

Friends of Local Government
Policy Paper Series

New Legal Tools for Redevelopment

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Preface

This is the 21st paper in NJLM Foundation's "Friends of Local Government" Policy Paper series. This paper, is entitled, "New Legal Tools for Redevelopment."

This paper is drawn from presentations at the 2014 New Jersey Planning Conference hosted by the New Jersey Chapter of the American Planning Association (www.njplanning.org) The article is contributed by Joe Mariziti and Anton Lendor. The PowerPoint was contributed by Stan Slachetka.

On behalf of the Board of the NJLM Educational Foundation, we thank the authors and the APA-NJ for these contributions, and believe you will find this paper informative. We would also like to note the support of the Foundation's Board for this project, as well as staff from the New Jersey State League of Municipalities. Previous papers are on the Foundation's website at www.njlmef.org.

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About the Contributing Authors

Joseph Maraziti, a partner at Maraziti, Falcon & Healey, has more than forty years of experience in legal issues related to infrastructure and the environment. Mr. Maraziti previously served as Chairman of the New Jersey State Planning Commission, which adopted the State Development and Redevelopment Plan in March 2001. In this role, he worked with the Governor's Cabinet, Counties, local communities and the private sector to ensure that development and redevelopment in the State of New Jersey enhances the quality of life for all citizens.

Mr. Lendor is an Associate at Maraziti, Falcon & Healey and has an extensive background in land use and redevelopment. Prior to joining the Firm, Mr. Lendor represented the City of Orange Township as Assistant City Attorney. Recently, Mr. Lendor was a member of the City of East Orange's Environmental Committee Transition Team of Mayor Lester Taylor.

Stan Slachetka is Planning Group Manager of the Middletown-based firm of T&M Associates, where he specializes in redevelopment, affordable housing, and local and regional land use planning issues. Mr. Slachetka is co-author of *The Redevelopment Handbook: A Guide to Rebuilding New Jersey's Communities*, which is published jointly by the New Jersey Department of Community Affairs and the New Jersey Chapter of the American Planning Association. In addition to *The Redevelopment Handbook*, he has authored published reports and articles on redevelopment and a variety of other planning issues.

NEW LEGAL TOOLS FOR REDEVELOPMENT

Redevelopment is Essential to New Jersey's Social, Economic and Environmental Welfare

Redevelopment is an essential tool that must be available to achieve the revitalization of New Jersey's cities and towns. Without the prompt and effective redevelopment of these vital areas of the state, New Jersey will face significant social, economic and environmental challenges in years to come.

This is true because, in the past dozen years or so, there has been an extraordinary transformation which resulted in a restriction of the legal ability to develop vast acres of the landscape of New Jersey. Examples include the designation of the Highlands Area, which essentially preserves almost 800,000 acres, the approval of a bond issue to expend \$1 billion to acquire 1 million acres for open space and farmland protection, the designation of miles of Category One streams, which removes 300 feet on each bank of the stream from development, and the acquisition of open space by countless local, county and non-profit organizations. These positive actions to preserve valued open spaces in the Garden State are causing new development activity to be refocused on older suburbs and inner cities. Without balanced growth, the economy of the state will stagnate, social ills will fester and the means to restore, preserve and enhance the natural environment will be lacking. New Jersey is among the most desirable places in the nation to live, work and play and it constantly ranks in first or second place on the list of highest levels of family income. Unless we provide robust opportunities for dynamic and desirable growth, community vitality will sag and the state will slowly slip behind.

Redevelopment Projects Delayed or Lost Due to Opposition to Condemnation

In recent years, redevelopment of older areas has lagged. Of course, the Great Recession of 2008 is a major contributor, but other factors have been responsible as well. One major inhibitor of local initiatives to undertake the formal redevelopment process under the Local Redevelopment and Housing Law (N.J.S.A. 40A:12A-1, et. seq.) is often the baggage that, until months ago, was an inescapable legal component of that statutory process - condemnation/ eminent domain. The condemnation power had been irrevocably imbedded in the statutory redevelopment process and even in situations where local redevelopment entities had no plan or desire to use the condemnation process, their legal hands were tied. Once eminent domain powers were delegated to municipalities by the state, they could not legally divest themselves of the condemnation power without legislative authority. An intense backlash against condemnation AND redevelopment flared around the country., after the United States Supreme Court issued its decision in Kelo v. City of New London, 545 U.S. 469 (2005), In Kelo, the Court upheld the City of New London's use of its condemnation powers to assemble a site for the construction of a major project because it advanced the public purpose of encouraging economic development in the city. However, this outcome wrongly created the impression that the condemnation was provided to benefit private interests, not the public interests. Since Kelo, there has been a negative stigma which has encumbered the redevelopment designation process, because the redevelopment designation set the stage for the availability of condemnation powers.

In New Jersey, this stigma has understandably caused local officials to hesitate to embark upon the redevelopment process. In certain cases, it has led to protracted litigation by fearful property owners. As a result, various redevelopment opportunities to foster economic development and revitalization have been delayed or totally lost.

Recent Amendments Facilitate Redevelopment and Rehabilitation Designations

In an attempt to stimulate redevelopment by providing an alternate tool for localities to use, Governor Christie signed a Bill to amend the Local Redevelopment and Housing Law (LRHL), which became effective in early January 2014. The Amendment changes the LRHL in several significant ways: (1) creates an option to designate redevelopment areas either with or without condemnation powers; (2) codifies the recent case law, which limits eminent domain and clarifies that notice requirements when designating an area in need of redevelopment; (3) provides a mechanism to achieve finality against late challenges to a redevelopment designation when condemnation is allowed; and (4) allows additional options for designating an area in need of rehabilitation.

➤ Non-Condemnation Redevelopment

One of the most significant aspects of the Amendment is that public entities can now pursue a redevelopment process which does not allow the municipality to undertake condemnation, even though an area has been determined to be one which is “in need of redevelopment.”

The new law now gives a municipality a choice. Specifically, it can decide to use the new option and undertake non-condemnation redevelopment. The decision to proceed either with the non-condemnation process or the traditional condemnation approach must be made at the very outset of the process. The resolution of the governing body requesting the planning board to undertake the redevelopment designation study must specify which path it chooses to travel regarding condemnation. Moreover, all the notices to the affected property owners must also clearly identify that choice.

Coming as it must at the earliest stage in the redevelopment process, this decision must be made while the prospects of the redevelopment effort typically are only dimly understood and knowledge of site acquisition issues is scant. The default position in most situations is likely to favor the non-condemnation alternative.

Although the initial decision can later be reversed, the law requires that the entire redevelopment designation process start anew. The fact that the area must once again go through the exacting designation process from the beginning may cause some serious legal and practical complications. If, for example, unexpected site acquisition difficulties arise over time and the use of condemnation to acquire “hold out” parcels is needed, the conditions on the ground that led to a valid redevelopment determination years before may no longer exist. The successful redevelopment of segments of the area may have taken place in the meantime, perhaps compromising the ability to conclude that one or more of the statutory criteria which are required to be demonstrated in order to designate the parcels as areas in need of redevelopment are still present.

Moreover, the notices that must be sent at that point to all property owners must state that the analysis will be conducted as a “condemnation redevelopment area” – an obvious red flag that understandably engenders intense opposition. In addition, there are other factual hurdles to clear when the decision is made to move from non condemnation redevelopment to the condemnation option. The change can only be made if the municipality is “unable to acquire property that is necessary for the redevelopment project.” Therefore, there must be proof that it is not possible to acquire the property by negotiation and also that the property is necessary for the project. Resourceful opponents to condemnation will have an opportunity to litigate the existence and validity of these two new factual conditions.

Nonetheless, as a result of the new law, some of the fears of property owners regarding the possibility of condemnation should be reduced, easing the task for local officials seeking effective means to transform areas of their communities.

***Practice Tip:* Careful consideration should be given early in the process before the Non-condemnation redevelopment approach is chosen in order to avoid costly and time consuming disputes later on.**

➤ Underutilization Must Now be Based on a Condition of Title to the Property

Key rulings of two redevelopment cases which have had a profound impact on redevelopment law and practice in New Jersey, Gallenthin v. Paulsboro, 191 N.J. 344 (2007) and Harrison v. DeRose, 398 N.J. Super. 361 (2008), have been codified by the Amendment.

In Gallenthin, property owners challenged the Borough of Paulsboro’s redevelopment designation, which was grounded on the net opinion of the municipality’s consultant who had determined that the properties were “underutilized” and “not fully productive” under N.J.S.A. 40A:12A-5(e). Generally, prior to Gallenthin, N.J.S.A. 40A:12A-5(e) was utilized by lawyers and consultants for redevelopment entities as the primary criterion for designating an area in need of redevelopment simply in an indiscriminate manner on the basis that it was not “fully productive” for a wide variety of reasons . The Paulsboro court sharply narrowed the basis upon which this criterion, known as the “e” criterion, could be used and held that the unproductive use must in some way be based upon a condition of title i.e. an issue related to ownership of the property.

Additionally, the New Jersey Supreme Court held that “The substantial evidence standard is not met if a municipality’s decision is supported by only the net opinion of an expert.” Gallenthin v. Paulsboro, 191 N.J. 344, 372-373 (2007). There must be substantial factual evidence in the record before the planning board that the conditions that give rise to the conclusion that the area qualifies as a redevelopment area in fact, exist. It is not sufficient for an expert, no matter how highly qualified, to opine that the area meets one or more of the statutory criteria.

➤ Finality of Redevelopment Designation/Notice of Right to Challenge

In Harrison, the local redevelopment agency sought to condemn property within a redevelopment area. The property owners challenged the condemnation many years after the determination was made. The City of Harrison responded that their attempt to challenge the underlying basis of the redevelopment determination was too late because it was far beyond the 45 day period to contest the municipal decision. The court reasoned that the due process rights of the property owners required that they be permitted to contest the designation because they had not been notified that that the redevelopment designation could result in the condemnation of their property. Until that decision, the only notice to property owners in such redevelopment hearings was the Planning Board notice regarding a hearing on the preliminary investigation of the redevelopment area. In Harrison, the Appellate Division held that if notice was not given to inform property owners that (1) their property is being designated for redevelopment; (2) the redevelopment designation authorizes condemnation; and (3) the specific time limits within which one may challenge the redevelopment designation, then the redevelopment designation may be challenged long after the designation is adopted. This decision resulted in great uncertainty as to when a designation not accompanied by the required "Harrison Notice" is "final" and therefore no longer subject to legal challenge. See Harrison v. DeRose, 398 N.J. Super. 361, 413 (2008).

In order to remedy the uncertainty as to the finality of a redevelopment determination and to remove the cloud hanging over such designations so that planning, financing and construction activities could all proceed with confidence that the legal rug would not be pulled out from under the project, the legislation codified the process set forth by the Harrison court. The new statute sets forth exacting notice requirements, which, if precisely followed, will establish a point in time when challenges will be subject to dismissal as too late. If the condemnation option is chosen, the notice must explain that the redevelopment designation will empower the municipality or other redevelopment entity to condemn property in the designated area and also explain that a legal challenge must be filed within 45 days or the opportunity to challenge the designation will be lost.

Practice Tip: Rigorous and precise attention to all the new notice requirements must be paid at every step in the process.

➤ Rehabilitation Designation Based on Environmental Conditions

The Amendment also reorganizes and clarifies the criteria for designating an area in need of rehabilitation. Under the revised law, an area may be designated in need of rehabilitation if one of the following conditions exists in the area: (1) a significant portion of structures therein are in a deteriorated or substandard condition; (2) more than half of the housing stock in the delineated area is at least 50 years old; (3) there is a pattern of vacancy, abandonment or underutilization of properties in the area; (4) there is a persistent arrearage of property tax payments on properties in the area; (5) environmental contamination is discouraging improvements and investment in properties in the area; or (6) a majority of the water and sewer infrastructure in the delineated area is at least 50 years old and is in need of repair or substantial maintenance.

The most significant change in the rehabilitation criteria is the addition of environmentally contaminated sites (i.e., brownfield sites) as potential areas in need of rehabilitation. The new criterion would require both documentation of the environmental contamination and the establishment of a causal link that the contamination was discouraging improvement or investment in the area. This will require planners to not only identify the nature of the contamination but also to provide clear and objective evidence that the environmental contamination is discouraging improvement and investment in the area.

In the final analysis, this new addition to the rehabilitation criteria may be of limited practical application. That is because, historically, environmental contamination that is so severe as to discourage improvements and investment usually accompanies other, and much easier to establish, rehabilitation criterion. If an area is plagued with contamination, oftentimes it is also an area that experiences persistent arrearage of tax payments and/or is served by water and sewer infrastructure that is over 50 years old and in need of substantial repair and maintenance. These situations lend themselves to clear and objective evidence, as contrasted with the murky area of opinion testimony to establish that it is the contamination – and not other factors – that have resulted in the lack of improvement and investment. More often than not, decision makers will choose to ground their decisions on the easier to defend criteria. It also is important to note that the inclusion of environmentally contaminated sites in the rehabilitation area criteria does not preclude these sites from being designated in need of redevelopment, particularly if the contamination so severe that it has caused the abandonment or stagnation of otherwise viable commercial and industrial properties or is adversely impacting the adjoining properties resulting in a “blighting” condition on the surrounding area.

***Practice Tip:* Before embarking on an effort to ground a rehabilitation designation on the newly available basis of “environmental contamination,” confirm that an alternate basis for the designation is not factually available.**

Summary

In summary, the key sections of the LRHL which have been amended are:

- (1) N.J.S.A. 40A:12A-6: to emphasize that redevelopment designations could be established by a municipality with or without the utilization of its condemnation powers, and to require the notice provisions outlined in Harrison, if condemnation powers are granted;
- (2) N.J.S.A. 40A:12A-5(e): to emphasize title issues within the context of lack of utilization and diverse ownership; and
- (3) N.J.S.A. 40A:12A-14(a): to include an additional rehabilitation designation criteria based on a finding that environmental contamination has discouraged improvements and investment in the designated area.

Considering the significance of these Amendments, there is the expectation that new vitality will be injected into the effort to redevelop New Jersey’s cities and towns in order to stimulate improvements to the economy, the environment, and the quality of life in our communities.

Sources of Environmental Information

New Jersey Department of Environmental Information: <http://www.state.nj.us/dep/>

- Open Public Records Act Request: <http://www.nj.gov/dep/opra/>
- Data Miner: <http://www.nj.gov/dep/opra/online.html>
- Data Miner Electronic Report Finder: http://www.nj.gov/dep/opra/report_finder.html
 - Known Contaminated Site List: <http://www.nj.gov/dep/srp/kcsnj/>
 - Active Site Remediation Cases
 - Compliance and Enforcement
 - Violations
 - Engineering and Institutional Controls: Deed Notices, Classification Exception Areas
 - Landfills
 - Active UST Remediation Cases

United States Environmental Protection Agency: <http://www.epa.gov/>

- Freedom of Information Act Request: <http://www.epa.gov/foia/submission.html>
- Superfund / RCRA Sites: http://www.epa.gov/region02/cleanup/sites/njtoc_name.htm
- EnviroMapper/ EnviroFacts: <http://www.epa.gov/emefdata/em4ef.home>

Miscellaneous:

- Sanborn Maps/Aerials (Historic Uses): Environmental Data Resources, Inc.
<http://www.edrnet.com/>
- County / Municipality public records;
- Owner-provided information.

AMERICAN PLANNING ASSOCIATION
NEW JERSEY CHAPTER
ANNUAL PLANNING CONFERENCE

Redevelopment 2014: New Tools to Achieve Results

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Stan Slachetka, PP, AICP *T&M Associates*

Choosing the right approach...

PROBLEM/ OBJECTIVE	SOLUTION				
	Zoning Changes	SIDs & BIDs	Rehabilitation Areas	Redevelopment Areas (Non-condemnation)	Redevelopment Areas (Condemnation)
Property Acquisition					✘
Form Based and/or Sustainable Design	✘		✘	✘	✘
30 Year PILOTs				✘	✘
Redevelopment Plans			✘	✘	✘
Redevelopment Agreements			✘	✘	✘
Property Transfers w/o Bid			✘	✘	✘
Land Use Controls	✘		✘	✘	✘
Project Funding		✘	✘	✘	✘
RAB/ERG Financing				✘	✘

Rehabilitate...

- A delineated area may be determined to be **in need of rehabilitation** if:
 - (1) a significant portion of structures therein are in a deteriorated or substandard condition;
 - (2) more than half of the housing stock in the delineated area is at least 50 years old;
 - (3) there is a pattern of vacancy, abandonment or underutilization of properties in the area;
 - (4) there is a persistent arrearage of property tax payments on properties in the area;
 - (5) environmental contamination is discouraging improvements and investment in properties in the area; or
 - (6) a majority of the water and sewer infrastructure in the delineated area is at least 50 years old and is in need of repair or substantial maintenance.

The Rehabilitation Area Process...



- *All powers of Redevelopment except condemnation and long-term tax exemptions (PILOTs)*
- *Powers granted upon adoption of a Redevelopment Plan*
- *Entire Municipality May be Designated in need of rehabilitation*

Five-Year Tax Abatement and Exemptions

- The governing body of a municipality may determine to utilize the authority granted under Article VIII, Section I, paragraph 6 of the New Jersey Constitution, and adopt an ordinance setting forth the eligibility or noneligibility of dwellings, multiple dwellings, or commercial and industrial structures, or all of these, for exemptions or abatements, or both, from taxation in areas in need of rehabilitation.
- Adopted by ordinance
- Home improvements
- Commercial improvements
- Conversion of commercial and industrial buildings to multi-family dwellings
- Can be provided in rehabilitation areas, redevelopment areas and in Urban Enterprise Zones (UEZ)

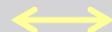
Rehabilitate...

Manitou Park Redevelopment Plan
Berkeley Township, NJ



Manitou Park Sidewalk Plan

GREEN ACRES -



HOMES FOR ALL



FUTURE EXTENSIONS



Rehabilitate...

Cranford Redevelopment Plan Cranford, NJ



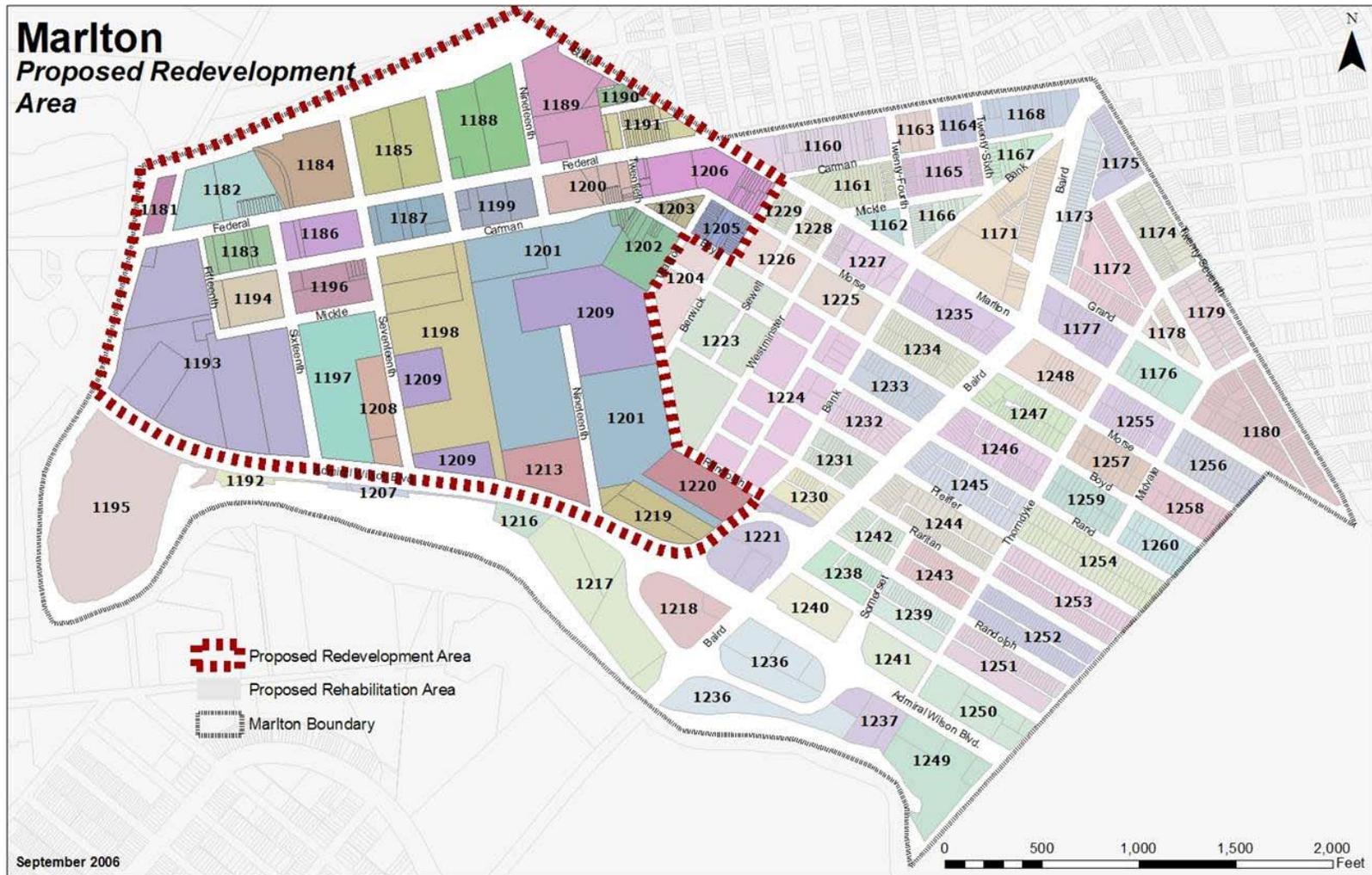
Rehabilitate...

Cranford Redevelopment Plan Cranford, NJ



Rehabilitate...

Combining Strategies
Marlton, NJ



Redevelop...

The Redevelopment Criteria...

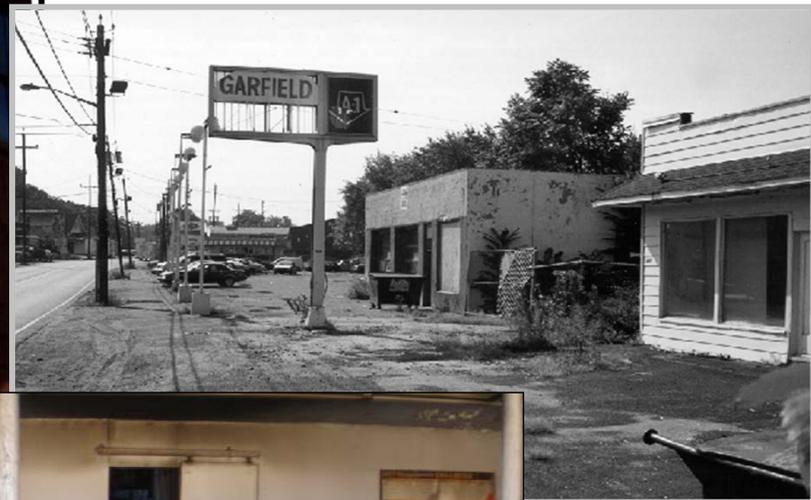
- A. Substandard Building Conditions
- B. Abandonment of Commercial and Industrial Buildings
- C. Public and Privately Owned Vacant Land
- D. Deleterious Land Use, Faulty Design, Obsolete Layout with Detrimental Impact
- E. "A growing lack or total lack of proper utilization of areas caused by the condition of title, diverse ownership, **or other similar conditions** which impede land assemblage or discourage the undertaking of improvements, resulting in a stagnant **and** unproductive condition of land...which condition is presumed to be having a **negative social or economic impact or otherwise being detrimental** to safety, morals, or welfare of the surrounding area or the community in general."
- F. Natural Disasters (5+ Acres)
- G. Urban Enterprise Zone (tax exemptions only)
- H. Consistency with Smart Growth Policies per Law or Regulation

Redevelop...

Examples of Redevelopment Areas...



A



B



A

Redevelop...

Examples of Redevelopment Areas...



D



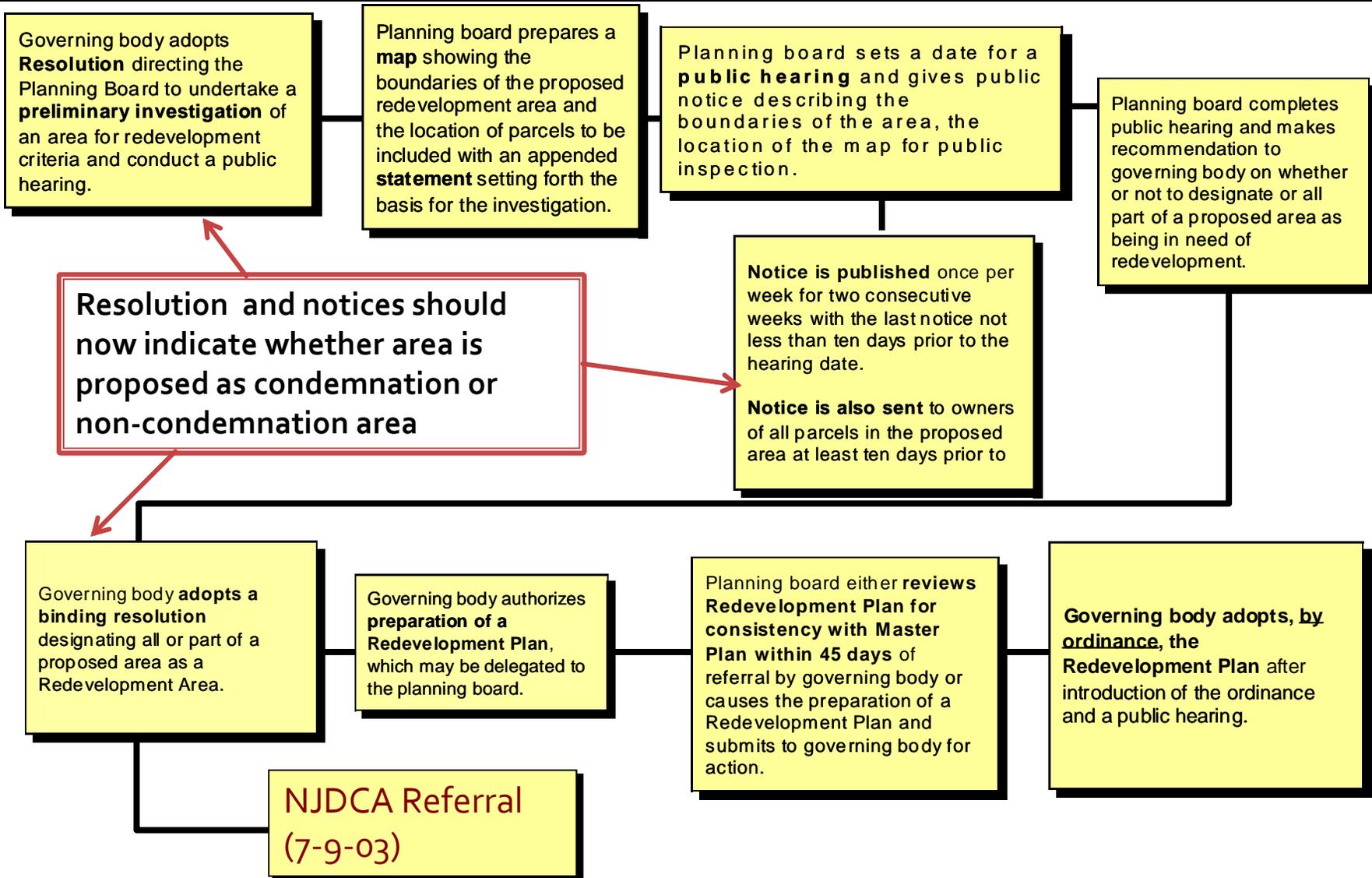
D



D

Redevelop...

The Process



Redevelop... Fanwood Downtown Redevelopment Fanwood, NJ



 11 Tindall Road
 Middletown, NJ 07748-2702
 Phone: 732-871-6400
 A S S O C I A T E S Fax: 732-871-7305
 0 20 40 60 Feet
 Prepared by: PH&CO, 2/2008
 Source: Union County GIS, NJDEP
 File Path: H:\P\RE001\0502\Project\Concept Plan D.swp.mxd

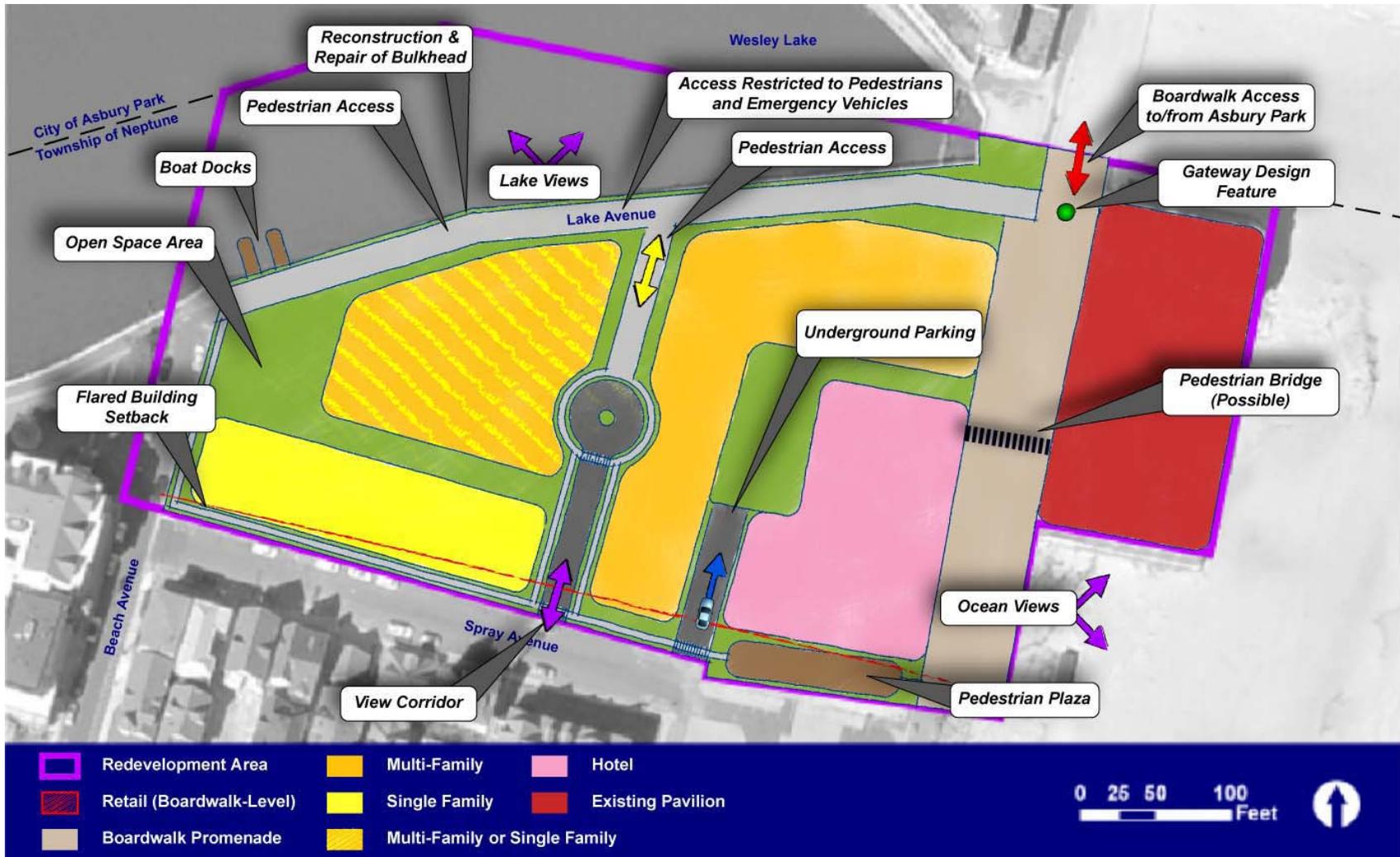
-  Multifamily
-  Mixed-Use (3 Story)
-  Mixed-Use (4 Story)
-  Rehabilitation Area
-  Pedestrian Promenade

Block 64 - Redevelopment Area Concept Plan
 Borough of Fanwood
 Union County, New Jersey

NOTE: This map was developed using data from the Jersey Department of Environmental Protection Geographic Information System digital data, but this secondary product has not been verified by NJDEP and is not state certified.

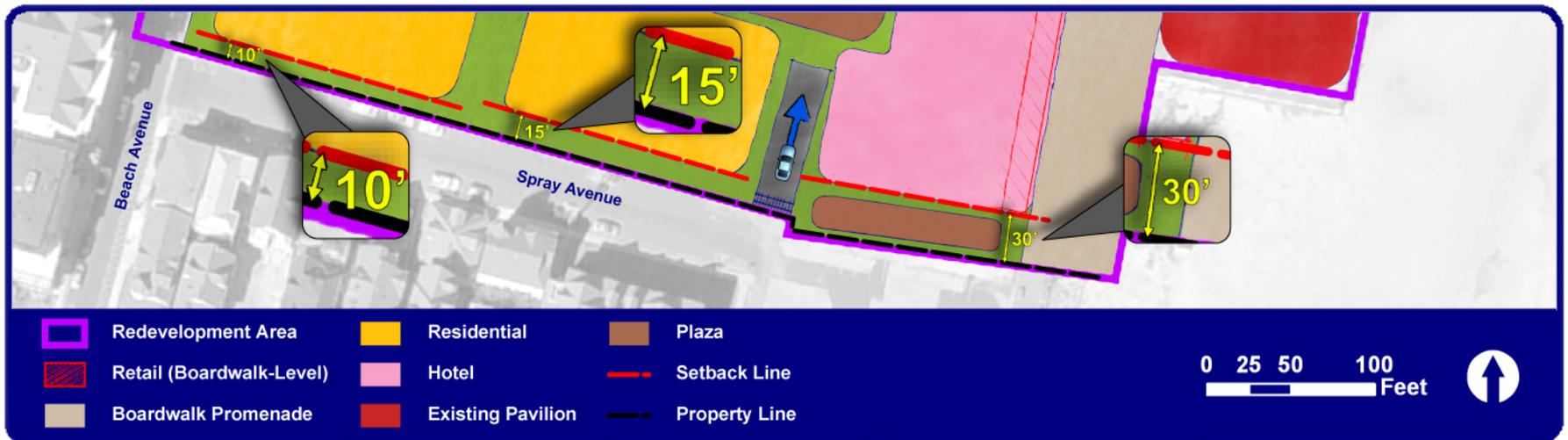
Redevelop...

North End Redevelopment Plan Ocean Grove, Neptune Township, NJ



Redevelop...

North End Redevelopment Plan Ocean Grove, Neptune Township, NJ



Redevelopment Plan

- ◆ **Governs development within a Redevelopment Area**
- ◆ **States goals and objectives for the redevelopment or rehabilitation area and relates them to comprehensive planning goals and objectives of the community**
- ◆ **Specifies land uses and building requirements within the redevelopment area**
- ◆ **Can supersede zoning or act as an overlay zone**
- ◆ **Identifies properties to be acquired if applicable**
- ◆ **Adopted by the Governing Body by ordinance**
- ◆ **Can significantly control the design of development within the redevelopment area**

Section 8 - Redevelopment Agreements

- ◆ **Contract between the redevelopment entity and designated redeveloper**
- ◆ **Negotiations regarding its provisions is a critical step to ensure that the community gets what**
- ◆ **Requires that project be constructed in accordance with the redevelopment plan**
- ◆ **Time frames for performance and schedule for construction of improvements**
- ◆ **Procedures for resolving disputes**
- ◆ **Project completion**
- ◆ **Must be fair to both parties**

Key Points...

- Determine objectives to be achieved
- Look at alternatives to redevelopment
- Understand implications of current case law and its affect on existing and proposed designations
- Rehabilitation and Redevelopment appropriate where the area meets the criteria and you need to use powers or authority that is only granted in either a rehabilitation or redevelopment area
- If choosing redevelopment determine if property a condemnation or non-condemnation designation is appropriate and follow appropriate notice requirements
- View the choice of zoning, rehabilitation, or redevelopment holistically—as part of a comprehensive strategy to promote community land use planning objectives and revitalization strategies