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BOROUGH OF GLASSBORO,	:	APPELLATE DIVISION
	:	DOCKET NO. A-4556-17
Plaintiff-Respondent,	:	
	:	On Appeal From
v.	:	SUPERIOR COURT,
	:	GLOUCESTER COUNTY
JACK GROSSMAN; MATTHEW ROCHE;	:	DOCKET NO. L-000075-18
DAN DESILVIO; JOHN DOE 1-20;	:	
and JANE DOE 1-20	:	Sat Below:
	:	Hon. Benjamin C. Telsey
Defendants-Appellants.	:	
	:	
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**BRIEF OF PROPOSED AMICUS CURIAE
INSTITUTE FOR JUSTICE**

Submitted August 8, 2018

Anthony DellaPelle, Esq.
MCKIRDY, RISKIN, OLSON &
DELLAPELLE, P.C.
Attorneys at Law
136 South Street
Morristown, NJ 07960
Attorneys for
Proposed Amicus Curiae
Institute for Justice

Robert J. McNamara*
Institute for Justice
901 N. Glebe Rd
Ste 900
Arlington, VA 22203
Attorneys for
Proposed Amicus Curiae
Institute for Justice

**Application for admission pro
hac vice to be filed
contemporaneously*

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INTRODUCTORY STATEMENT

When municipalities in New Jersey undertake redevelopment projects, New Jersey's Local Housing and Redevelopment Law allows them to condemn "any land or building [within a properly designated redevelopment area] which is necessary for the redevelopment project[.]" N.J.S.A. 40A:12A-8(c). Here, property owners subject to condemnation claim their land is not necessary for the redevelopment project and, moreover, that the Borough of Glassboro has not even managed to articulate an explanation for why it would be. The crux of this case is whether that matters: whether Glassboro needs to establish that the land "is necessary for the redevelopment project" or whether New Jersey law allows condemnors to take property for no purpose beyond holding onto it until some future use presents itself.

Two different legal principles counsel in favor of ruling for the property owners here. First, New Jersey (like the vast majority of other states) holds that statutes authorizing eminent domain must be strictly construed against condemnors, which means that any doubt about the scope of Glassboro's power must be resolved in favor of the property owners. Second, courts across the country have repeatedly rejected takings where (as here) a condemnor is unable to provide evidence that the

property in question is actually necessary for any current public use.

LEGAL ARGUMENT

I. Eminent Domain Statutes Must Be Strictly Construed Against Condemnors.

While New Jersey law limits condemnors like Glassboro to taking property that is "necessary for the redevelopment project," the court below essentially disregarded this requirement and held that Glassboro is entitled to the broadest possible discretion in determining what can be taken under the statute. This was error: New Jersey law requires courts to strictly construe eminent-domain statutes against condemnation. And New Jersey's practice here is in keeping with the law in nearly every other American jurisdiction. The lower court's contrary conclusion should be reversed.

A. New Jersey courts construe eminent-domain laws narrowly rather than broadly.

While the Local Housing and Redevelopment Law clearly limits municipalities condemnation powers to "land or building[s] which [are] necessary for the redevelopment project" (N.J.S.A. 40A:12A-8(c)), the trial court repeatedly held that the actual necessity of the taking was subject to "one of the lowest standards of judicial review in local government law or indeed all government law." (See Initial Br. of Defs./Appellants

at 22 (collecting transcript citations).) But in according such a liberal reading to a statute authorizing condemnation, the trial court departed from New Jersey's longstanding rule governing the interpretation of eminent-domain statutes.

The rule, stated simply, is that eminent domain is disfavored and therefore statutes granting eminent-domain authority must be read as narrowly as they fairly can be. As the Appellate Division explained in 2001, "it is well established that statutes granting the power are to be given a strict construction because, by definition, they derogate the private property rights so comprehensively protected by the federal and State constitutions." State v. Trap Rock Indus., Inc., 338 N.J. Super 92, 95(App. Div. 2001).

Trap Rock is particularly instructive here. In that case, the State Commissioner of Transportation sought to acquire land for environmental mitigation of a highway project roughly a mile away, and the property owners objected on the grounds that "environmental mitigation" was not an enumerated purpose in the statute. Id. The court acknowledged that the statute must be strictly construed, but it upheld the taking nonetheless. The court's reasoning took two forms. First, it found "a **solid basis** in the reasons articulated for determining that, in every practical sense, the property at issue here was **needed** for "the

traveled way, [] for without that property's availability for mitigation purposes . . . **the highway could not have been constructed.**" Id. at 96 (emphases added). Second, the court noted that the underlying statute actually expressly authorized the Commissioner to condemn entire tracts of land (rather than partial interests) "even though said entire lot, block or tract is not needed for transportation purposes." Id. at 97.

In other words, the condemnation went forward in Trap Rock because (1) there was an evidentiary showing that the land was actually necessary for the project in question and (2) the statute explicitly authorized condemnation of property beyond that strictly needed for a highway. That is a sharp contrast with this case, where there is no evidentiary showing (or even assertion) of necessity and the enabling statute explicitly confines the government to condemning land that is **necessary** to its redevelopment project. Trap Rock teaches that eminent-domain laws must be read strictly—and also that the New Jersey legislature knows how to write a broad eminent-domain authorization when it wants to do so. It has not done so here, and the trial court's contrary holding was therefore error.

B. New Jersey's strict-construction rule is in keeping with the rule in the majority of American jurisdictions.

Significantly, New Jersey's rule about the strict interpretation of eminent-domain laws is not unusual. Indeed, nearly every single American jurisdiction has articulated a similar rule. See 1A Nichols on Eminent Domain (3d Ed) § 3.03(6) (b) (3d ed. 2018) ("Even when the power of eminent domain has been expressly granted, the grant must be construed strictly against the grantee. The grantee will not be allowed to take the lands of another unless this right comes clearly and unmistakably within the limits of the authority granted."); accord Agricola v. Harbert Constr. Corp., 310 So.2d 472, 475 (Ala. 1975); Municipality of Anchorage v. Suzuki, 41 P.3d 147, 150 (Alaska 2002); Orsett/Columbia L.P. v. Superior Court ex rel. Maricopa Cty., 83 P.3d 608, 610-611 (Ariz. Ct. App. 2004); City of Little Rock v. Raines, 411 S.W.2d 486, 491 (Ark. 1967); Kenneth Mebane Ranches v. Superior Court, 10 Cal. App. 4th 276, 282-283 (1992); Bly v. Story, 241 P.3d 529, 533-34 (Colo. 2010); Simmons v. State, 280 A.2d 351, 355-56 (Conn. 1971); Rollins Outdoor Advert., Inc. v. D.C., 434 A.2d 1384, 1388 (D.C. 1981); Cannon v. State, 807 A.2d 556, 559 (Del. 2002); Tosohatchee Game Pres., Inc. v. Cent. & S. Fla. Flood Control Dist., 265 So. 2d 681, 684 (Fla. 1972); Dep't of Transp. v. City of Atlanta, 337

S.E.2d 327, 334 (Ga. 1985); McKenney v. Anselmo, 416 P.2d 509, 514 (Idaho 1966); Dep't of Transp. v. First Galesburg Nat. Bank & Trust Co., 566 N.E.2d 254, 270-71 (Ill. 1990); Util. Ctr., Inc. v. City of Fort Wayne, 985 N.E.2d 731, 735 (Ind. 2013); Clarke Cty. Reservoir Comm'n v. Robins, 862 N.W.2d 166, 176 (Iowa 2015); Nat'l Compressed Steel Corp. v. Unified Gov't of Wyandotte Cty./Kansas City, 38 P.3d 723, 730 (Kan. 2002); Royal Elkhorn Coal Co. v. Elk Horn Coal Corp., 237 S.W. 1083, 1086 (Ky. 1922); Dep't of Highways v. Jeanerette Lumber & Shingle Co., 350 So .2d 847, 855-56 (La. 1977); In re Bangor Hydro-Elec. Co., 314 A.2d 800, 809 (Me. 1974); Davis v. Board of Educ. of Anne Arundel Cty., 170 A. 590, 590-92 (Md. 1934); Providence & Worcester R.R. Co. v. Energy Facilities Siting Bd., 899 N.E.2d 829, 828 (Mass. 2009); Chesapeake & O. R. Co. v. Herzberg, 166 N.W.2d 652, 655-56 (Mich. 1968); Miss. Power & Light Co. v. Conerly, 460 So. 2d 107, 111 (Miss. 1984); City of N. Kansas City v. K.C. Beaton Holding Co., LLC, 417 S.W.3d 825, 832 (Mo. Ct. App. 2014); City of Bozeman on Behalf of Dep't of Transp. of State of Mont. v. Vaniman, 869 P.2d 790, 794 (Mont. 1994); Burlington N. & Santa Fe Ry. Co. v. Chaulk, 631 N.W.2d 131, 137 (Neb. 2001); Claremont Ry. & Lighting Co. v. Putney, 62 A. 727, 728 (N.H. 1905); Soc'y of N.Y. Hosp. v. Johnson, 154 N.E.2d 550, 552 (N.Y. 1958) ("[A]ll statutes authorizing officers of bodies

to exercise the right of eminent domain must be strictly construed.”); State v. Core Banks Club Properties, Inc., 167 S.E.2d 385 (N.C. 1969); Minnkota Power Co-op., Inc. v. Anderson, 817 N.W.2d 325, 331 (N.D. 2012); Johnson v. Preston, 203 N.E.2d 505, 506 (Ohio Ct. App. 1963); City of Muskogee v. Phillips, 352 P.3d 51, 54 (Okla. Civ. App. 2014); City of Portland v. Kamm, 285 P. 236, 237 (Ore. 1930); In re Condemnation of 110 Wash St., 767 A.2d 1154, 1159-60 (Pa. Commw. Ct. 2001); Ronci Mfg. Co. v. State, 403 A.2d 1094, 1098 (R.I. 1979); Eldridge v. City of Greenwood, 503 S.E.2d 191, 203 (S.C. Ct. App. 1998); Ehlers v. Jones, 135 N.W.2d 22, 23 (S.D. 1965); Draper v. Webb, 418 S.W.2d 775, 777 (Tenn. Ct. App. 1967); Tx. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tx., LLC, 363 S.W.3d 192, 198 (Tex. 2012); Marion Energy, Inc. v. RFJ Ranch P’ship, 267 P.3d 863, 870 (Utah 2011); Dillon v. Davis, 112 S.E.2d 137, 141 (Va. 1960); Cowlitz Cty. v. Martin, 177 P.3d 102, 105 (Wash. Ct. App. 2008); Mountain Valley Pipeline, LLC v. McCurdy, 793 S.E.2d 850, 855 (W. Va. 2016); Coronado Oil Co. v. Grieves, 603 P.2d 406, 411 (Wyo. 1979).

Against the overwhelming weight of this authority, counsel has been able to identify exactly one jurisdiction that explicitly dissents from the general American rule of strict construction: Nevada. See Standard Slag Co. v. Fifth Jud. Dist.

Ct. in & for Nye. Cty., 143 P.2d 467, 469 (Nev. 1943) (rejecting rule in favor of liberal construction). The court below, in liberally construing the conditions under which Glassboro is entitled to use eminent domain and in according the government extraordinary deference in determining whether those conditions have actually been met here, applied the Nevada rule.

That was error. As seen in Trap Rock, supra, New Jersey courts follow the American rule and strictly construe eminent-domain statutes against condemnors and in favor of property owners, not the other way around. The trial court's contrary conclusion should be reversed.

II. Courts across the country reject takings that are unnecessary to the broader public purpose.

New Jersey's rule limiting redevelopment condemnations to property that is "necessary" for the redevelopment project is hardly unusual. To the contrary, it is not only common but commonly enforced by the judiciary, both in New Jersey and across the country. And judicial enforcement of such requirements demands more of condemnors than a simple assertion of necessity. The lower court's holding to the contrary was therefore error.

The leading New Jersey case demanding real evidence of necessity is Gallenthin Realty Development, Inc. v. Borough of

Paulsboro, 191 N.J. 344 (2007). In that case, the New Jersey Supreme Court rejected a redevelopment taking because (among other reasons) the property being taken was not "integral to" a legal public use. 191 N.J. at 372. The Gallenthin opinion makes abundantly clear that condemnors have an affirmative burden to demonstrate that a taking is appropriate; they must "establish a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met." Id. at 373. The record in this case (which contains no more than an assertion that Glassboro has met the statutory necessity requirement) falls short of what Gallenthin requires.

Gallenthin's holding on this point is in keeping with a long line of New Jersey precedent making clear that courts must examine whether a taking goes too far in light of the public use justifying that taking. See, e.g., Burnett v. Abbott, 14 N.J. 291, 295 (1954) (noting that courts will prevent "the exercise of the power of eminent domain in excess of the public use upon which it is bottomed in a particular instance."); see also, e.g., Twp. of Bridgewater v. Yarnell, 64 N.J. 211, 214-15 (1974) (holding that property owners had made out a sufficient prima facie case that the condemnor's proposed sewer-line route was arbitrary); Twp. of W. Orange v. 769 Assocs., L.L.C., 172 N.J.

564, 578 (2002) (noting that condemnation may be set aside for abuse of discretion by condemnor).

And New Jersey courts are hardly alone in demanding that government officials make a real record justifying why they are condemning a particular piece of property. In Utah Department of Transportation v. Carlson, for example, the Utah Supreme Court rejected a taking on the grounds that the government had failed to specifically articulated its plans for the property and “[s]uch an articulation could be crucial to an evaluation of the viability of UDOT’s taking[.]” 332 P.3d 900, 907 (Utah 2014). Similarly, a California appellate court rejected a taking where the project description in the resolutions authorizing condemnation was so “vague . . . [that it] precluded an intelligent inquiry into whether [the government] had a legal right to condemn the property[.]” City of Stockton v. Marina Towers L.L.C., 88 Cal. Rptr. 3d 909, 913 (Cal. Ct. App. 2009).

The basic insight animating these cases applies with equal force here: Eminent domain can be used only in service of a constitutionally sufficient public use, and the only way courts can examine whether that constitutional requirement is being fulfilled is for the government to make a clear record explaining how the condemned property will further that public use. In the absence of such a showing, there is simply no way

for a reviewing court to evaluate the taking—and, if the legality of the taking is uncertain, the tie must go to the property owner, not to the condemnor.

This conclusion is not changed by the fact that Glassboro suggests it may, in the future, come up with a redevelopment project for which it will need Respondents' land. Courts reviewing condemnations ask whether condemned property is needed for a public use today. And that makes sense because the condemned property is being taken today; if it is needed in the future, it can be taken in the future. Cf. City of Stockton, 88 Cal. Rptr. 3d at 913 (describing project as "a case of 'condemn first, decide what to do with the property later'").

This basic idea—that present takings must be justified by present purposes—has been widely adopted by other states as well. Regents of Univ. of Minnesota v. Chicago & N.W. Tasp. Co., 552 N.W.2d 578, 580 (Minn. Ct. App. 1996) (rejecting condemnation "for speculative future use (stockpiling) by condemnation"); Engelhaupt v. Vill. of Butte, 539 N.W.2d 430, 432 (Neb. 1995) (rejecting village's power to condemn parcel for potential use in speculative project where enabling statute sanctioned only those takings necessary for present projects); Krauter v. Lower Big Blue Nat. Res. Dist., 259 N.W.2d 472, 475-76 (Neb. 1977) (holding that "a condemning agency must have a

present plan and a present public purpose for the use of the property before it is authorized to commence a condemnation action [T]he possibility that the condemning agency at some future time may adopt a plan to use the property for a public purpose is not enough to justify a present condemnation.”); State ex rel. Sun Oil Co. v. City of Euclid, 130 N.E.2d 336, 340 (Ohio 1955) (holding that land may not be appropriated for a contemplated but undetermined future use); Hester v. Miller, 11 N.J. Super. 264, 270-71 (Law. Div. 1951) (rejecting commissioner’s power to condemn land for construction of nursery where enabling statute sanctioned only takings in furtherance of transportation department’s founding purposes); Tx. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tx., LLC, 363 S.W.3d 192, 198-99 (Tex. 2012) (rejecting particular pipeline company’s authority to use eminent domain under statute delegating authority to common carriers absent reasonable probability that pipeline would actually serve public); Mountain Valley Pipeline, LLC v. McCurdy, 793 S.E.2d 850, 862-63 (W. Va. 2016) (denying company’s authority to enter and survey property for pipeline-construction condemnation where statute required pipeline to have public use and company failed to show more than speculative public use)

To be clear, questions of judicial deference—that is, of how closely a court must scrutinize a proposed public use—are entirely separate from the basic requirement that the government must have one. The existence of a clearly articulated public use (in the present) is a necessary precondition of judicial review of condemnations. Failing to require such articulations is to allow government officials the power to condemn any property at any time for any reason—or for no reason.

Two New Jersey decisions illustrate exactly why an articulation of a present public use is necessary to facilitate judicial review of condemnations. First, in Hester v. Miller, the Highway Department sought to condemn a tract of land for two reasons (1) in order to transplant shrubs and trees from a tract of land the Department had formerly used as a nursery but which the State was turning into an office building, and (2) to potentially erect service buildings at some point in the future. 11 N.J. Super. 264, 269 (Law Div. 1951). The Law Division rejected the taking because the Department's statute did not give it authority to condemn for these purposes. Id. at 269-70. Under the trial court's view of the law in this case, though, the outcome in Hester would be impossible; the Department could support a condemnation on the bare assertion that the land would

be used for "future highway purposes," leaving the court unable to discern the actual impropriety at issue.

Similarly, in Borough of Essex Fells v. Kessler Institute for Rehabilitation, Inc., Essex Fells sought to condemn land in order to build a public park. 289 N.J. Super. 329, 331 (Law Div. 1995). But the borough's Master Plan and public meetings revealed no need for additional parkland; instead, public statements made clear that the condemnation was intended to stymie the construction of a politically unpopular rehabilitation center. Id. at 339-40. Once again, this result is difficult to square with the trial court's conclusion below: After all, even if Essex Fells had no current plans or need for more parkland, it might well have a desire for parkland in the future.

Simply put, requiring condemnors to articulate a present public use to justify a condemnation is the essential first step in determining whether a condemnor is exceeding its statutory authorization or operating in bad faith—which is something New Jersey courts actually do in these cases. That is why courts in New Jersey and across the country require government officials to come to court armed with a clear explanation of why they are taking this property at this time. The trial court's failure to do so in this case was error, and it should be reversed.

CONCLUSION

New Jersey law authorizes Glassboro to condemn Respondents' property if (and only if) that property is "necessary" for its redevelopment plan. Glassboro, in essence, asks this Court to transmute that requirement from a requirement that Glassboro show that the property is necessary into a requirement that Glassboro say that the property is necessary. But "the bland recitation of applicable statutory criteria" cannot justify a redevelopment condemnation in New Jersey, Gallenthin, 191 N.J. at 373), and this Court should therefore reject Glassboro's arguments and instead apply the statute as written.

Dated: August 8, 2018

Respectfully submitted,

 /s/ Anthony DellaPelle
Anthony DellaPelle, Esq.
MCKIRDY, RISKIN, OLSON &
DELLAPELLE, P.C.
Attorneys at Law
136 South Street
Morristown, NJ 07960
Attorneys for
Proposed Amicus Curiae
Institute for Justice

 /s/ Robert J. McNamara
Robert J. McNamara*
Institute for Justice
901 N. Glebe Rd
Ste 900
Arlington, VA 22203
Attorneys for
Proposed Amicus Curiae
Institute for Justice

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