62-64 MAIN STREET, L.L.C. and 59-61 MOORE STREET, L.L.C., Plaintiffs-Appellants, v. MAYOR and COUNCIL OF THE CITY OF HACKENSACK; PLANNING BOARD OF THE CITY OF HACKENSACK, Defendants-Respondents, and THOMAS P. KAVANAGH, Defendant.

DOCKET NO. A-3257-11T4

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2013 N.J. Super. Unpub. LEXIS 1031

February 27, 2013, Argued
May 3, 2013, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket Nos. L-6854-08 and L-4358-11.

62-64 Main St., LLC v. Mayor & Council of Hackensack, 2011 N.J. Super. Unpub. LEXIS 108 (App.Div., Jan. 14, 2011)

COUNSEL: Peter D. Dickson argued the cause for appellants (Potter and Dickson, attorneys; Mr. Dickson, on the briefs).

Robert J. Hitscherich argued the cause for respondent Mayor and Council of the City of Hackensack (Zisa & Hitscherich, attorneys; Mr. Hitscherich, on the brief).

Joseph P. Kreoll argued the cause for respondent Planning Board of the City of Hackensack (The Law Offices of Richard Malagiere, P.C., attorney; Richard Malagiere, of counsel; Mr. Kreoll, on the brief).

JUDGES: Before Judges Grall, Koblitz and Accurso.

OPINION

PER CURIAM

Plaintiffs 62-64 Main Street, L.L.C. (Main) and 59-61 Moore Street, L.L.C. (Moore) appeal from a January 12, 2012 judgment affirming the City of Hackensack's designation of plaintiffs' properties[1] as an area in need of redevelopment pursuant to the Local Redevelopment and Housing Law (LRHL), *N.J.S.A. 40A:12A-1* to -73. Plaintiffs also appeal from the February 27, 2012 order denying reconsideration. Because the trial judge and the City misapplied our Supreme Court's decision in *Gallenthin Realty Development, Inc. v. Borough of Paulsboro, 191 N.J. 344, 924 A.2d 447 (2007)*, we [*2] reverse.[2]

1 Main's property consisted of Block 205, Lots 4-7 and Moore's contiguous property was Block 205, Lot 8.

2 The resolutions at issue here were passed by the City's Planning Board on February 13, 2008 and the City's Mayor and Council on April 5, 2011. The latter was adopted following this court's decision addressing alleged procedural irregularities that are not at issue here. *62-64 Main St., LLC v. Mayor & Council of Hackensack, No. A-0342-09, 2011 N.J. Super. Unpub. LEXIS 108, *3 (App. Div. Jan. 14, 2011)*. Plaintiffs' challenge to the April 5, 2011 resolution was consolidated with its previously filed action in lieu of prerogative writs discussed in our prior opinion.

A statement of the governing legal principles provide a framework for the discussion of the facts. It is well established that the State may take private property in accordance with our State Constitution. *Gallenthin, supra, 191 N.J. at 356*; *Abbott v. Beth Israel Cemetery Ass'n of Woodbridge, 13 N.J. 528, 545, 100 A.2d 532 (1953)*. One limit on that power is that private property may only be taken for "public use." *N.J. Const. art I, ¶ 20*. In accordance with the "public use" limitation, Arti-

cle VIII, Section 3, Paragraph 1, the Blighted Areas Clause, [*3] provides:

> The clearance, replanning, development or *redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired.* Municipal, public or private corporations may be authorized by law to undertake such clearance, replanning, development or redevelopment . . . .
>
> [(Emphasis added).]

Through this Clause, the taking of property to address blight is a "public purpose." In *Gallenthin*, the Court reviewed the history of the Blighted Areas Clause and legislation governing redevelopment and held that "blight" means "deterioration or stagnation that negatively affects surrounding areas." *191 N.J. at 363.*

The LRHL is the legislation that presently implements the Blighted Areas Clause, which "empowers municipalities to designate property as 'in need of redevelopment' and thus subject to the State's eminent domain power." *Id. at 357* (citing *N.J.S.A. 40A:12A-3*).

N.J.S.A. 40A:12A-5 outlines the conditions that, if found, allow a municipality to designate the area in need of redevelopment. The provisions of *N.J.S.A. 40A:12-5* at issue here are:

> a. The generality of buildings are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess [*4] any of such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living or working conditions.
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> b. The discontinuance of the use of buildings previously used for commercial, manufacturing, or industrial purposes; the abandonment of such buildings; or the same being allowed to fall into so great a state of disrepair as to be untenantable.
>
> . . . .
>
> d. Areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.
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> e. A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

In *Gallenthin*, the Court made it clear that a municipality's interpretation of the foregoing conditions must [*5] be confined to property that is also in such condition to satisfy the constitutional meaning of the term blight -- "deterioration or stagnation that negatively affects surrounding areas." *191 N.J. at 363.* While the Court addressed only *subsection (e)* of the statute in *Gallenthin*, to the extent that the Court reasoned that the statute could not be interpreted or applied to cover property that is not blighted within the meaning of the Constitution, *Gallenthin's* holding applies to every subsection of *N.J.S.A. 40A:12A-5. See Hoagland v. City of Long Branch, 428 N.J. Super. 321, 324, 53 A.3d 677 (App. Div. 2012)* (noting that *Gallenthin* reaffirms that the "Constitution requires a finding of actual blight before private property may be taken for purposes of redevelopment"), *certif. denied, 213 N.J. 388, 63 A.3d 228 (2013).*

The resolution of the Mayor and Council declaring these properties blighted incorporates by reference and adopts the recommendations and findings of the Planning Board of the City of Hackensack (Board) in its February 13, 2008 resolution:

> (i) Based upon [evidence from its hearings] . . . , the Board found that Block 205, Lots 4 through 7 [(the Main property)] contains buildings which show prominent [*6] signs of structural deterioration, and is boarded up to prevent unauthorized access. The code enforcement issued by the City to the property owner on March 10th, 2005, to demolish the buildings or correct unsafe conditions, places the property within criteria "a" of [*N.J.S.A. 40A:12A-5*] because the two buildings are substandard and unsafe for occupancy. The property meets criteria "b" because the two existing commercial buildings are vacant due to deteriorated conditions that have rendered them un-

> tenable [sic]. The parking area is unsightly and not well maintained. The property also suffers from faulty arrangement of design under criteria "d".
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> (ii) Based upon [evidence from its hearings] . . . , the Board found that Block 205, Lot 8 [(the Moore property)] meets criteria "d" for faulty arrangement of design, which is indicated by the undefined layout and related poor circulation for the parking lot. The conditions have a negative impact on the surrounding properties because it is an unsightly area and the inefficient utilization of the parking area contributes to greater use of the on-street parking resources than would otherwise occur.

The trial judge found that the Board's designation [*7] of plaintiffs' properties was not arbitrary, capricious or unreasonable because the Main property satisfied *subsections (a)*, *(b)*, and *(d)* of *N.J.S.A. 40A:12A-5*, and the Moore property satisfied *subsection (d)* of the statute for the reasons expressed in the Board's 2008 resolution. The judge additionally determined that "the term 'blight' does not apply to each of the LRHL's statutory criteria." Rather, the judge interpreted *Gallenthin* as holding that blight only applies to *subsection (e)* of *N.J.S.A. 40A:12A-5*, which was not cited in the Board's findings.

It is also clear that neither the Board nor the Mayor and Council considered whether the conditions noted in the Board's resolution rose to the level of blight. The conditions deemed found to make Lot 8, a parking lot, blighted were the absence of lighting and landscaping that led to over-utilization of street parking, and the presence of a faulty layout and crumbling surface. Indeed, the City's expert acknowledged that with those improvements there would be no negative impact on the community. *See N.J.S.A. 40A:12A-5(d)*. Moreover, the Board did not address the fact that the owners had attempted to obtain approval to develop the properties, [*8] and that the proposals were denied.

The Mayor and Council's determination that plaintiffs' properties were an area in need of redevelopment came to the trial judge "invested with a presumption of validity." *Levin v. Twp. Comm. of Bridgewater, 57 N.J. 506, 537, 274 A.2d 1, appeal dismissed, 404 U.S. 803, 92 S. Ct. 58, 30 L. Ed. 2d 35 (1971)*. "[M]unicipal redevelopment designations are entitled to deference provided that they are supported by substantial evidence on the record[.]" *Gallenthin, supra, 191 N.J. at 372-73* (citing *N.J.S.A. 40A:12A-6(b)(5)*). Challengers have "the burden of overcoming that presumption and demonstrating that the blight determination was not supported by substantial evidence." *Levin, supra, 57 N.J. at 537. Accord id. at 372; Concerned Citizens of Princeton, Inc. v. Mayor and Counsel of Princeton, 370 N.J. Super. 429, 452-53, 851 A.2d 685 (App. Div.), certif. denied, 182 N.J. 139, 861 A.2d 844 (2004)*.

However, "a municipality must establish a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met." *Gallenthin, supra, 191 N.J. at 373*. The resolutions adopted by the Board and the Mayor and Council in this case provide insufficient [*9] findings to support their conclusions. Moreover, there is no indication that the bodies gave any consideration to whether the conditions that it deemed to establish the statutory criteria also established blight within the meaning of the Constitution.

As noted above, *Gallenthin* established a heightened standard for designating an area in need of redevelopment, requiring not only a determination that an area satisfies a subsection under *N.J.S.A. 40A:12A-5*, but also a finding of blight. *See Hoagland, supra, 428 N.J. Super. at 324*. In recapping the court's holding in *Gallenthin*, we stated in *Hoagland* that "[t]he trial court had decided these cases prior to the Supreme Court's decision in [*Gallenthin*], which reaffirmed that the New Jersey Constitution requires a finding of actual blight before private property may be taken for purposes of redevelopment." *Ibid.*

Because this constitutionally mandated finding was not made here and the factual findings that were made do not support it, we reverse.

In light of our reversal, we need not address the remaining issues raised by plaintiffs.

Reversed.