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LBK ASSOCIATES, L.L.C. and ROBERT D. BONANNO, Plaintiff(s), and SAVE OUR HOMES, an unincorporated association, Intervening Plaintiff, vs. BOROUGH OF LODI, MAYOR AND COUNCIL OF THE BOROUGH OF LODI, and PLANNING BOARD OF THE BOROUGH OF LODI, Defendant(s),	SUPERIOR COURT OF NEW JERSEY LAW DIVISION : BERGEN COUNTY DOCKET NO. BER-L-8766-03
COSTA REALTY CO., INC., Plaintiff(s), and SAVE OUR HOMES, an unincorporated association, Intervening Plaintiff vs. PLANNING BOARD OF THE BOROUGH OF LODI, THE BOROUGH OF LODI, A MUNICIPAL CORPORATION OF THE STATE OF NEW JERSEY, AND THE MAYOR AND COUNCIL OF THE BOROUGH OF LODI, Defendant(s),	SUPERIOR COURT OF NEW JERSEY LAW DIVISION : BERGEN COUNTY DOCKET NO. BER-L-8768-03 OPINION Argued: September 22, 2005 Decided: October 6, 2005 Honorable Richard J. Donohue, J.S.C.

Re: LBK Associates, L.L.C., et al v. Borough of Lodi, et al
Docket No. BER-L-8766-03

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Docket No. BER-L-8768-03

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Procedural & Factual Background

This action comes before this Court as an appeal of the decision of the Mayor and Council of the Borough of Lodi and the Planning Board of the Borough of Lodi which found that an area of land within the Borough is in need of redevelopment.

Separate complaints were filed on December 3, 2003 by Costa Realty Co. (L-8768-03) and by LBK Associates, L.L.C. and Robert D. Bonanno (L-8766-03). Save Our Homes moved to intervene on April 6, 2004. On June 11, 2004 intervention was allowed by the court and the complaint of the intervening plaintiff was filed. Save Our Homes is identified in its complaint as "an association of twenty-six mobile home owners and renters in Costa Mobile Home Park and Brown's Trailer Court, Lodi, New Jersey, acting in concert to pool their resources in opposing

the efforts of the Borough of Lodi to interpose a redevelopment project on the real property on which their homes are located."

Plaintiffs allege the municipal defendants committed reversible error in determining that the three criteria relied upon by defendants in N.J.S.A. 40A:12A-5, subsections (a), (d) or (e), justified a determination that the study area was "in need of redevelopment."

The properties in question, which were the study of the redevelopment designation, are made up of 19 lots located along the south side of Route 46, east of Hope Street, Lodi, New Jersey. This area occupies approximately 20.4 acres.

LBK Associates owns the following real property located within Lodi: Block 158.01, Lot 9; Block 158.02, Lot 5; Block 159.01, Lots 9, 20 and 21.01; and Block 274, Lots 4.02 and 6, all commercial properties. Situated on the commercial properties are two buildings, one occupied by Good Year Motors and another building occupied by three commercial tenants, Pro-Tech Performance, a stool manufacturer, and a delivery service. Bonanno and LBK own Block 122, Lots 1 and 3.01; Block 159.02, Lot 1; and Block 159.01, Lot 21.02 (hereinafter referred to as "Brown's Trailer Court"). In addition to approximately 50 trailer homes, a Transmission Works building is located on Brown's Trailer Court. The commercial properties and Brown's Trailer Court total approximately 6.5 acres in defendants' entire 20.5 acre proposed redevelop.

Costa Realty owns the following real property located within Lodi: Block 266, Lot 55; Block 122, Lots 3.03 and 4; Block 267, Lot 22; and Block 268, Lot 1. Costa Trailer Court began

operation in the 1950's and maintains a license from Lodi to lease up to 218 mobile home units. The trailers are hooked up to trailer pads with appropriate utility connections. At the time of the redevelopment proceedings, the trailer park was home to 183 mobile home owners and their families. Costa Trailer Court consists of 13.67 acres. The property fronts on Route 46 East and has additional frontage on Massey Street and Church Street.

In 1994, Lodi adopted a Master Plan pursuant to the Municipal Land Use Law.

In January 2002, the Planning Board and/or Mayor and Council engaged PMK Group to conduct and prepare a report to study whether or not certain Costa, LBK and Bonanno properties were an area in need of redevelopment.

A public hearing was conducted by the Planning Board of January 16, 2002. A planner from PMK Group, John Chadwick, testified. Part of the evidence showed that Lodi had not conducted a re-examination of its Master Plan within the required six (6) year period governed by N.J.S.A. 40:55D-89. Following this hearing, Lodi abandoned these redevelopment proceedings.

On or about April 15, 2002, by Resolution 02-157, the Mayor and Council engaged H2M Associates, Inc. to conduct a re-examination of its Master Plan. In or about April 2002, without first adopting an authorizing resolution, the Mayor and Council directed Jeffrey Stiles of Edwards & Kelcey, Professional Planners, to conduct a second study as to whether or not the

Costa, LBK and Bonanno properties along Route 46 East in Lodi constituted an area in need of redevelopment.

On June 17, 2002, by Resolution 02-207, the Mayor and Council authorized the Planning Board to conduct a preliminary investigation whether or not certain lands were areas in need of redevelopment, pursuant to the Redevelopment and Housing Law, N.J.S.A. 40A:12A-1, et seq.

On June 17, 2002 the Mayor and Council adopted Resolution 02-195, formally authorizing the retention of Edwards & Kelcey, Professional Planners to study the area in question.

On May 8, 2002 the Planning Board approved the re-examination report of its master plan.

Public hearings were held by the Planning Board, pursuant to N.J.S.A 40A:12-6, et seq., to determine whether the properties in question should be recommended as an area in need of redevelopment. These hearings were conducted on August 13 and 27, 2002, October 2, 2002, November 26, 2002, January 7, 2003, February 4, 2003, April 9, 2003, May 14, 2003, and June 4, 2003.

Prior to the initial hearing on August 13, 2002, Costa filed a letter of objection with the Planning Board (PC12).

During these hearings, the Planning Board produced Mr. Stiles of Edwards & Kelcey. He presented a written report dated June 2002. Costa produced Joseph Burgis, a professional

planner. Mr. Burgis prepared two reports in opposition to the redevelopment dated March 2002 and August 12, 2002.

LBK and Bonanno produced their planner, Peter G. Steck, who also provided a detailed report in opposition to the redevelopment.

On June 11, 2003, the Planning Board adopted a resolution recommending that the subject properties be determined by the Mayor and Council to be an area in need of redevelopment.

On October 20, 2003, the Mayor and Council adopted Resolution 04-81, which resolution accepted the Planning Board's recommendation and further determined that the subject properties be designated as a redevelopment area.

The plaintiffs have come to this court seeking a review of Lodi's decision to declare Brown's Trailer Court, Costa Trailer Park, and adjacent commercial properties as areas in need of redevelopment.

Lodi declared the subject area as being in need of redevelopment pursuant to the powers granted to municipalities by the New Jersey Redevelopment and Housing Law N.J.S.A. 40A:12A-2. The Redevelopment and Housing Law dictates the guidelines that local municipalities are required to follow when evaluating whether property is in need of redevelopment. The Legislature enacted this law to "codify, simplify, and concentrate prior enactments relative to local redevelopment and housing, to the end that the legal mechanisms for

such improvement may be more effectively employed." N.J.S.A. 40A:12A-2. However, the Legislature also warned that the powers contained in this law should only be exercised when private efforts are not likely to correct or ameliorate the obsoliate or dilapidated condition.

The Redevelopment and Housing Law states that a "delineated area may be determined to be in need of redevelopment if, after investigation, notice and hearings" the governing body of the municipality by resolution concludes that within the delineated area, one of seven conditions exist. N.J.S.A. 40A:12A-5.

The planning report, which Lodi relied on in reaching its determination that redevelopment was needed, stated that three of the seven conditions were present. The Planning Board found that the (a), (d), and (e) criteria were applicable to the properties in question.

The (a) criteria states that:

> The generality of buildings are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess any such characteristics, or are so lacking in light, air, or space, as to be conductive to unwholesome living or working conditions.

N.J.S.A. 40A:12A-5(a).

In support of this, Lodi found that some of the trailers were a state of disrepair. Lodi's expert testified that this meant that trailers were in need of paint and required ground maintenance on the trailer pads. Lodi's expert testified that there were locations through the properties which had litter, trash, and weeks growing up. Lodi's expert testified that he did not observe any unsanitary conditions.

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The Plaintiff's have argued that the testimony and evidence provided by the Defendant is insufficient and does not prove that the "(a) criteria" have been satisfied.

Paragraph (d) of N.J.S.A. 40A:12A-5 states:

> Areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangements 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.

The planning report stated that the disconnected roadways make it difficult for emergency vehicles to quickly maneuver throughout the park. Lodi's expert testified that the trailer courts had heightened density of units per acre then other trailer courts.

The plaintiffs contend that the density is no greater in the trailer courts then it is in the near by garden apartments nor can the defendants point to a state or national standard for trailer court density to which the trailer courts in question can be compared. The plaintiffs also argue that their expert's study determined that the roads within the courts are wide enough to safely handle two-way traffic.

Paragraph (e) of the statute states:

> 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."

N.J.S.A. 40A:12A-5(e).

Lodi found that there were empty trailer pads, outdoor areas used for storage and unused commercial property constituted a lack of proper utilization.

The plaintiffs argue that it is rare for all the trailer pads to be occupied at one time, and that the Borough of Lodi recognizes this because the trailer courts are only assessed fees for the pads that are in use. The plaintiffs also state that one of the trailer park owners is not leasing some trailer pads as they become available so that he may develop the land at a later date. As to the question of utilization, the plaintiffs contend that the property is being properly and effectively used as low income housing in an area where such housing is very limited.

Legal Standard

Judicial Review Standard

In order for a municipal government's determination that a site is in need of redevelopment to be set aside, the plaintiff must demonstrate that the Municipal Planning Board reached its decision in an arbitrary, capricious manner or in a manner other then as prescribed by the law. Spruce Manor v. Bor. of Bellmawr, 315 N.J. Super. 286 (1998); Downtown Residents v. Hoboken, 242 N.J. Super. 329 (1990). In the action currently before this court, the standard of review is whether the defendants, reached the decision that there was substantial evidence that the area was in need of redevelopment, the criteria for which is laid out in N.J.S.A. 40A:12A-5, in an arbitrary and capricious manner.

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Decision

Authority of Public Agency to Condemn Private Property

The ancient concept that the king can do no wrong has been tempered by the U.S. Constitutional mandate in the Fifth Amendment's taking clause, "Nor shall personal property be taken for pubic use without just compensation." U.S. Constitution, Amendment 5.

This court's analysis cannot proceed without first addressing the United States Supreme Court decision in Kelo v. City of New London, 125 S. Ct. 2655; 162 L. Ed.2d 439; 2005 U.S. Lexis 5011 (2005). Both sides to this litigation have cited this case, and with the recent concern among attorneys and the population at large as to how the Kelo decision will affect property rights it is necessary to begin with an analysis of the what is now the law of the land.

While the Court affirmed the Connecticut Supreme Court's determination that property, including some residential premises, may be taken by the municipality through eminent domain, the Court's decision was based upon specific statutory enactments in Connecticut. The geographical area, referred to as Fort Trumball, was occupied by nine petitioners and the Naval Undersea Warfare Center. The naval base was closed in 1996 and the city's unemployment rate was nearly double that of the State.

State and local officials targeted New London, and particularly the Fort Trumball area, for economic revitalization. The city had established the New London Development Corp. (NLDC) and the State authorized a $5.35 million dollar bond issue to support the planning

activities, and a $10 million dollar bond issue toward the creation of Fort Trumball State Park. Pfizer Chemical planned to create a research facility on land adjacent to Fort Trumball.

The local agency created by the city purchased 90 acres of property, but the petitioners refused to sell, thus creating the need for condemnation. The Connecticut Supreme Court, in affirming the trial court, decided that the takings were authorized by Chapter 132, the State's municipal development statute, which provided for the taking of land, even developed land, as part of an economic development project where there is a "public use" and in the "public interest." (L. Ed.2d at 449).

While it has been held that the State may not take private property and transfer to another private party:

> On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example. Neither of these propositions, however, determines the disposition of this case. (L. Ed.2d at 450)
>
> The disposition of this case therefore turns on the question whether the City's development plan serves a 'public purpose.'" (L. Ed.2d at 452)
>
> It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled. (L. Ed.2d at 452, citing from Berman v. Parker, 348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954).
>
> Those who govern the City were not confronted with the need to remove blight in the Fort Trumball area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that

> it believes will provide appreciable benefits to the community, including – but by no means limited to – new jobs and increased tax revenues. (L. Ed.2d at 454)
>
> Petitioners contend that using eminent domain for economic development impermissibly blurs the boundary between public and private takings. Again, our cases foreclose this objection. Quite simply, the government's pursuit of a public purpose will often benefit individual private parties. (L. Ed.2d at 455)
>
> In affirming the City's authority to take petitioners, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. (L. Ed.2d at 457)

What this court takes from Kelo, is that respect must be shown to the efforts and enactments of New Jersey's elected representative body. The New Jersey Legislature has enacted a comprehensive law aimed at creating a uniform and simplified mechanism for redeveloping areas in need. This law has been in effect for over a decade and has not been deemed by the highest court of this state to overstep the bounds of personal property rights. Therefore, as this court reviews the facts of the case before it, it will be mindful not to substitute its judgment for that of the elected representatives of the New Jersey Legislature or those from the Borough of Lodi. This court's role is not to determine whether the actions taken by Lodi are sound decisions or effective governance, but rather, if Lodi has acted in accordance with the law.

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Governing Body Must Find Substantial Evidence of Need for Redevelopment

New Jersey has adopted comprehensive legislation to ensure that agencies and municipalities wield their power of eminent domain in a judicial manner. N.J.S.A. 40A:12A-5.

The Local Redevelopment and Housing Law, N.J.S.A. 40A:12-1, et seq., sets forth the procedures and conditions under which a local municipality may conclude that a delineated area is in need of redevelopment. These conditions include "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," N.J.S.A. 40A:12A-5(b), and "a growing lack or total lack of proper utilization of areas ... resulting in a stagnant or not fully productive condition of land, potentially useful and valuable for the contributing to and serving the public health, safety and welfare." N.J.S.A. 40A:12A-5(e). Moreover, "a redevelopment area may include lands, buildings, or improvements which of themselves are not detrimental to public health, safety or welfare, but the inclusion of which is found necessary, with or without change in their condition, for the effective redevelopment of the area of which they are a part." N.J.S.A. 40A:12A-3(c). Forbes v. Board of Trustees of the Twp. of South Orange Village, 312 N.J. Super. 519, 531 (App. Div.), certif. denied, 156 N.J. 411 (1998). Not every property within the redevelopment area must be shown to be itself substandard."

The standard of judicial review of a blight determination is limited to whether the governing body's declaration is supported by substantial evidence. Hirth v. City of Hoboken, 337 N.J. Super. 149, 161 (App. Div. 2001); Levin v. Tp. Committee of Tp. of Bridgewater, 57 N.J. 506 (1971). "Consequently a governing body's decision that an area is blighted is 'vested with a presumption of validity[,]' ... and courts should not 'second guess the municipal action[.]'" Id. at 161-62. (Internal citations omitted.) Municipal actions will not be overturned unless they are found to be arbitrary, capricious or unreasonable. Bryant v. City of Atlantic City, 309 N.J. Super. 596, 610 (App. Div. 1998). It is not a court's function to determine if it would have concurred in the designation, but rather, only to determine if the designation is supported by substantial evidence. See Forbes, supra, at 532. "If the decision is supported by substantial evidence, the fact that the question is debatable does not justify substitution of judicial judgment for that of the local legislators." Lyons v. City of Camden, 52 N.J. 89, 98 (1968). Arbitrary and capricious means willful and unreasoned action in disregard of the circumstances. Baystore Sewerage Co. v. Dept. of Environmental Protection, 122 N.J. Super. 184, 199 (Ch. Div. 1973). "Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that erroneous conclusion has been reached." Id.

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In the instant matter, following eight public hearings, the Planning Board voted to recommend to the Mayor and Council that the entire delineated area be declared in need of redevelopment. The recommendation came during a ninth public hearing held on June 4, 2003.

An area in need of redevelopment must be established by substantial evidence. In other words, each project is fact sensitive and must be so analyzed. The court's review is dependent on the substantial credible evidence being presented. The public hearings in this case were substantial and, on occasion, lead themselves to piquing and unimportant dialogue. The municipal planner was subject to extensive and somewhat unnecessary questioning. In fact, it was a battle between the municipal planner, Mr. Stiles, and the plaintiffs' planners, Mr. Burgis and Mr. Steck

> Soundly planned redevelopment can make the difference between continued stagnation and decline and a resurgence of healthy growth. It provides the means of removing the decadent effect of blight on neighboring property values and of opening up new areas for residences and industry. In recent years, recognition has grown that governing bodies must either plan for the development or redevelopment of blighted areas or permit them to become more deteriorated, obsolescent, stagnant, inefficient and costly.

Levin v. Tp. Committee of Tp. of Bridgewater, 57 N.J. 506, 540 (1971).

This issue is not new to the State of New Jersey. The Courts of this state have been presented with the question of what sufficiently constitutes substantial evidence. In Lyons v. City of Camden, supra, the court was presented with evidence that 89 units or 53% of the units in a complex were substandard and 14 units were unlivable.

In Kimberline v. Planning Board of Camden, 73 N.J. Super. 80 (1962), evidence was presented that 32 families had unites without living rooms, 32 families had to share toilets and baths, and 12 families used a single gas burning hot plate.

In the above cases the courts were provided with very specific data and documentation, which demonstrated why the areas designated for redevelopment were classified as unsanitary, obsolete, dilapidated, and unlivable. In the matter of Spruce Manor v. Borough of Bellmawr, supra, the court found that designation of redevelopment was unsubstantiated because there was a lack detailed factual proof to support the governing body's position that it had provided substantial evidence. The court in Spruce went on to state that the municipality's evidence consisted of "vague criticism of the conditions at the complex based upon superficial observations by certain Borough officials." Spruce Manor v. Borough of Bellmawr, 315 N.J. Super. 286, 289 (1998).

Counsel for the municipality and the plaintiffs have adequately and zealously argued the opinions and facts contained in each parties experts' testimony. However, the court agrees that the municipal planner failed to address the important criteria, i.e., interior inspection of trailers, lack of specific references to safety violations and failure to identify any type of health hazards. The evidence put forth by the defendants in support of their designation of redevelopment can be summed up as vague criticism of the conditions at the complex upon superficial observations. The defendants' expert admitted that he had not completed a trailer by trailer analysis. The

defendants' expert could not point to one single unsanitary condition, or a condition that would make the area unlivable. The defendants could not explain, other then stating it as a conclusion, how the property was suffering from a complete lack proper utilization in contrast to the plaintiffs, who provided evidence that the property was successfully operating as a provider of low income housing. In short, there was a complete lack of detailed specific proofs as to why this property should be designated as in need of redevelopment.

Public Purpose

The New Jersey statute requires not only a finding of a need for redevelopment, but that it must be for a public purpose. What that public purpose should be is absent from either Planning Board or Mayor and Council resolutions. There is also a lack of disclosure in the resolutions as to what the premises are to be utilized for.

Counsel for Save Our Homes sent to the court documents[1] entitled "Request for Proposals," and a submission from the Lodi 46 Renewal, LLC[2] outlines the proposed redevelopment uses. Both documents propose commercial development with some residential age restricted housing. There is no indication that this information was before the Planning Board, but the court has reviewed such information and has included it in this opinion in order that the facts are fully set forth.

[1] Michael B. Kates' letter to the court and copies to all counsel dated June 27, 2005.
[2] Apparently, a redevelopment contractor has been selected by the municipality, i.e., Lodi 46 Renewal, LLC.

The uses proposed by the redeveloper, Lodi 47 Renewal, LLC, include a two-story villa (approximately 116 units), active adult villas, age restricted residential apartments (approximately 150) with the "cornerstone" being an upscale retail mall and 112,000 square fee of retail space.

In Twp. of West Orange v. 769 Assoc., 172 N.J. 564, 73 (2002) the court defined public use as:

> ... as anything that "tends to enlarge resources, increase the industrial energies, and ... manifestly contributes to the general welfare and the prosperity of the whole community." Julius L. Sackman, 2A *Nichols' The Law of Eminent Domain* § 7.02[2] (3d ed. rev. 1990) (hereinafter *Nichols'*). Thus, " 'public use' is synonymous with 'public benefit,' 'public advantage' or 'public utility.'" *Totowa Lumber, supra,* 96 *N.J. Super.* at 119, 232 *A.*2d 655 (quoting *Hindenlang, supra,* 35 *N.J. Super.* at 489, 114 *A.*2d 461).
>
> Given the broad definition of "public use," it is not essential that the entire community or even any considerable portion of the community directly enjoy or participate in the condemned property for the taking to constitute a "public use." *Totowa Lumber, supra,* 96 *N.J. Super.* at 121, 232 *A.*2d 655 ("The number of people who will participate in or benefit by the use for which the property is condemned is not determinant of whether the use is or is not a public one.") (quoting *Hindenlang, supra,* 35 *N.J. Super.* at 491, 114 *A.*2d 461). Further, the fact that a private party may benefit from the taking does not render the taking private and not for "public use." See *County of Ocean v. Stockhold,* 129 *N.J. Super.* 286, 289, 323 *A.*2d 515 (App. Div. 1974); *State v. Buck,* 94 *N.J. Super.* 84, 88, 226 *A.*2d 840 (App. Div. 1967) (holding that although private interests may be served by condemnation, overarching question is whether purpose of taking is in public interest).

While the purpose of this proposed condemnation may be classified as a public purpose, the statutory criteria of N.J.S.A. 40A:12A-5 has not been met.

For the redevelopment to be warranted under N.J.S.A. 40A:12-5, there must exist conditions of deterioration in housing causing unwholesome buying conditions, dilapidation, obsolescence, deleterious land use or obsolete layout detrimental to safety, health, morals and welfare of the community or lack of proper utilization of areas of land resulting in stagnant or not fully productive condition.

As testified to below, there were no safety or health hazards, no excessive police activities and the land, as utilized, generated revenue in terms of license fees and taxes. While the road layout was questioned by the municipal planner, there does not appear to have been any problem with emergency vehicles in the area. The court has reviewed the original photographs. While it is obvious that some trailers are in need of repairs or painting and there is an apparent overgrowth of vegetation, enforcement of the property maintenance code would correct those conditions.

As stated in Spruce Manor v. Bor. of Bellmawr, 315 N.J. Super. 286, 289-95 (Law Div. 1998), the fact that a structure is old and may not meet present standards is insufficient to meet the substantial evidence criteria. Therein, the court stated that "obsolete" required a showing that the structure was detrimental to the safety, health, morals or welfare of the community.

As stated by Judge Costello in the unreported decision of Tp. of Bloomfield v. 110 Washington Street, Docket No. ESX-L-2318-05 (Law Div. 2005):

> Not only do defendants have to demonstrate blight by substantial evidence, they must also establish that said blight is "detrimental to the health, safety and welfare of the community.

They have failed to do so in the case.

One additional point should be made on the utilization of the land. Reference is made to the comment in the American Planning Association Journal in reference to Kelo, supra. The following quote was taken from its attorney's amicus brief:

> Eminent domain is concededly an unsettling power, and is subject to misuse overuse if not properly constrained. But eminent domain is disruptive for all who experience it, not just those who might be able to persuade a reviewing court that a particular condemnation is not "public" enough. The dangers of eminent domain should be addressed by assuring that it remains a second-best alternative to market exchange as a means of acquiring resources, by encouraging careful planning and public participation in decisions to invoke eminent domain, and by building on current legislative requirements that mandate additional compensation beyond the constitutional minimum for persons who experience uncompensated subjective losses and consequential damages.

Part of the evidence presented to the Planning Board related to plaintiff's (Costa) statement that it intends to develop its portion of the premises privately, and to that end, has relocated some trailers to another section of its premises. In addition, the majority of both plaintiffs' premises are part of an ongoing business, i.e., rental properties that provide affordable housing, which generate tax revenues to the municipality.

The court does not concur with the plaintiffs that the municipality's actions were a pretext to simply include additional revenue. Were the court to blind itself to the fact that the governing body has a duty to the entire municipality to seek to maintain budgeting constraints

and to add revenue when possible for the sake of all of the residents of the borough, would be to discount the realities that face all governmental bodies. Contrary to the arguments of the plaintiffs, this court appreciates the goals of the Borough of Lodi. The fact that the proposed use would bring more tax ratables to the borough requires this court to inspect with heightened scrutiny the motives of Lodi. See Tp. of West Orange, supra, at 577. However, where premises are presently productive and serve the benefit of modest housing, any presumption, which the municipality may be entitled to by case law, is negated by use of the premises.

Against this background, the court has reviewed the entire record carefully and determines that the municipality has not established by substantial evidence that the premises in question is in need of redevelopment. The court, therefore, concludes that the actions of the municipality were arbitrary and capricious. Plaintiff's counsel shall submit a proposed order in conformance with this opinion.

RICHARD J. DONOHUE, J.S.C.