 89, 98 (1968):

Clearly the extent to which the various elements that informed persons say enter into the blight decision-making process are present in any particular area is largely a matter of practical judgment, common sense and sound discretion. It must be recognized that at times men of training and experience may honestly differ as to whether the elements are sufficiently present in a certain district to warrant a determination that the area is blighted. In such cases courts realize that the Legislature has conferred on the local authorities the power to make the determination. If their decision is supported by substantial evidence, the fact that the question is debatable does not justify substitution of the judicial judgment for that of the local legislators.

The importance of reviewing municipal with due deference to local considerations, concerns, objectives, and familiarity is paramount in municipal redevelopment determinations. If the courts were to apply the heightened standard urged by Petitioner Amicus, there is truly no purpose for the local government to even play a role in redevelopment decisions. Whenever a local governing body believes redevelopment may be appropriate, the ultimate authority would lay with the trial judge to independently determine whether the conditions of a proposed area warrant redevelopment. Such a rule would effectively place a hearing judge on every municipal planning board and governing body and, rather than putting the responsibility of determining whether redevelopment is appropriate with the local officials who are most familiar with the conditions and needs of their communities, such determinations would instead be made by a

disinterested judge who has no familiarity with the specific community.

This Court and the lower courts have consistently, and appropriately, recognized that this is not the role of the judiciary and that such decisions must necessarily be made by the local officials that are responsible for taking action in the interest of their communities. It is of no small significance, moreover, that these officials are subject to the political process. If the public they represent does not believe the officials are truly acting in the public's best interest, that public has a political voice and these officials will not likely be reelected. Conversely, by effectively stripping such decision-making from the local officials (who were selected by the very public to be effected by the proposed redevelopment actions) and giving such power to judges (appointed officials who have no political obligation to represent the interest of a particular community), the Public Advocate's suggested holding by this Court, however, well-intentioned, would serve to take power from the very public its office exists to protect.

By urging this Court to heighten the burden of proof in judicial review of redevelopment decisions, Petitioner Amicus also ask this Court to usurp the power of the Legislature and reverse its own long-established principles of judicial

deference to local decision-making, a concept applicable to every municipal decision that Petitioner Amicus argue should in this one instance, in which such discretion is of paramount importance, be ignored. Indeed, by asking the Court to remove any deference in this one area of local decision-making, Petitioner Amicus are asking this Court to direct every judge in the State to presume that when a local governing body takes any redevelopment action, it is acting in bad-faith and for an improper purpose, and that its decisions should be reviewed with suspicion.

Moreover, Petitioner Amicus misinterpret the current standard and burden of proof in urging that the burden be shifted to municipalities. In fact, the municipality currently bares the burden of establishing by substantial and credible evidence that its decision is reasonably supported by the facts and the record. See, e.g., ERETC, 381 N.J. Super. at 278 ("we will defer to the local legislators if their decision to designate areas in need of redevelopment is supported by substantial evidence.") By requiring a showing of substantial evidence, redevelopment determinations are already subject to a heightened burden as compared to other municipal land use and zoning decisions, wherein no such showing would be required if a challenger failed to demonstrate that the action taken was arbitrary and capricious. Thus, even with a presumption of

validity, the municipality still bares the burden to support its decision by a showing of substantial evidence. If it fails to do so in the face of a reasonably supported challenge, the presumption of validity does not save the municipal action.

Public Advocate cites to cases in which the courts have established a heightened scrutiny or burden of proof required to sustain certain state action. These cases are inapposite and they do not support the radical change to firmly-established judicial review standards urged by Petitioner Amicus. For example, Public Advocate notes that in First Amendment cases dealing with laws restricting the right of free speech, the state must establish that the law furthers a compelling interest and that the regulation is narrowly tailored to achieve that interest. Public Advocate brief at p. 36 (citing R.M. v. Supreme Court of New Jersey, 185 N.J. 208, 217 (2005)). This standard is unique to review of laws and regulations that impinge upon First Amendment rights, however, which the founding fathers clearly held to be of utmost importance to the principles upon which this Country was founded and which the drafters of the Constitution clearly intended to warrant special protection above other rights. See. e.g., State v. Schmid, 84 N.J. 535, 542 (1980) (noting that First Amendment protections are guaranteed through the 14th Amendment of the Federal Constitution and that freedom of speech is "clearly vital to the

preservation of a free society." (quoting Martin v. Struthers, 319 U.S. 141, 146-147 (1943)).

Public Advocate also cites other instances where courts have imposed a higher proof burden upon state action that has an impact upon individual liberty protections and required the state to support such actions by clear and convincing evidence. Examples cited by Public Advocate include termination of parental rights, actual malice in libel cases, and probability of re-offense in Megan's Law notification and registration. These cases, too, are distinguishable and inapposite as they deal typically with rights that historically warrant more strict protection than property rights and are specifically guaranteed through the 14th Amendment. Malice in a libel case, for example, touches upon the right of free speech protected by the First Amendment. The right to require a clear showing before an individual is labeled a pedophile or sex offender by public record or before removing a child from a parent are also, appropriately, viewed as greater infringements upon personal liberty than taking municipal action that subjects a property owner to the possibility of the municipality acquiring the property through exercise of eminent domain.

Indeed, even absent a redevelopment designation, property owners are generally subject to the exercise of eminent domain through municipal, state, county, federal, and any number of

subordinate agencies of any of the foregoing governmental entities. Accordingly, the deprivation of right to private property through the exercise of eminent domain is specifically addressed in the Takings clause, which requires a showing of valid public purpose for the taking and payment of just compensation.

Thus, it is inaccurate for Petitioner Amicus to state that the property owner effectively bears the burden of showing because his or her property is not blighted. In essence, the property owner need only show a prima facie case sufficient to overcome this presumption. Moreover, in the event that the municipality fails to support the blight designation with substantial credible evidence, then regardless of any presumption in its favor a reviewing court would not uphold such determination. The presumption in favor of municipal action only comes into play when it appears that challengers have shown that the question is debatable and that the evidence could weigh in support of either party. In these circumstances, the presumption of validity applies to support a decision in favor of the municipal action absent a finding of arbitrary or capricious decision-making.

As noted above, this is the established principal of review for all municipal action in the enactment of a zoning or other land use ordinances, all of which are based in constitutional

principals and on some level have constitutional implications. In all such cases, a lack of substantial evidence effectively equates to arbitrary and capricious action.

Public Advocate argues that judicial economy and efficiency and fairness support shifting and heightening the proof burden to the municipality. The arguments supporting this claim are erroneous. For example, Public Advocate argues that the relevant evidence is in the hands of the municipality and, thus, it should bear the burden of proof. However, all of the relevant information is public information and the redevelopment studies, evidence, and related activities are conducted in a full open and public process, as mandated by the LRHL. N.J.S.A. 40A:12A-6. The relevant evidence is all contained in the record that is reviewed by the court. Indeed, this limited review makes the municipal determination harder to defend as a municipality is limited to the record created below and generally not permitted to supplement the evidence before the court.

New Jersey courts have not invoked alternative standards but have consistently applied the arbitrary and capricious standard applicable to all municipal action and have appropriately upheld municipal determinations supported by substantial evidence and reversed municipal action that was arbitrary and capricious. Notably, the several cases cited by

Petitioner Amicus to stand for the "proper" review standard all consistently applied the standards articulated above, but held that the municipality failed to meet the substantial evidence test and, therefore, its determination was arbitrary and capricious. Apparently, the standard Petitioner Amicus truly urge this Court to adopt is one in which the courts will be sure to reverse every municipal redevelopment determination: i.e, if the court appropriately applies the standard, the redevelopment determination will be reversed; if the court does not reverse, it misapplied the standard.

The Public Advocate finally asserts that the courts below failed because it relied on nothing more than the openness of the targeted area to affirm the redevelopment designation.⁴ The lower courts, however, had a voluminous record before it with hundreds of documents, studies dating back to the late 1990s, the entire transcripts before the planning board, and all of the enacting Resolutions and Ordinances. To suggest that the lower courts failed to conduct a thorough review of the record is preposterous and demeaning to those courts.

⁴ Petitioner amicus also criticize what they characterize as net opinion and a scant investigation and report of the Property, such as was conducted in Wilson of Lyons, to argue expert findings should be required in all redevelopment cases (an absurd imposition upon trial court discretion). It is hard to imagine what more the planner would be expected to do with respect to investigating the Property. There is no interior to inspect, it is one parcel, etc. and cannot be individually compared to the area studied in Wilson or Lyons.

The Court should be further aware of the implications of reversing its over fifty years of established precedent and applying the heightened standard suggested by Petitioner Amicus. Such a drastic change to the law would jeopardize countless redevelopment efforts throughout the State. For every redevelopment that has been under challenge and review of the courts, there are many that have proceeded without challenge or controversy and have received substantial public support. No doubt many of these redevelopment efforts, although either previously deemed valid by the courts or never seriously challenged by an objector, would fail to meet the substantial burden that Public Advocate argues for herein. In all likelihood, however, stripped of the tools of proper planning and revitalization, these areas no doubt would meet such a burden five or ten years from now as the continues to decline and ultimately reaches a state of unquestionable blight.

Additionally, the effective "presumption of invalidity" to municipal actions that Petitioner Amicus urge would have a chilling effect on municipalities that were taking any steps towards redevelopment efforts and would further have a chilling effect on prospective developers that are in a position to carry out such redevelopment.

POINT V

**THE FRESHWATER WETLAND OPEN SPACE ARGUMENTS WERE NEVER RAISED
BELOW AND SHOULD BE PRECLUDED AND ARE IRRELEVANT TO THE ISSUES
BEFORE THIS COURT**

Public Advocate and Environmental Amicus now claim, for the first time before this Court, that the Property cannot meet the Section 5(e) criteria or that such designation should be reversed because the Property contains portions of protected freshwater wetlands, pursuant to N.J.S.A. 13B-1, et seq., or the Property is open space in its "natural" state.⁵ Public Advocate argues that due to the fact that portions of the Property are within designated as wetlands, for which the State has expressed a policy of preservation, it is per se a "proper utilization" for the Property to remain in its natural state and, therefore, it cannot meet the criteria of Section 5(e). Environmental Amicus adopts the same argument as Public Advocate and further argues that the redevelopment designation must be reversed because it conflicts with the State's preservation goals.

⁵ Petitioner also raised arguments based upon the purported wetlands designation of the Property, for the first time, in its substantive brief to this Court. While Petitioner's wetland arguments fail for the same reasons as Amici who raised these arguments, Petitioner's reliance upon any purported preservation of the Property so directly contradict Petitioner's position before the lower courts in opposition to the redevelopment designation (that it had development plans) that Petitioner should be judicially estopped from maintaining any argument based on wetland status or preservation of the Property. See, e.g. State v. Jenkins, 178 N.J. 347, 358-59 (2004).

At the outset, the Court should not permit Public Advocate and Environmental Amicus to raise the issue and related legal arguments concerning the purported wetland designation or open space as a basis for overturning the municipality's actions because these issues were never raised by Petitioner before either the municipality or either of the lower courts. See, Pressler, N.J. Court Rule 2:5-4, Comment 1 (citing, inter alia, Cipalla v. Lincoln Tech., 179 N.J. Super. 45, 52 (2004)). It is manifest that the lower courts cannot be found in error for failing to accept or address an argument never raised and, indeed, supported by assertions directly contradicting Petitioner's representations before those courts.

Moreover, Petitioner's Property is not the pristine wetland or open space in its natural state that Petitioner Amicus now wish to paint a picture of for the Court. It is a commercial property that Petitioner admittedly sought to utilize for dredge dumping, not for preservation. Slip Opinion at pp. 14-16. It sits in an industrial area surrounded by abandoned refineries and a chemical plant and likely in need of some level of environmental remediation as a result of contamination of the surrounding sites, as well as prior incidents of dredge dumping. Id. In 1998 Petitioner also sought, and obtained, a rezoning of the Property for marina industrial business park use. Id. It was never asserted before either court below that Petitioner,

nor any governmental agency or private conservation group, had any intention to preserve the Property.

Despite the plans it discussed to either develop or use the Property for dredge dumping, Petitioner is now characterized before this Court as a trusted caretaker or faithful custodian of pristine freshwater wetlands in its natural state, which it has diligently sought to protect and preserve. Clearly, Petitioner's intended uses for the Property were wholly-inconsistent with the legislative purposes of the Fresh Water Wetlands Act referred to by Petitioner, Public Advocate and Environmental Amicus. See, e.g., Public Advocate Brief, p.31.

Even assuming this issue was properly before the Court, Public Advocate's and Environmental Amicus' arguments are erroneous. Public Advocate and Environmental Amicus argue that because the property is designated as freshwater wetland, it cannot be deemed to meet the redevelopment criteria under Section 5(e) as a matter of law. The rationale behind this conclusion is that the property must inherently be properly utilized. As set forth above, the Property was not being preserved, it is not in its "natural" state, it is partially developed, and Petitioner has testified that it intends to either develop the Property or utilize it for dredge dumping.

In any event, assuming the Property did contain portions of wetlands, this fact is irrelevant to the redevelopment

designation of the Property. First, the NJDEP regulations do not prohibit development of wetlands, but regulates such development. See Public Advocate Brief, p. 33, n.19. In any case, there is no current plan to develop the Property that Public Advocate or Environmental Amicus can infer conflicts with these applicable regulations. Second, the redevelopment designation has no impact upon the jurisdiction of any applicable State environmental laws or regulations. Even if the Property is wetlands or its use is otherwise subject to NJDEP review or approval, such approvals will still be required. If the Property is designated for protection or preservation by NJDEP, then the Property will be protected or preserved, regardless of a redevelopment designation.

Environmental Amicus argues that application of the LRHL to this Property must be reversed because it conflicts with the State's preservation policies and goals. The basic premise upon which Environmental Amicus' argument is based is that preservation is more important to the State than redevelopment. Environmental Amicus interpret these policies to provide that all open space must be preserved. Environmental Amicus overlooks the fact that the State also has an express policy to encourage redevelopment.

There are two sides to smart growth that basically seek to strike a balance between where land should be preserved and

where development should be encouraged, as set forth in the State Development Redevelopment Plan ("State Plan"). Notably, the Property is situated in Planning Area One under the State Plan, which constitutes the areas where development and redevelopment is considered most valuable and important to the State. See Appendix to Amicus New Jersey Builder's Association Brief, at p. 102-103. Additionally, the redevelopment of this area of Paulsboro and its plans for construction of a public port are specifically endorsed by the Governor, as set forth in the Governor's Office 2007 Economic Growth Strategy. See Appendix to Respondent's Brief in Response to Amicus, Ra31.

Similarly, Environmental Amicus suggest that the Appellate Division decision constitutes a repeal by implication of all statutes underlying the State's goal to preserve open space. Environmental Amicus argue that the Appellate Court has failed to meet the clear and compelling evidence required before a court will imply legislative intent to impliedly repeal all of the environmental laws. See, e.g., Mahwah v. Bergen County Bd. Of Taxation, 98 N.J. 268, 280-81 (1985). Ironically, in making this argument, Environmental Amicus is asking the Court to determine that by enacting various open space preservation laws, the Legislature intended to repeal the LRHL by implication. New Jersey Amicus simply responds that Environmental Amicus also fails to show by clear and compelling evidence that the

Legislature intended to repeal the LRHL by adopting the various preservation laws.

Public Advocate and Environmental Amicus argue that this Court's recent holding in Mt. Laurel v. Mipro Homes, LLC, 188 N.J. 531, 533-34, authorizing the exercise of eminent domain for preservation purposes, would be irreconcilable with a decision by this Court affirming the Appellate Division. This Court's holding that land could be taken for preservation purposes does not lead to the absurd conclusion reached by Public Advocate and Environmental Amicus that all vacant or unimproved land may only be acquired for such purposes.

The significant factor in either case is the Court's recognition that the government has the authority to acquire property for either purpose based upon the specific context. In either event, the municipality is removing the property from private ownership to effectuate a public purpose. As set forth at great length earlier in this brief, it is province of such municipality and the Legislature, not the court, to determine which public purpose any particular property may better serve. To the extent that State or regional concerns come into play, State policy supports Paulsboro's decision, as expressed in the State Plan and the Governor 2007 Economic Growth Strategy.

CONCLUSION

For the foregoing reasons, New Jersey Amicus respectfully urge the Court to reject all of Petitioner Amicus' requested changes to the LRHL and the Court's prior holdings and reaffirm its decades of sound precedent and proper actions by Legislature in enacting the LRHL, and not to engage in the legislative action suggested by Petitioner Amicus.

Respectfully submitted,

GREENBAUM, ROWE, SMITH AND DAVIS LLP
Metro Corporate Campus One
P.O. Box 5600
Woodbridge, New Jersey 07095
(732) 549-5600
Attorneys for Amici Curiae New Jersey
State League of Municipalities,
Downtown New Jersey, Inc. and New
Jersey Chapter-American Planning
Association

BY: _____
ROBERT BECKELMAN

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