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' REPLY 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
Scott A. Heiart, Esq.

LEGAL ARGUMENT

POINT I

THE APPELLATE DIVISION SHOULD NOT AFFORD DEFERENCE TO THE TRIAL COURT'S FINDINGS BECAUSE THOSE FINDINGS WERE NOT BASED ON ADEQUATE, SUBSTANTIAL AND CREDIBLE EVIDENCE BUT RATHER BASED ON AN INCOMPLETE RECORD.

A trial court's interpretation of the law 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). It follows from the foregoing that when, as here, the decision of the Trial Court was made on the papers without the benefit of a plenary hearing pursuant to R. 4:67-5 the appropriate standard of review to be applied is de novo.

Contrary to Respondent's arguments, Appellants do not debate that municipal actions are vested with the presumption of validity. Levin v. Township Committee of Bridgewater, 57 N.J. 506, 537-539 (1971). However, Appellants argue that the Appellate Division should not afford deference to the Trial Court's findings when those findings are based on an incomplete record. In the current matter, the Trial Court erred by not conducting the requisite hearing pursuant to R. 4:67-5 based on genuine issues of material facts raised by the Anzalones and the other MTOTSA residents. Furthermore, the Trial Court erred by making improper legal conclusions that were based on the

certifications supplied to the Court by Plaintiffs, including the fact that the City was allowed to proceed with the taking despite the conflicts of interest and the prior representations to the Appellants that their home would remain as residential infill. Given the alleged conflicts of interests raised by Appellants, significant credibility issues existed that should not have been resolved without live testimony and the opportunity of the Court and counsel to assess the demeanor of the witnesses.

In addition Rule 4:67-5 is clear:

> 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.

(emphasis added).

Contrary to the City's position, it is mandatory for the Court to conduct a hearing when presented with genuine issues of material fact. R. 4:67-5, In re Kortvellessy's Estates, 102 N.J. Super. 226, 233-234 (App. Div. 1968). There can be no question that Appellants raised significant issues of material fact including, but not limited to, multiple conflicts of interest and the issue that the City's Redevelopment Plan and Design Guidelines clearly show that the Appellants' home would remain as residential infill and would not be necessary for the redevelopment project. (Da251, Da274). Respondent's argument

that the Appellate Division should freely adopt the legal conclusions and factual findings of the Trial Court is misplaced. 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. Accordingly, the Appellate Division should not afford deference to the Trial Court's decision, especially when that decision was based on an incomplete record as a result of the Court's denial of Appellants' right to a hearing pursuant to R. 4:67-5.

POINT II

THE COURT ERRED BY FINDING THAT THE PROPERTIES IN QUESTION MET THE CRITERIA SET FORTH IN THE LOCAL REDEVELOPMENT HOUSING LAW.

The City argues in Point II of its brief that the Appellants' failure to argue that the evidence presented by the City did not support the findings that the area met both criteria "a" and "c" of the Local Redevelopment Housing Law ("LRHL"), N.J.S.A. 40A:12A-1 et seq., constitutes an admission by Appellants that the area was properly designated. (Pb40). This argument is completely flawed and unsupported by the record. Point II of Appellants' brief clearly states: 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. (emphasis added)(Db 17).

Appellants' brief disputes the criterion adopted by the City pursuant to criteria "a" of the LRHL and states that 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, in fact, found to be in "Good Condition" which is defined by the City 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 improper application of such broad and trivial criteria in its effort to declare blight did not meet the standards set forth in the LRHL. The record clearly shows that the Anzalones' property, as well as 44 percent of the neighboring properties in the subject area, were not properly blighted pursuant to criteria "a" of the LRHL.

Appellants further contend that the area was not properly blighted pursuant to criteria "c" as evidenced by the fact 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. (Db20, Da178). Appellants argue

that any areas of vacant land were due to the City rezoning the residential infill area in a manner which effectively prevented development. (Db20-21). Thus it was the City's actions that contributed to the alleged blight pursuant to criteria "c" and not the condition of the Appellants neighborhood.

Should the Court entertain the City's argument that Appellants' alleged silence regarding the applicability of criteria "a" and "c" constitutes an admission of blight, then the Court must also conclude that the City's failure to address in its ninety-five page brief, Appellants' arguments concerning: the conflicts of interest surrounding the City, City Counsel and Monmouth Community Bank, as well as the argument that the City improperly transferred the power of eminent domain to the Developer; constitutes an admission by the City that such conflicts exist and that an impermissible transfer indeed occurred.

Putting aside the City's arguments, the fact remains that 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. ERETC, L.L.C., v. City of Perth Amboy, 381 N.J. Super. 268, 281 (App. Div. 2005). The City's voluminous analysis regarding the blight designation of the Broadway Corridor is of no consequence to this appeal. The

only area currently in question before this Court is Beachfront North Phase II, in which the Anzalones and the MTOTSA defendants currently reside.

The City does not dispute that the Planning Board's findings regarding Beachfront North were based on a cursory and covert inspection of the properties by the Fire Code Official.(Da366-368). The Report of Findings conveniently lumps Beachfront North, Beachfront South, and the Broadway Corridor together in an attempt to portray the subject property as one in need of redevelopment. The Report of Findings lacks 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. (emphasis added). In addition, the City's Report of Findings does not address how the properties located in the residential infill area, 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). This issue must be addressed in a plenary hearing before the trial court.

The City seemingly acknowledges that a comprehensive analysis of each of the properties was not performed and contends that even though the Anzalones' property was not blighted per se, it is necessary for the overall redevelopment

of the other areas. (Pb58-59). There was absolutely no evidence in the planning report, redevelopment plan, or in the record before the Planning Board and City Council or the Trial Court below, that the inclusion of the Subject Property was necessary for the redevelopment of the other properties. The City's decision to include the Anzalones' property as necessary for the overall development is unsupported and serves as a blatant attempt to seize property which is not blighted.

The City cites Levin v. Twp. Committee of the Twp. of Bridgewater, 57 N.J. 506 (1971), and Lyons v. City of Camden, 52 N.J. 89 (1968) to support its proposition that the Anzalones' property is necessary for the overall development of the area. Both Levin and Lyons are factually distinguishable from the case at bar. In the current matter, the property in question is part of a neighborhood of well-maintained, single-family homes that are adjacent to the Atlantic Ocean. Levin and Lyons deal with a handful of properties that are scattered throughout the central region of the redevelopment area and are necessary to proceed with the overall development. Unlike the properties in Levin and Lyons, Appellants' property, given its location, is not needed for the development of the overall project. In fact, the project as it was originally designed has been built. The acquisition of the properties in Beachfront North Phase II is a significant departure from the plan as it was originally designed.

The City's contention that the Subject Property has been properly blighted pursuant to the criteria of the LRHL, while simultaneously arguing that the Anzalones' property is in good condition free of signs of blight but needed for the development of the overall project is contradictory. This contradiction sheds further light on the City's failure to properly blight the Subject Property. Having failed to establish that the Anzalones' property is blighted and/or necessary for the overall redevelopment, the Trial Court erred by not dismissing the complaint, or granting Appellants a hearing on this issue.

POINT III

THE COURT ERRED BY NOT DISMISSING THE COMPLAINT DUE TO THE CITY'S MISREPRESENTATIONS AND FAILURE TO ABIDE BY THE OBJECTIVES OF THE REDEVELOPMENT PLAN

The City fails to address the fact that Appellants were assured in 1996 by City Officials that the City intended to preserve their homes as residential infill. (Da178). These assurances were unambiguously reflected in the Redevelopment Plan and the color-coded Design Guidelines Handbook which clearly depict the MTOTSA neighborhood as being integrated into the redevelopment plan as infill. (Da251, Da274-275). The City does not supply the Court with any supporting certifications or evidence which would negate Appellants' contention that they were expressly told by City officials that their home would

remain as residential infill. (Da178). Instead, the City argues that the plan always allowed for the takings of the property, if deemed necessary, and that Appellants had an opportunity to object to the designation of their property if they chose to do so. (Pb71).

It is disingenuous at best for the City to claim that the Appellants did not object to the Redevelopment Plan at the outset. (Pb71). Appellants did not challenge the designation of the area to be in need of redevelopment because they relied on the representations of the City and the color-coded Design Guidelines Handbook, which clearly shows that Appellants' home would remain as residential infill and not be subject to condemnation. Appellants have vigorously challenged the taking of their home ever since the City enacted Ordinance 2-01 in 2001 which formally targeted Appellants' home for acquisition. (Da16). To the extent that the City attempts to argue that the Appellants were never assured that their homes would not be taken, all the City has done is point out another disputed material fact which warranted the Court to conduct a plenary hearing pursuant to R. 4:67-5. (Pb61).

The City further contends that construction of the condominium units would meet the objectives set forth in the Redevelopment Plan. This argument is also unsound and lacks any support by the record. (Pb63). The Redevelopment Plan clearly

states its objective was “to conserve sound, well-maintained single-family housing and encourage residential development through infill.” (Da251). The City’s takings would leave no single-family housing in place, but instead replace such homes with condominiums. The City implies that condominiums qualify as residential infill. This notion is absurd. The Design Guidelines Handbook clearly delineates those areas in which planned residential condominiums would be constructed. (Da274). That area does not include the infill area in which Appellants reside. The elimination of the long standing and stable neighborhood of single family homes is in direct contravention to the Redevelopment Plan and Design Guidelines.

Furthermore, the Redevelopment Plan states that the amount of relocation required to implement the Plan is “expected to be moderate at most, given the policy of encouraging infill.” (Da262). The City’s brief provides no explanation as to why the City has forgone this policy in favor of acquisition and relocation of all the MTOTSA residents, including the Anzalones.

It was only after the private redeveloper was designated that the City deemed it necessary to seize Appellants’ property to clear the way for further development of condominiums. The “coincidental” timing of these condemnations and the enormous value to be gained by the private developer gives rise to a plausible inference that the developer’s interests, and not

those of the public, are driving the condemnation. Accordingly, the Court erred by not dismissing the complaint due to the City's misrepresentations and the City's failure to comport fully with the objectives of its Redevelopment Plan and Design Guidelines.

POINT IV

THE COURT ERRED BY NOT DISMISSING THE COMPLAINT DUE TO THE LACK OF PUBLIC PURPOSE FOR THE PROJECT

The essence of the City's brief is that it merely complied with the LRHL, and therefore, Appellants' home, as well as the neighboring homes of the MTOTSA residents, have properly been blighted. However, the City fails to show what public purpose the condemnations will serve except to say the holding in Kelo v. City of New London, 125 S.Ct. 2655 (2005) allows for such takings. (Pb65-66). The holding in Kelo, came about only after a careful review of the Redevelopment Plan and a detailed inquiry into whether the Plan served a public purpose. In addition, the decision in Kelo was reached after a complete record had been compiled in which there was extensive discovery and a trial. In the current matter, the Trial Court failed to allow for a hearing and such discovery which would show that the main purpose served by the City's Redevelopment Plan is to increase the profits of the private redevelopers and not to serve the public.

A plan which primarily benefits the private developer is unconstitutional under the state and federal constitutions. The City disregards the fact that the government may exercise its power of eminent domain only when the condemned property is put to a public use. N.J. Const. Art. I, ¶ 20 ("Nor shall private property be taken for public use without just compensation."); U.S. Const. Amend. V; City of Atlantic City v. Cynwyd Investments, 148 N.J. 55 (1997). If the Court were to adopt the City's arguments, the public use clauses of the New Jersey and U.S. Constitutions would carry little or no weight. The public use provisions prohibit takings that primarily benefit private parties, such as in the current matter. Justice O'Connor clearly envisioned such problems by holding:

> 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.

Kelo, supra, at 2677.

The City's unwavering reliance on the Kelo decision is misplaced. The New Jersey Supreme Court has not been afforded the opportunity to rule on a case similar to that of Kelo, since the U.S. Supreme Court's 2005 decision. As such, Appellants contend that if such a case arose, the New Jersey Supreme Court would implement an analysis which allows the State to place

further restrictions on the exercise of the takings power by adopting "public use" requirements that are stricter than the federal level. Kelo, supra, 125 S. Ct. at 2668.

It is clear that Appellants' property as it stands today comports with the Redevelopment Plan as well as the goals and objectives established therein. Appellants' property as condemned, advances the private use of the developer and serves only to increase the developer's profits. As such, the complaint should be dismissed for failure to serve a public purpose or, in the alternative, discovery should be granted to allow Appellants to look into the motives behind the development process.

POINT V

THE CITY'S DENIAL OF THE EXISTENCE OF THE CONFLICTS OF INTEREST SUPPORTS APPELLANTS' ARGUMENT THAT MATERIAL QUESTIONS OF FACT EXIST SURROUNDING THE CONFLICTS WHICH REQUIRED THE TRIAL COURT TO HAVE GRANTED A PLENARY HEARING AND DISCOVERY INTO THESE ISSUES

Appellants focus on various conflicts of interest surrounding the inclusion of the Subject Property in the redevelopment area. Material questions of fact arise concerning the attorney conflicts of interest between the Greenbaum firm, the Ansell firm, the Mayor and City Council, the developers, K. Hovnanian, and the Monmouth Community Bank. These factual disputes warranted a plenary hearing and discovery at the Trial level. The Court erred by merely relying on the timeline and certifications set forth by the City in upholding the City's

right to take. (Pb74-75). The Court's denial of a hearing precluded Counsel from further developing the conflicts arguments. A plenary hearing would have provided a forum for the Court, as well as counsel, to assess the credibility and demeanor of witnesses.

In Point V of its brief, the City attempts to preclude the Appellate Division from reviewing and addressing as part of this appeal, an opinion letter prepared by the Greenbaum Firm for the City regarding a conflict of interest between certain City Council Members and Monmouth Community Bank. The Greenbaum opinion letter was "inadvertently" filed with the Court as part of the City's Appendix. The Greenbaum opinion letter, though the subject of a pending motion in the Appellate Division, should not be disregarded by the Court. The opinion letter was provided to the Trial Court below and was reviewed by Judge Lawson in the context of Appellants' conflicts argument. Accordingly, the Appellate Division should not be precluded from having access to the same record that was before Judge Lawson. Furthermore, there is a presumption of public access to documents filed with the Court. Lederman v. Prudential Life Insurance Co., 385 N.J. Super. 307, 316 (App. Div. 2006). The City's brief does not provide the Court with any justification for why that presumption should be overcome. As such, the Appellate Division should examine an unredacted copy of the Greenbaum Opinion

Letter in the context of Appellants' conflicts argument and determine whether such document warrants further discovery and a hearing on the issues raised therein.

The City's lengthy brief is absent any comprehensive analysis concerning the alleged conflicts between City Counsel James Aaron, Esq., City Council Members and Monmouth Community Bank. The City merely states that Appellants' attempt to create a conflict where, factually one does not exist. (Pb87). The City does not deny that Monmouth Community Bank, an institution to which both James Aaron and several Council members are shareholders and employees of, lent millions of dollars to the developers. The City does not dispute that the Ansell Firm lists Monmouth Community Bank as one of its representative clients. (Da296). In addition, the City does not deny that City Councilmen Anthony Giordano III, Michael DeStefano, and David G. Brown all own shares in the bank and are or were employed by the bank. These same Council members voted for and approved the amended redevelopment agreement approving Matzel & Mumford as co-developer with Applied Management. (Da192). The City does not provide any justification for why James Aaron, Esq., who sits on the Board of Directors of Monmouth Community Bank, and who is reported as personally owning or co-owning $775,000.00 in shares of the Bank, was providing legal advice to the City with regard

to the potential conflicts with Monmouth Community Bank. (Da194, Da197).

The Trial Court found that the potential for conflict existed if there was evidence that the City or either the Greenbaum or Ansell Firms were a part of the negotiations or discussions which lead to the partnership between Applied and Matzel & Mumford. (Da157-158). Yet the Trial Court, when confronted with such plausible accusations of impermissible favoritism, did not treat the objection as a serious one and denied Appellants' request for a hearing and discovery into the matter. Kelo, supra 125 S. Ct. at 2669.

The relationships between the Greenbaum and Ansell firms with K. Hovnanian and Matzel and Mumford, and the City Council and Monmouth Community Bank all 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 Phase II of the Beachfront North Redevelopment.

The City sets forth a timeline which ignores the fact that the Greenbaum firm was involved in the redevelopment from the very beginning as evidenced by the firm's name prominently appearing on both the Redevelopment Plan and Design Guidelines respectively. (Da245, Da273). The City does not deny that the Greenbaum firm served as redevelopment counsel while providing counsel to K. Hovnanian, the parent company of one of the

developers. (Da289). In addition, James Aaron, Esq., certifies that the developers are, and have been chosen, by the Mayor and Council with input from the City Administrator, Howard Wooley, Pratap Talwar of the Thompson Design Group, and Ralph Basile, the City's economic consultant. (Pa643, ¶5). This is seemingly inconsistent with the Certification of Greg Russo, Vice President of Applied Management who states that it was Applied, not the City, who unilaterally chose Matzel & Mumford as a co-developer for Beachfront North.(Pa3,¶4). The inconsistencies in the certifications proffered by the City create genuine issues of material fact which warrant a plenary hearing and discovery.

The City further provides the Court with the certifications of Arthur Greenbaum, Esq. and Robert Goldsmith, Esq. in support of its position. Mr. Goldsmith states that in addition to himself, Peter Buchsbaum, Esq., and Alan Davis, Esq., a named partner in the firm, were the attorneys at the Greenbaum firm primarily involved as redevelopment counsel. (Pa667, ¶8). There is no mention of whether Messrs. Goldsmith, Davis and Buchsbaum ever had communications with the City or representatives from Matzel & Mumford/K. Hovnanian regarding the redevelopment process or the designation of Matzel & Mumford as co-developer. In light of the fact it was Alan Davis who brokered the deal for K. Hovnanian to acquire Matzel & Mumford in August 1999, (Da204) and it was Mr. Davis who allegedly informed James Aaron, Esq. of

Matzel and Mumford's involvement in the redevelopment, (Pa647, ¶16), the noticeable absence of certifications from Mr. Buchsbaum and Mr. Davis supports a finding that discovery is necessary to ascertain their involvement in the redevelopment process and the selection of the developer.

Appellants showed good cause as to why the Court should have allowed discovery to examine, among other things, the relationship between the Greenbaum Firm, the Ansell firm, City Council, the developer and Monmouth Community Bank. At a minimum, Appellants provided the court with genuine issues of material fact which mandate a hearing under R. 4:67-5. Accordingly, Appellants respectfully request that the Appellate Division reverse the Trial Court's judgment and remand the matter for a hearing and grant discovery so that the conflicts arguments can be developed fully.

POINT VI

THE CITY FAILS TO REBUT OR EVEN ADDRESS THE CITY'S IMPERMISSIBLE TRANSFER OF POWER TO THE DEVELOPER

Appellants argue that the Redevelopment Agreement, the Amended Agreement, and the Second Amended Agreement impaired the City's ability to conduct bona-fide negotiations. The crux of Appellants' argument is that the City relinquished or contracted away its powers of eminent domain by allowing the Developer to dictate when and which properties would be condemned. Courts

have held that agreements with a redeveloper, which require the redeveloper's prior written consent to commence a condemnation action are 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).

The heading of Point VI of the City's brief states that, "Delegation of Authority Was Not An Improper Use of the Condemning Authority's Discretion" yet nowhere in Point VI, does the City provide any factual or legal argument to support such a contention. (Pb88). As done in 110 Washington, the Court should invalidate the redevelopment agreements between the City and MM-Beachfront North, LLC, 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.

Furthermore, Appellants argue that the Trial Court 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 developer and the City arbitrarily placed a ceiling on the amount of compensation that could be paid to the property owners. The City fails to fully address this point in its brief and merely cites to the Trial Court's decision in arguing that Appellants were not willing to negotiate with the City. (Pb91). The City was required to make its best offer to Appellants free

of any ceiling effecting just compensation. 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, bona-fide negotiations did not occur and dismissal of the complaint is appropriate. Morris County v. Weiner, 222 N.J. Super. 560 (App. Div. 1988).

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 plenary hearing pursuant to R. 4:67-5 based on the material issues placed in dispute by the Appellants and the City's brief. In addition, the Court should grant discovery so that the Appellants' arguments can be developed fully and presented at the plenary hearing.

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

By:_____
WILLIAM J. WARD, ESQ.

Dated: December 28, 2006