SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

CITY OF LONG BRANCH, a Municipal Corporation in the State of New Jersey, Plaintiff-Respondent, vs. LOUIS THOMAS ANZALONE and LILLIAN ANZALONE, h/w, CITY OF LONG BRANCH, LONG BRANCH SEWERAGE AUTHORITY, JOHN DOES 1-10 and JANE DOES 1-10, Appellants-Defendants.	DOCKET NO. A-0067-06T2 Civil Action **ON APPEAL FROM:** Superior Court of New Jersey Law Division Monmouth County Docket No.: MON-L-141-06 **SAT BELOW:** Hon. LAWRENCE M. LAWSON, A.J.S.C.

APPELLANTS'-DEFENDANTS' BRIEF

CARLIN & WARD, P.C.
25A Vreeland Road
P. O. Box 751
Florham Park, New Jersey 07932
(973) 377-3350
Attorneys for Defendant/Appellants
Louis and Lillian Anzalone

Of Counsel and on the Brief
William J. Ward, Esq.

On the Brief
Arthur G. Warden, III, Esq.
Scott A. Heiart, Esq.

PRELIMINARY STATEMENT

This is an appeal from a condemnation action brought by the City of Long Branch in which the Trial Court denied Louis and Lillian Anzalones' ("Appellants") motion to dismiss the complaint or, alternatively, their request for a plenary hearing on the issues raised and limited discovery. Da114.

The underlying condemnation action does not serve a public purpose nor does it comport with the City's Redevelopment Plan; therefore, it should have been dismissed. The Redevelopment Plan and Design Guidelines clearly state that the Appellants' property was to remain as residential infill and not subject to eminent domain. The City's designation of this property to be in need of redevelopment failed to address the critical public purpose aspect of the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq., which gives rise to a municipality's power to condemn private property for private redevelopment. The process of designating the property as being in need of redevelopment was also fatally compromised by conflicts of interest among City Counsel, the designated redevelopers, and members of the City Council and Monmouth Community Bank. The aforementioned issues required the Court below to dismiss the condemnation complaint or, alternatively, conduct a plenary hearing on the issues and allow limited discovery into the conflicts of interest arguments. Such error compels Appellants

to move before this Court for an order reversing the Trial Court's decision.

PROCEDURAL HISTORY

The City of Long Branch ("City") commenced the underlying condemnation action by filing an Order to Show Cause and Verified Complaint on January 11, 2006. Da94, Da4. On February 3, 2006, Appellants Louis and Lillian Anzalone filed an answer, cross-motion to dismiss the action, briefs and certifications in support thereof. Da99. In May 2005, McGuire Associates, on behalf of the City, appraised the Anzalones' property as of January 7, 2005, valuing it at three-hundred and four thousand dollars ($304,000).Da21. As of the date of this filing, the City has not deposited the amount of its estimated just compensation into court nor filed its declaration of taking pursuant to N.J.S.A. 20:3-17; N.J.S.A. 20:3-18.

In February 2006, Appellants filed a request pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 et seq. seeking the opinion letter prepared by the City's outside redevelopment counsel, Greenbaum, Rowe, Smith, Ravin & Davis, the content of which presumably discussed a conflict of interest relating to the members of the Municipal Council and Monmouth Community Bank. Da374. The City denied Appellants' request arguing that the letter was privileged but agreed to provide a partially redacted copy to Judge Lawson for in camera review prior to the

return date of the order to show cause. Da378. Judge Lawson agreed to review the letter in its context to Appellants' arguments and make a ruling sua sponte. Da369.

On March 24, 2006 the Hon. Judge Lawrence M. Lawson, A.J.S.C., heard oral argument on the Appellants' challenge to the condemnation.[1] Judge Lawson reserved decision and, on June 22, 2006, the Court rendered a 60 page written opinion denying the relief sought by Appellants in its entirety and denying Appellants any right to stay the condemnation action. Da114. In addition, Judge Lawson's opinion did not address the Greenbaum opinion letter sought by Appellants. On July 19, 2006, the Court entered an Order for Final Judgment but delayed the appointment of commissioners. Da174. By letter dated August 15, 2006, Appellants requested that Judge Lawson make a ruling regarding the Opinion Letter. Da380. On August 30, 2006, Appellants filed a Notice of Appeal of the Court's July 19, 2006 order and subsequently on October 6, 2006 Appellants filed a motion to stay the underlying condemnation action with the Appellate Division accompanied by a brief and appendix in support thereof in accordance with R. 2:9-5. Da1. Subsequently, on October 27, 2006, the City filed a cross-motion for an order expediting the

[1] It should be noted that several other property owners contested the City's right to take. (See City of Long Branch v. Brower et als, Docket No. Mon-L-4987-05). Though the cases were not consolidated, Judge Lawson heard oral argument on all the challenges concerning the Marine Terrace, Ocean Terrace and Seaview Avenues ("MTOTSA") areas of Long Branch. The MTOTSA property owners have also filed a Notice of Appeal. Docket No. A-196-06T2.

appeals process. By letter dated October 25, 2006, Appellants renewed their request that Judge Lawson make a ruling on the opinion letter or provide it to the Appellate Division for its review. Da382. On November 2, 2006, co-counsel for the City, Paul V. Fernicola, Esq., informed Appellants' Counsel that the opinion letter was "inadvertently disclosed" in the City's appendix provided with its response to Appellants' motion to stay. Da387. By letter dated November 3, 2006 Appellants' counsel responded to Mr. Fernicola informing him that any and all copies of the opinion letter were sealed and that the opinion letter was not disseminated to any third party. Da389. On November 3, 2006, Appellants' Counsel received a letter opinion from Judge Lawson dated October 31, 2006, and post-marked on November 2, 2006, regarding the opinion letter. Da384. Judge Lawson ruled that the letter was not relevant to Appellants' challenge to the redevelopment and was privileged. Da384. On November 13, 2006, Mr. Fernicola, filed a Notice of motion and certification without an accompanying brief and appendix with the Appellate Division seeking an order compelling all copies of the opinion letter held by the Appellate Division and Appellants' counsel be returned. As of the date of this filing, that motion is pending.

STATEMENT OF FACTS

A. Subject Property

By this action, the City seeks to condemn the single family home of Louis and Lillian Anzalone located at 32 Ocean Terrace in Long Branch, New Jersey ("Subject Property").Da177. The Anzalones' home is located in the Beach Front North Phase 2 Area of the City and sits approximately 150 feet from the beach. Da177. The Anzalones are eighty-eight years of age as of the date of complaint, and they have lived in their home for the last forty-five years. Da176-177.

B. The Redevelopment Process

On August 8, 1995, the City Council adopted Resolution 271-95, pursuant to the Local Redevelopment Housing Law ("L.R.H.L."), N.J.S.A. 40A:12A-6, requesting that Long Branch undertake an investigation to determine whether the properties designated in a study area set forth by the City Council were in need of redevelopment. Da238. In August 1995, at the request of Carl Turner, the City's Planning Director, the Long Branch Fire Bureau conducted a cursory inspection of the residences and buildings in the study area. Da366. The report was done by Edward Williams, the City's Fire Official and it outlined the basic type and condition of the buildings in the area. Da366. Mr. Williams was instructed not to make interior inspections of the homes and more importantly not to disclose to the residents

the reason for the inspection. Da366. The Appellants' home was rated as being in good condition by the Fire Official. Da368.

In January 1996, based in part on the findings of the Fire Official, the City Planning Department prepared a report, finding the Subject Property as well as others to be in an "area in need of redevelopment." Da221. A public hearing was then held on January 16, 1996, at which time Appellants were informed that their properties would be designated as "residential infill" and would not be taken. 178a. After the hearing, the Planning Board recommended that the study area be designated in need of redevelopment.

On May 14, 1996, via Ordinance 15-96, the City adopted a Redevelopment Plan to which the City's outside redevelopment counsel, Greenbaum, Rowe, Smith, Ravin & Davis ("Greenbaum firm") contributed to its creation. Da245, Da268. An objective of the Redevelopment Plan was to "conserve sound, well-maintained single-family housing to the extent possible, and encourage residential development through infill." Da251. As part of the Redevelopment Plan, the Greenbaum firm collaborated on the establishment of color coded Design Guideline Handbooks which outlined the various areas and the redevelopment that would occur therein. Da273. These guidelines provided further detail and enumeration of the specific objectives of the uses by sector set forth in the Redevelopment Plan. Da274. The

guidelines clearly indicated, via a color-coded, map that "residential infill" would occur on the Subject Property. These guidelines were made available to the residents both during and after the January 16, 1996, meeting. Da274-275. In January 2001, the City adopted Ordinance 2-01 which authorized the City to exercise its power of eminent domain over all the residences in the redevelopment area including that of the Subject Property. Da16. Instead of conserving the existing single family homes, or using the Subject Property for residential infill as stated in the Redevelopment Plan and Design Guidelines, the City instituted eminent domain proceedings against Appellants in January 2006 in order to acquire the property for the construction of condominiums.

On February 22, 2000, the City adopted a resolution entering into a Redevelopment Agreement with Beach Front North, LLC, the designated redeveloper of the area. Da277. Beach Front North, LLC, is a subsidiary of Applied Development Company of Hoboken, New Jersey. Da127. The Redevelopment Agreement was then amended on June 22, 2002, to designate Matzel and Mumford, a wholly owned subsidiary of K. Hovnanian, as a co-redeveloper for the Beachfront North District. Da281, Da291. Together, Beach Front North, LLC, and Matzel and Mumford formed MM-Beachfront North, LLC. Da281.

c. Actual and/or Appearance of Conflicts of Interest

1. The Greenbaum Firm

From 1992 through March 2006, Arthur Greenbaum, Esq., senior partner, of the Greenbaum firm served as a member of the Board of Directors and was a stockholder of K. Hovnanian Enterprises, Inc., the parent company of Matzel and Mumford. Da288. Furthermore, throughout that period, the Greenbaum firm provided legal representation to K Hovnanian. Da289, Da292. In addition, the Greenbaum firm served as redevelopment counsel for the City of Long Branch from 1995 until July 27, 2005. On July 27, 2005, the Greenbaum firm resigned from its representation of the City in connection with the Beach Front North Redevelopment because of the apparent conflict of interest. Da357. The Greenbaum firm's resignation occurred less than two weeks after the publication of the United States Supreme Court decision in Kelo v. New London. 125 S. Ct. 2655 (2005). Da357.

2. The Ansell Firm & Monmouth Community Bank

The City is also represented by the firm Ansell, Zaro, Grimm & Aaron ("Ansell Firm") in this matter, and in other matters related to the Beach Front North Redevelopment. The Ansell Firm has also represented K. Hovnanian Enterprises, Inc. Da296, Da298. In conjunction with the redevelopment, a $2.5 million line of credit was made available by Monmouth Community Bank and used by the developer, Beachfront North, LLC, for

property acquisitions. Da130, Da192.

The Ansell Firm lists Monmouth Community Bank as one of its representative clients. Da296. In addition, City Councilmen Anthony Giordano III, Michael DeStefano, and David G. Brown are shareholders in the bank. Da192. Councilman Brown is employed by the bank. Da195-196. Councilman Giordano served as Senior Vice President and Chief Financial Officer of the Bank. Da195-196. These Council members are the same members who voted for and approved the amended redevelopment agreement approving Matzel & Mumford as co-developer with Applied Management. Da192. City attorney James Aaron, Esq., sits on the Board of Directors of Monmouth Community Bank and he is reported as personally owning or co-owning $775,000.00 in shares of the Bank. Da194. Co-Counsel for the City, Paul V. Fernicola, Esq. is currently handling this appeal for the City due to the allegations regarding the conflicts of interest against Mr. Aaron.

3. The Greenbaum Opinion Letter

In November 2002, the Greenbaum firm prepared an opinion letter on the conflicts issue regarding transactions with the City Council and Monmouth Community Bank. Da300, Da374. This opinion letter was sought by Appellants in February 2006 pursuant to the Open Public Records Act, ("OPRA") N.J.S.A. 47:1A-1 et. seq. Da374. The Ansell firm denied Appellants access to the opinion letter arguing that the document was protected by

Attorney/Client Privilege but agreed to make it available to the Trial Court for an in camera review prior to the March 24, 2006 return date of the Order to Show Cause. Da378, Da369. In February 2006, the Court held a telephone conference in which it was agreed that the Court would review the opinion letter in camera and rule sua sponte on its relevancy in the context of Appellants' arguments concerning the conflicts of interest. Da369. The Court never made a ruling prior to the oral argument held on March 24, 2006.

Judge Lawson's June 22, 2006, written opinion makes no mention of the Greenbaum opinion letter. Da114. By letters dated August 15, 2006, and October 25, 2006, Appellants again requested that the Court make a ruling regarding the OPRA request and the relevancy of the Greenbaum opinion letter. Da380, Da382. On the evening of November 2, 2006, Appellants' counsel received a letter via facsimile from Paul V. Fernicola, Esq., notifying them that the Greenbaum opinion letter was "inadvertently" provided in the City's appendix which was filed with the Appellate Division on October 27, 2006 in response to Appellants' motion to stay. Da387. In addition, Mr. Fernicola also notified Judge Lawson of the disclosure either telephonically or by letter via facsimile. By letter dated November 3, 2006, Appellants' attorney notified the Appellate Division and City counsel, Messrs. Fernicola and Aaron that the

document was sealed and not disseminated to anyone outside the firm and that the Appellate Division had jurisdiction over the matter pursuant to R. 2:9-1. Da389. On the afternoon of November 3, 2006, Appellants' counsel received a letter opinion from Judge Lawson dated October 31, 2006, and post-marked November 2, 2006, in which the Court found that the subject matter of the submission was not related to the redevelopment and the information was privileged. Da384. Significantly the Court's letter opinion also referenced that there had been no waiver of privilege even though this issue was not before the Court and jurisdiction is clearly with the Appellate Division. R. 2:9-1. By letter dated November 3, 2006, Mr. Fernicola notified the Appellate Division of the disclosure and sought to have the Appellate Division return any and all copies of the opinion letter as well as order Appellants' Counsel to return the copies in their possession which had already been sealed. Da391. On November 13, 2006, Mr. Fernicola filed a Notice of Motion and certification, without a brief and appendix with the Appellate Division seeking an order compelling the Appellate Division as well as Appellants' Counsel to return any and all copies of the Greenbaum Opinion letter. As of the date of this filing, said motion is currently pending before the Court.

D. Issues Before the Trial Court

On the return date of the Order to Show Cause, Appellants argued in part that the City's taking was improper and unjust, and alleged a conflict of interest existed between the developer, city counsel, and Monmouth Community Bank, which tainted the underlying taking; the City's redevelopment plan allowed for the property owners' homes to remain as residential infill not to be taken; the City did not conduct bona-fide negotiations pursuant to N.J.S.A. 20:3-6; the City improperly delegated its powers of Eminent Domain over to the developer; the properties slated to be taken did not meet the blight criteria pursuant to the L.R.H.L., N.J.S.A. 40A:12A-1 et. seq.; and the Appellants' homes were being taken to further the interest of a private redeveloper rather than serving a public purpose. In addition, Appellants sought a plenary hearing and discovery, including that of the Greenbaum opinion letter, prior to Judge Lawson making a final determination as to the City's right to take.

LEGAL ARGUMENT

POINT I

THE APPELLATE DIVISION SHOULD NOT AFFORD DEFERENCE TO THE FINDINGS OF FACT AND LEGAL INTERPRETATIONS SET FORTH IN THE TRIAL COURT'S OPINION OF JUNE 22, 2006.

The appropriate standard of review in this matter is de novo. This differs from the deference normally afforded to the Court's findings below because Judge Lawson failed to conduct the requisite hearing on genuine issues of material fact pursuant to Rule 4:67-5 and made improper legal conclusions, based on certifications supplied to the Court by Plaintiffs.

Appellants' submission to the Trial Court below raised genuine issues of material fact. For example, Appellants placed in contention the City's right to condemn property pursuant to the Redevelopment Plan. The Redevelopment Plan and Design Guidelines clearly state that the Appellants' home will remain as residential infill and is not necessary for the redevelopment project. Da251, Da274. Appellants further claimed that City officials specifically stated their property would remain as part of the residential infill exempt from condemnation. Da178.

The City responded to Appellants' allegations by claiming that at all times it intended to condemn these properties as being necessary for the redevelopment. These conflicting claims represent one of the material facts that remain in dispute.

Another fact in dispute is whether City officials and representatives acted in connection with the taking despite having multiple conflicts of interest. The City contends that no conflicts of interest existed. This disagreement is another material fact which was in dispute before the trial court below and is very germane to the conflicts opinion letter issued by the Greenbaum firm.

Pursuant to Rule 4:67-5, Appellants objected to the Court deciding the matter on the pleadings and requested a plenary hearing. The Court denied Appellants' request for a plenary hearing. The trial court's failure to provide the requested hearing was contrary to the requirements of Rule 4:67-5 and caused the record below to be incomplete.

Rule 4:73-1 requires condemnation actions to be brought in "a summary manner pursuant to R. 4:67." The Rule provides in relevant part:

> If no objection is made by any party, or the Appellants have defaulted in the action, or the affidavits show palpably that there is no genuine issue as to any material fact, the court may try the action on the pleadings and affidavits, and render final judgment thereon. If any party objects to such a trial and there may be a genuine issue as to a material fact, the court shall hear the evidence as to those matters which may be genuinely in issue, and render final judgment.

R. 4:67-5. (emphasis added).

In the construction of laws and statutes, both should be given their generally accepted meanings, according to the approved usage of the language. See N.J.S.A. 1:1-1. “The words ‘must’ and ‘shall’ are generally mandatory.” Harvey v. Board of Chosen Freeholders of Essex County, 30 N.J. 381, 391 (1959); Cryan v. Klein, 148 N.J. Super. 27, 30 (App. Div. 1977). If a party objects to a trial on the pleadings and there may be a genuine issue as to material fact the trial court is required to hear evidence on the matters which may be genuinely at issue. Klock New Jersey Practice, Court Rules Annotated, West Group 2000, Rule 4:67-5, Author’s comments. (emphasis added). The comment supports Appellants’ contention that a hearing is mandatory. In contrast, the word “may” is used instead of “shall” when it is meant to be nonmandatory or permissive. MacNeil v. Klein, 141 N.J. Super. 394, 402-403, (App. Div. 1976). The term “may be a genuine issue of material fact” shows that there is a lower standard to be met to obtain a hearing under the Rule. Exxon Corp. v. Hunt, 475 U.S. 355, 370 (1986)(“may be” shall not be interpreted to mean “is”).

The Trial Court was in error when it found that no genuine issues of material fact may exist. As a result of that errant finding, the Court denied Appellants the requested hearing provided for under R. 4:67-5. In this case, Appellants met the standard established in the Rule and raised claims that at a

minimum there may be genuine issues of material facts on which a hearing should have been conducted. Teamsters Local Union Number 11 v. Abad, 144 N.J. Super.239, 242 (App. Div. 1976).

It is imperative to conduct a hearing when a Court is reviewing issues of conflicts of interest in the context of a government body's alleged abuse of power in a condemnation proceeding. County of Bergen v. S. Goldberg & Co., 39 N.J. 377, 380-381 (1963); Haggerty v. Red Bank Borough Zoning Bd. of Adjustment, 385 N.J. Super. 501 (App. Div. 2006). The Court's failure to provide a hearing makes the standard of review established in Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 483-484 (1974) inapplicable to this case. Judge Lawson's opinion is based on an incomplete review of the evidence and should be given no deference.

Judge Lawson's decision on the remainder of Appellants' challenges is also subject to de novo review. In addition to raising genuine issues of material fact, Appellants challenged the City's right to take the Subject Property on several grounds including: the City did not conduct bona-fide negotiations pursuant to N.J.S.A. 20:3-6; the city improperly delegated its powers of Eminent Domain to the developer; the properties slated to be taken did not meet the blight criteria pursuant to the L.R.H.L., N.J.S.A. 40A:12A-1 et. seq.; and the Appellants' home was being taken to further the interest of a private redeveloper

rather than serving a public purpose. Judge Lawson's interpretation of the law concerning these challenges and the legal consequences that flow from the established facts are not entitled to any special deference by the Appellate Division. Manalapan Realty v. Township Committee, 140 N.J. 366, 378 (1995).

POINT II

THE COURT ERRED BY FINDING THAT THE CITY ESTABLISHED THE SUBSTANTIAL EVIDENCE NECESSARY TO SUSTAIN THE DESIGNATION OF THE AREA TO BE IN NEED OF REDEVELOPMENT

The City failed to establish the requisite "substantial evidence" that the properties in question met any of the criteria of N.J.S.A. 40A:12A-5 when designating the properties to be in need of redevelopment. See Hirth v. Hoboken, 337 N.J. Super. 149, 165-66 (App. Div. 2001); N.J.S.A. 40A:12A-6(b)(5). Judicial review of the City's redevelopment designation is limited solely to whether the designation was supported by substantial credible evidence in the record before the City Planning Board and Council. Levin v. Township Comm. Of Bridgewater, 57 N.J. 506, 537 (1971). Absence of such substantial evidence in the record would indicate an arbitrary or capricious action. Lyons v. City of Camden, 48 N.J. 524, 533 (1968).

The City's Report of Findings did not address how the properties located in residential infill, including that of the

Subject Property, impacted the safety, health, morals, or welfare of the community. A finding in this regard must be part of any blight declaration pursuant to N.J.S.A. 40A:12A-5(d) and (e). Redevelopment is designed to protect the health, safety and welfare of the community by correcting these conditions. If there is no evidence that these conditions exist, then there can be no public purpose found in taking private property for private redevelopment.

The City's written report of findings presented to the Planning Board shows that 44 percent of the properties in Beachfront North Phase II are in either good or fair condition. Da228. The Anzalones' home was found to be in "Good Condition" which is defined as "any building free from all forms of deterioration, which includes: 1)broken windows; 2) deteriorating paint; 3) falling rotten, exterior columns; 4)cracked, chipped masonry veneer; 5)siding, walls, roof, stairs, porches, balconies, and other structural parts showing evidence of deterioration; 6) gutters, leaders, drains, window frames and doors showing evidence of apparent defects. Da227. The City's application of such broad and trivial criteria in an effort to declare blight does not meet the standards set forth by the L.R.H.L. In addition, the fact that the City deemed that the Appellants' home was in "Good Condition" stands in contravention to declaring it blighted.

In ERETC, L.L.C., v. City of Perth Amboy, 381 N.J. Super. 268 (App. Div. 2005), the Court found that there was insufficient evidence in the City planner's report to sustain a finding by the City that each property included in the designated area met the criteria set forth in the L.R.H.L. The Court went onto hold that "absent such substantial evidence, the City's decision to designate the area to be in need of redevelopment does not enjoy the deference generally accorded such findings." Id. at 281.

In the current matter, the City failed to establish any evidence, no less substantial evidence, to support the finding that the properties including that of the Subject Property, located in the residential infill area were in need of redevelopment. See Hirth, supra 337 N.J. Super. at 165-66. The Planning Board's findings were based on a cursory inspection of the properties by the Fire Code Official. The Report of Findings does not provide the requisite comprehensive analysis of the statutory criteria as it applied to each of the properties in the study area. ERETC, supra. 381 N.J. Super. at 280. The case law articulates what constitutes "substantial evidence" for purposes of the L.R.H.L. See Lyons, supra, 52 N.J. at 95, (noting that the substantial evidence included structure-by-structure inspections of the interior and exterior of each building within the proposed redevelopment area).

The residential infill area in which the Anzalones reside was a stable residential neighborhood with many of the same families owning property for 40-50 years. 178a. Appellants' home in no way meets the blight criteria as demonstrated by the photographs presented to the Court below and the fact that it was deemed by the City's own reports as being in "Good Condition." 181a. At a minimum the evidence the Trial Court had before it evidenced that the area was not in need of redevelopment pursuant to the L.R.H.L.

The City alternatively argued before the Trial Court that the Subject Property was necessary for the redevelopment of other areas. There was absolutely no evidence in the planning report, redevelopment plan, or otherwise in the record before the Planning Board and City Council or the Trial Court below, that the Subject Property was necessary for the redevelopment of the other properties. Having failed to establish this, the Trial Court could not have found that the Subject Property was necessary for the redevelopment and should have dismissed the complaint.

In addition, the conditions alleged to cause the area to be in need of redevelopment were caused by the City's contrived actions which masked the true conditions of the neighborhood including the Subject Property. In the years leading up to the redevelopment study, the City rezoned the residential infill

area in a manner which effectively chilled development in the area. For example, the Subject Property had been historically in a residential neighborhood with lots that were approximately 2,000 to 3,000 sq. ft. in size. The City rezoned the area to require lots to have a minimum of 8,000 sq. ft. and permitted commercial and other uses which are incompatible with the residential character of the neighborhood. By necessity, any development under the zoning would require the assemblage of several lots. It was the change in zoning, and not a lack of interest in the neighborhood, that created those conditions described of in the Redevelopment Study and Plan. Furthermore, the City did not allow private property owners to develop their properties in accordance with the plans without first waiving their rights to compensation for such improvements in the event those properties were condemned. The City purposefully neglected to enforce building codes or repair sidewalks and streets, in order to place the subject properties in an improper light. This type of self-serving conduct has been specifically addressed and denounced by the New Jersey Supreme Court. Riggs v. Long Beach Township, 109 N.J. 601, 616-17 (1988). As it did in ERETC, the Court should examine the record below and find that the City's taking was invalid because the City failed to set forth the necessary criteria to establish the Subject Property as being in an area in need of redevelopment.

POINT III

THE COURT ERRED BY FAILING TO DETERMINE THAT THE CITY'S TAKING STANDS IN CONTRAST TO ITS OWN REDEVELOPMENT PLAN AND SERVES A PRIVATE RATHER THAN PUBLIC PURPOSE

The City's actions are inconsistent with its own Redevelopment Plan and are solely driven by the developer to maximize its profits. The Redevelopment Plan in place as of the date of the filing of the condemnation action, clearly states its objective was "to conserve sound, well-maintained single-family housing and encourage residential development through infill." Da251. The elimination of the long standing and stable neighborhood of single family homes is in direct contravention to that stated objective. Therefore, the City's decision to acquire the Subject Property is arbitrary and capricious and not supported by the Redevelopment Plan.

The City's intent under the Redevelopment Plan to keep the Anzalones' neighborhood intact is demonstrated by the Design Guidelines Handbook which accompanied the Plan. The Handbook clearly indicates through a color coded map that the Subject Property is to be part of a neighborhood of single family homes which would not be taken. Da274-275. The Anzalones' property falls in an area which was clearly marked and designated by color as being "residential infill." Da274. At the January 16, 1996, hearing the property owners were informed that their properties would be designated as "residential infill" and would

not be taken. Da178. Furthermore, the Mayor and other City officials assured Appellants that their home would not be subject to eminent domain as was done in other phases of the redevelopment. Da178.

Yet without justification or a formal amendment to the Redevelopment Plan, the City moved to condemn the Subject Property among others, in January 2006, in order to replace this neighborhood with high priced condominiums. The objectives of the Redevelopment Plan are set forth in the Design Guideline Handbooks. Da246, section 5. The Design Guideline Handbook referenced in the Redevelopment Plan, indicates that the Subject Property is to be part of the area designated for residential infill. Da274-275. In order for the City to amend the redevelopment plan it must comply with N.J.S.A. 40A:12A-7(e) and (f). This requires that the municipality adopt the amendment after a report is submitted recommending the amendment from the Planning Board. Id. This procedure was not followed in this case and is fatal to the taking. The Anzalones were never given notice or an opportunity to be heard. Da178. Despite the procedural omissions, the City arbitrarily condemned the properties solely to provide the developer with more land to exploit.

The Redevelopment Plan goes on to state that the amount of relocation required to implement the Plan is “expected to be

moderate at most, given the policy of encouraging infill." 262a. However, the City's current actions are in complete contrast to the policy and objectives of the Plan and are driven solely by the developers' interest in maximizing their profits. The Redevelopment Plan and Guidelines show that the City's argument that it always intended to condemn these properties is not credible.

In addition, the City's taking is for a private, not public use in violation of the U.S. Constitution, Amendment V, and the New Jersey Constitution, Article 1, Section 20. Every condemnation undertaken as part of a redevelopment plan must be necessary to accomplish the public purpose of the plan. See, Texas E. Transmission Corp. v. Wildlife Preserves, Inc., 48 N.J. 261, 269 (1966). Accordingly, the Court should carefully examine the true purpose of the taking. City of Atlantic City v. Cynwyd Investments, 148 N.J. 55, 73 (1997).

POINT IV

THE COURT ERRED BY FINDING THAT THE CONFLICTS OF INTEREST DID NOT TAINT THE UNDERLYING ACTION AND THEREFORE WARRANTED A DISMISSAL

The Court below erred by not granting discovery to the Appellants so that the facts surrounding the inclusion of the Subject Property in the redevelopment zone, in light of the attorney conflicts of interest between the Greenbaum firm, the

Ansell firm, the Mayor and Council of the City of Long Branch, the developers, K. Hovnanian and the Monmouth Community Bank, could further be developed.

> The condemnation process involves the exercise of one of the most awesome powers of government. Generally, when the exercise of eminent domain results in a substantial benefit to specific and identifiable private parties, "a court must inspect with heightened scrutiny a claim that the public interest is the predominant interest being advanced." Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455, 459 (1981). In determining whether projects with substantial benefit to private parties are for a public purpose, this Court has held that the trial court must examine the "underlying purpose" of the condemning authority in proposing a project as well as the purpose of the project itself.
>
> Cynwyd Investments, supra 148 N.J. at 73.

In Kelo v. City of New London, 125 S. Ct. 2655, 2669 (2005), Justice Kennedy wrote in his concurring opinion: “A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit[.]” In her dissenting opinion, Justice O’Connor characterized the consequence of the Court's decision as follows:

> The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result.

Id. at 2677.

Both Justice Kennedy and Justice O'Connor warn of overly aggressive municipalities, such as the case herein, who seek to expand their power of eminent domain only to benefit a select few.

The substantial conflicts and appearance of conflicts undermine the validity of the Plaintiff's redevelopment process as it applies to Beach Front North Phase II and vitiates the validity of the City's redevelopment and the underlying condemnation action. It also impermissibly undermines the public's confidence in its government. See Lafayette Township v. Board of Chosen Freeholders, 208 N.J. Super 468, 474 (App. Div. 1986):

> An attorney advising a public body wields considerable power and influence by virtue of his ability and opportunity to interpret the law and advise on legal matters. The force of his influence is subtle and pervasive. A reasonably-minded citizen has to conclude there was a disqualifying interest when the advice of County Counsel leads to a significant business opportunity for an individual with whom he had a business relationship to the extent of the one that existed here.

See also Wilson v. Long Branch, 27 N.J. 360, 396 (1958) wherein the court indicated that an attorney's conflict of interest can be fatal to a blight declaration if the attorney had the opportunity to influence the municipal action being taken. This is true whether or not the conflict was in bad faith. See Dover Tp. Homeowners & Tenants Ass'n v. Township of Dover, 114 N.J.

Super. 270, 276-77 (App. Div.1971); Newton v. Demas, 107 N.J. Super. 346, 349-50 (App. Div. 1969). The Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et. seq. governs conflicts of interest. The statute provides that:

> No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

The relationships between the Greenbaum and Ansell firms with K. Hovnanian and Matzel and Mumford, and the City Council and Monmouth Community Bank create the appearance, if not actual conflict and taken as a whole appear to have improperly influenced the City's actions taken in pursuit of the Beach Front North Redevelopment and the condemnation of the Subject Property. The City argues that the Greenbaum firm recused itself with regard to any alleged conflict and had no influence with regard to the selection of the redeveloper or input into the Redevelopment Plan. Yet the Greenbaum firm did have input as evidenced by its name prominently appearing on both the Redevelopment Plan and Design Guidelines respectively. Da245, Da273. This shows the Greenbaum firm was involved in the redevelopment from the very beginning. In addition the fact that the Greenbaum firm served as redevelopment counsel while

providing counsel to K. Hovnanian, the parent company of one the developers, in other matters creates the appearance of a conflict.Da289.

At a minimum, the dealings between City Counsel, the Developers, Monmouth Community Bank and the City Council violates the City's duty to deal forthrightly with Appellants.

> We have in a variety of contexts insisted that governmental officials act solely in the public interest. In dealing with the public, government must "turn square corners." Gruber v. Mayor and Tp. Com. of Raritan Tp., 73 N.J.Super. 120 (App.Div.), aff'd., 39 N.J. 1, (1962). This applies, for example, in government contracts. See Keyes Martin v. Director, Div. of Purchase and Property, 99 N.J. 244, 491 A.2d 1236 (1985). Also, in the condemnation field, government has an overriding obligation to deal forthrightly and fairly with property owners. See Rockaway v. Donofrio, 186 N.J.Super. 344, 452 A.2d 694 (App.Div.1982); State v. Siris, 191 N.J.Super. 261, 466 A.2d 96 (1983). It may not conduct itself so as to achieve or preserve any kind of bargaining or litigational advantage over the property owner. Its primary obligation is to comport itself with compunction and integrity, and in doing so government may have to forego the freedom of action that private citizens may employ in dealing with one another.

F.M.C. Stores Co., v. Borough of Morris Plains, 100 N.J. 418, 426-27 (1985). (emphasis added).

In addition, the Appellants showed good cause as to why the Court should have allowed discovery to examine, among other things, the relationship between the Ansell firm, City Council, Applied Co. and Monmouth Community Bank, which not only provided a line of credit to the developer, but also employed members of the City Council who were in charge of selecting the developer.

In re Advisory Opinion 452 of the Advisory Committee on Professional Ethics, 87 N.J. 45, 51 (1981), in which the Court held:

> With attorneys holding public offices, the appearance of conflict strikes at an essential element of public trust, the ability to exercise discretion unimpeded by external considerations. An attorney for a public body, like Caesar's wife, must be above suspicion.
>
> Opinion 452, supra, 87 N.J. at 52.

At the very least, Appellants provided the court with genuine issues of material fact which mandate a hearing under R. 4:67-5.

The Greenbaum opinion letter serves as a further instance in which the members of the City Council and City attorney, James Aaron were not above suspicion. Judge Lawson's opinion faults Appellants for not developing their arguments regarding the alleged conflicts yet the Court's recent ruling bars production of an opinion letter which concerns the Monmouth Community Bank, an institution to which both James Aaron and several Council members are shareholders of, and a depository which has lent millions of dollars to the developers.

When the conflict first arose in November 2002, the City Council members sought advice from James Aaron, Esq., who himself had ties to the bank as a shareholder. Da197. Mr. Aaron reportedly told the Council members he did not believe there was any impropriety. Da197. The City then sought a second opinion

from the Greenbaum firm. Da300. According to the City's ethics ordinances, before they were amended, a city official was prohibited from engaging in any business transaction or from having "any financial or other personal interest, direct or indirect, which is incompatible with the proper discharge of his official duties in the public interest or would tend to impair his independence of judgment or action in the performance of his official duties." Da197. The ordinances further state that any officer or employee who violates any ordinance related to conflicts of interest "shall be deemed guilty of misconduct in office and liable to removal from office." Da197.

This standard was in place at the time the City Council voted to approve the redeveloper and also when the decision was made by the bank to provide financing for the redevelopment. Da198-199. As the bank's stock rose, the Council Members and City Counsel profited from such transactions. Mayor Adam Schneider was quoted as stating, the "Council Members' ties to Monmouth Community Bank would be reviewed by the administration with an eye toward removing any appearance of a conflict of interest." Da193. Despite such, public representations by the Mayor, the City Council acted to amend the local ethics laws rather than fully address the conflicts.

Given that the Greenbaum opinion letter was disclosed in materials filed with the Court, there is a presumption of public

access to the document. Lederman v. Prudential Life Insurance Co., 385 N.J. Super. 307, 316 (App. Div. 2006). Though that presumption is not absolute, the burden of proof rests with the party who seeks to overcome the "strong presumption of access" to establish "by a preponderance of the evidence that the interest in secrecy outweighs the presumption." Id. at 317. The Greenbaum opinion letter was made public by the City's Counsel and not provided as part of discovery, therefore the City must show by a preponderance of the evidence why such a relevant document should remain sequestered from the public. In addition, Appellants respectfully request that the Court examine the document in context of Appellants' conflicts argument and decide whether the document should be sealed.

Given the apparent conflicts, Appellants request that the court reverse the lower court's judgment and grant discovery so that the conflicts arguments can be developed fully and presented at a hearing pursuant to R. 4:67-5.

POINT V

THE COURT ERRED BY NOT DISMISSING THE COMPLAINT DUE TO THE CITY'S FAILURE TO CONDUCT BONA-FIDE NEGOTIATIONS & THE CITY'S IMPERMISSIBLE TRANSFER OF POWER TO THE DEVELOPER

The Court below erred by not dismissing the complaint due to the City's failure to conduct bona-fide negotiations pursuant to N.J.S.A. 20:3-6. The City's failure to do so creates a jurisdictional defect in the condemnor's action against the

condemnee requiring dismissal of the complaint. Borough of Rockaway v. Donofrio, 186 N.J. Super. 344, 354 (App. Div. 1982); State by Commissioner of Transportation v. Carroll, 234 N.J. Super. 37 (App Div. 1989) reversed on other grounds 123 N.J. 308 (1991). The sanction of dismissal is required in order to promote a condemnor's compliance with the requirements of the Eminent Domain Act, N.J.S.A. 20:3-1 et seq. County of Monmouth v. Whispering Woods, 222 N.J. Super. 1, 10 (App. Div. 1987) certification denied, 110 N.J. 175 (1988).

A condemnor must obtain an appraisal of a proposed taking and make an offer based on that appraisal to the prospective condemnee as a precondition to filing a condemnation action. An offer cannot be considered bona fide if it is based on an inappropriate appraisal. It also cannot be considered bona fide if it is based on an invalid assumption. If the offer is based on an inappropriate appraisal, the complaint must be dismissed. See Donofrio, supra, 186 N.J.Super. at 351-352.

Ordinance 2-01 adopted by the City Council, states that the City is;

> "authorized to make payment in an amount based upon the fair market value as determined by the appraiser appointed to appraise the properties. Such payment may be in excess of the appraised value, but shall not exceed the amount set forth in the Redevelopment Agreement between the City and Beachfront North, LLC."

(emphasis added). Da16.

The developer and the City arbitrarily placed a ceiling on the amount of compensation that could be paid to the property owners. The City did not provide any method for how this "ceiling" is calculated. The February 22, 2000, Redevelopment Agreement which first sets forth the maximum amount of compensation to be paid to the properties owners is presumably based on calculations that are nearly six years old. Plaintiff was required to make its best offer to Appellants as part of the requisite bona-fide negotiations pursuant to N.J.S.A. 20:3-6. State Department of Environmental Protection v. Fairweather, 298 N.J. Super. 421 (App. Div. 1997). By placing a ceiling on what the City could offer the property owners, Plaintiff's "take it or leave it" offer did not constitute bona-fide negotiations as set forth by the court in Morris County v. Weiner, 222, N.J. Super. 560 (App. Div. 1988).

Furthermore, the Redevelopment Agreement, the Amended Agreement and the Second Amended Agreement impaired the City's ability to conduct bona-fide negotiations. The Second Amended Agreement states, "In the event that the Redeveloper concludes that it is unable to acquire through negotiation any Acquisitions Parcel, the Redeveloper shall notify the City in writing of such conclusion and, in accordance with the following provisions, instruct the City to acquire said parcel." Da366. It goes on to state that "the City agrees not to condemn or take

title by exercise of its eminent domain powers to any portion of the Site without the Redeveloper's consent." Da367.

The City cannot relinquish or contract away its powers of eminent domain nor its rights to negotiate in good faith with the property owners. Courts have held that that agreements with a redeveloper which require the redeveloper's prior written consent to commence a condemnation action was an unlawful delegation of the authority's eminent domain powers. See In re Condemnation of 110 Washington Street, Borough of Conshohocken, 767 A.2d 1154, 1160 (Pa. Cmwlth 2001). In 110 Washington Street, the redevelopment agreement contained a clause which stated that the Condemning Authority shall not undertake the use of its eminent domain powers except at the specific request of the developer. Id. at 1156. The Court held that any agreement which purportedly transfers such power to a private individual must be deemed void and unenforceable. Id. at 1160. In the current matter, the underlying action, as well as the redevelopment agreements with MM-Beachfront North, LLC, should be found to be invalid because it was the developer, not the City, that decided if, when, and which properties would be condemned. Such an impermissible delegation of the City's power of eminent domain cannot be upheld.

POINT VI

THE COURT ERRED BY NOT GRANTING APPELLANTS A PLENARY HEARING AND DISCOVERY

The Court below rendered final judgment solely based on the briefs, certifications, and oral argument of counsel. In doing so, the Court denied the property owners' request for a plenary hearing and discovery in which testimony and evidence could be introduced to further develop Appellants' arguments as they pertain to the conflicts of interest, the blight determination, and the City's representations regarding residential infill.

According to the holding in County of Bergen, supra, 39 N.J. at 380 "[i]f any party objects to a [condemnation trial] and there may be a genuine issue as to a material fact, the court shall hear the evidence as to those matters which may be genuinely in issue, and render final judgment." The court in State v. Orenstein, 124 N.J. Super. 295 (App. Div. 1973), supports this proposition by stating:

> [T]he only issue to be determined by the commissioners and by the fact finder in event of appeal is the lump sum compensation to be paid by the condemnor, plus any damages to the remaining property of the owner if the taking is only a part thereof…
>
> If there are any issues to be decided other than that of value and damages – be they a challenge to the plaintiff's right to exercise the power of eminent domain or a claim that the condemnor is in fact taking more property and rights than those described in the complaint – those issue must be presented to and decided by the court before it enters judgment

> appointing condemnation commissioners. State v. N.J. Zinc Co., 40 N.J. 560, 572 (1963).

Id. at 298.

In the current matter, Appellants presented the Court below with genuine issues of material fact. R. 4:67-5. Appellants placed in contention the City's right to condemn the Subject Property pursuant to the redevelopment plan arguing that the plan and the City's representations allowed their homes to remain as residential infill. There was no formal amendment to the redevelopment plan as required by N.J.S.A. 40A:12A-7. The City's pleadings and affidavits, while not disputing Appellants' property was designated as infill, argue that the property could be used for redevelopment if deemed necessary for the overall project regardless of the designation. Da161. This is in direct contrast to the Redevelopment Plan, the Design Guidelines Handbook, and the express representations of the Mayor and City Officials. If the City's argument is accepted, it demonstrates that the Redevelopment Plan was arbitrary and capricious and unduly vague. Despite these genuine issues of material fact, Appellants were not provided a hearing.

Furthermore, the conflicts of interest issue was clearly in dispute by both parties. This disagreement is another material fact which was at issue before the trial court. The Court in

Teamsters Local Union Number 11 v. Abad, supra 144 N.J. Super. at 242 addressed a similar matter and held:

> that it was error for the trial judge to enter judgment for plaintiff without a plenary hearing. The affidavit submitted by the parties project conflicting factual assertions from which contradictory inferences and conclusions may be drawn. A full hearing is required wherein the testimony of the witnesses will be subjected to the searching inquiry of cross-examination. R. 4:67-5.

Despite the common law support for a hearing and the express provisions of R. 4:67-5, the trial court denied such relief. Therefore, Appellants request that this matter be remanded for a hearing and limited discovery be granted on the issues raised herein. Abad, supra 144 N.J. Super. at 242.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the Court below be reversed in its entirety and the condemnation complaint be dismissed or in the alternative the matter be reversed and remanded to the Law Division for a hearing pursuant to R. 4:67-5 and limited discovery on the issues raised by Appellants.

Respectfully submitted,
CARLIN & WARD, P.C.
Attorneys for Appellants
Louis and Lillian Anzalone

By:_____
WILLIAM J. WARD, ESQ.

Dated: November 16, 2006