SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0067-06T2

CITY OF LONG BRANCH Plaintiff/Respondent v. 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 Defendants/Appellants	Civil Action **ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY DOCKET NO. MON-141-06** **HONORABLE LAWRENCE M. LAWSON, A.J.S.C.**

BRIEF ON BEHALF OF PLAINTIFF/RESPONDENT THE CITY OF LONG BRANCH IN OPPOSITION TO THE APPEAL BY LOUIS AND LILLIAN ANZALONE

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PRELIMINARY STATEMENT

Appellants, Louis and Lillian Anzalone attempt to rewrite basic appellate practice as well as New Jersey's settled redevelopment law when challenging Long Branch's designation of their property as part of an area in need of redevelopment pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40a:12a-1, et seq. ("LRHL"). Appellants' arguments rely upon an incorrect standard of review and several spurious conclusions unsupported by the record before this court.

The trial court rejected their challenge to the redevelopment designation. The issues for this Court to determine is whether the inclusion of Appellants' property as an area in need of redevelopment, pursuant to LRHL, was arbitrary and capricious or was this redevelopment designation supported by substantial evidence and whether a conflict of interest requires the invalidation of resolution adopted by the Long Branch City Council on January 23, 1996 designating the area as in need of redevelopment when Appellants themselves argue that the purported conflict arose in 2002, or more than six (6) years after their property was designated for redevelopment.

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. Da4a; Da16a. On February 3, 2006 the defendants, Louis and Lillian Anzalone filed an Answer and Cross Motion challenging the City's authority of condemnation by seeking to invalidate the redevelopment designation. Da20a. The subject property ("Property") is located at Block 301, Lot 5 on the official tax map of the City of Long Branch, commonly known as 32 Ocean Terrace, Long Branch, New Jersey.

While no formal order was entered technically consolidating the matters, in addition to the Appellants, several of their property owners, represented by other counsel, contemporaneously challenged the designation of this area as in need of redevelopment. Therefore, all of the matters were argued in a single hearing before the Honorable Lawrence M. Lawson, A.J.S.C., on March 24, 2006. After reserving decision, Judge Lawson rendered a single written opinion on June 22, 2006 on all of the challenges to the redevelopment designation. Da35a. Judge Lawson's opinion rejected the challenges to the redevelopment zone in its entirety and denied defendants any right to stay the condemnation action. Id. A separate Notice of Appeal was filed in the other matters entitled City of Long

Branch v. Brower,et al., bearing Docket No. A-000196-06T2 which is currently pending before the Appellate Division.

On July 19, 2006, the Court entered the Final Order for Judgment but did not appoint commissioners because of the likelihood of this appeal. Da95a. On August 30, 2006, defendants filed a Notice of Appeal. Da1a.

On October 6, 2006, Appellants filed an application to the Appellate Division for a Stay of the underlying condemnation proceedings in this action. The City represented that it would not seek to take the Anzalones' property during the pendency of the appeal and cross-moved for an expedited appeal. A stay was ordered by the Appellate Division, but the City's cross-motion to expedite was denied. Da149a; Da150.

STATEMENT OF FACTS

The History of the Redevelopment Efforts

By the early 1990's, it became apparent that the City of Long Branch's prior redevelopment efforts from 1984 when it designated a portion of its oceanfront as blighted under the former Redevelopment statute, N.J.S.A. 40:55D-21.1, et. seq, were largely unsuccessful. Pa210. In 1984, an area known as the lower-Broadway-Oceanfront Project Area, approximately two (2) blocks to the South of Appellant's Property, was generally characterized as a deteriorated and rundown section of the City. Many of the structures were in a desperate need of major repairs and several vacant buildings in the project area presented a tremendous negative impact upon the area.

The lack of success in the initial redevelopment efforts of 1984 was the result, in part, of a fire on June 1987 which destroyed the famous Long Branch Pier on which amusements and arcades were located including the popular Haunted Mansion. Pa210. Other factors included the dilapidation of properties and lack of investment in properties by owners around the Hilton Ocean Plaza Resort and Spa, the only successful redevelopment of the oceanfront area from the 1984 Redevelopment Plan, and pier area, the influx of crime, the existence of boarding houses and

America. The city, has at one time, been the toast of the East Coast as a tourist attraction; hosts to 7 Presidents and the affluent notables in America; a city that slowly went into decline, battered by the winds of change over the years. It is our intention to help reverse the negative trend, to work with the obvious and hidden assets of Long Branch; to tap into the boundless energy And strong will of the residents and their elected representatives, working together to improve the quality of life for all of the people of Long Branch, and its neighbors.

To accomplish this objective we have brought the Administration, the elected officials, the business community, the medical facility, the two areas of higher education, the Housing Authority and dedicated private individuals, all volunteers, under one umbrella, all of whom comprise the boards of Long Branch Tomorrow.

We reach (to) the finest consulting talent available, Thompson & Wood, Inc., from Cambridge, MA. Their accomplishments began at Faneuil Hall Boston, South Street Seaport in New York, Baltimore Harbour Place, and continued with Union Station in Washington, the new Navy Pier in Chicago, and Lincoln Road in Miami Beach. As part of the consulting group we included the Atlantic Group, whose notable success stories include the Ocean Place Hilton in Long Branch. This outstanding team was given the charge to provide a new concept plan for revitalization of 136 acres of Long Branch oceanfront. This document is a result of their efforts. AND THIS IS JUST THE BEGINNING.

Pa239.

This Oceanfront Master Plan was produced on June 30, 1995 and it became the catalyst for the subsequent

designation of the oceanfront as a redevelopment zone now challenged by Appellants. Pa235.

The Process

On August 8, 1995, the Council of the City of Long Branch passed Resolution 271-95 stating that the Long Branch Waterfront in an area from Seven Presidents Park in the North to the South as far as Takanassee Lake and Broadway:

> [A]re critical areas of the City of Long Branch which may benefit from a comprehensive plan for revitalization and redevelopment.
>
> **WHEREAS, Long Branch Tomorrow has just study much of the same area and provided its findings on it; and**
>
> **WHEREAS, the Local Redevelopment and Housing Law provides a legal framework for establishing a redevelopment area and comprehensively planning for revitalization of such an area;**
>
> Pa34; Pa212; Pa291. [Emphasis added].

By adopting this Resolution, the Council authorized the Planning Board to undertake the initial process for possible redevelopment; a preliminary investigation under N.J.S.A. 40A:12A-6a to determine whether all or part of the proposed area should be designated as an area in need of redevelopment. Pa34; Pa 291. The Resolution for this potential redevelopment area included the Appellants' property. Pa212-13.

The Study and Report

As part of the study then undertaken by the Planning Board, the Planning Department, with the assistance of The Atlantic Group prepared a report entitled "Report of Findings Area in Need of Redevelopment" dated January 1996 and concluded:

> A careful analysis of the Study Area revealed widely divergent conditions in terms of the need for public redevelopment action. The "Oceanfront North" and "Broadway Corridor" meet the statutory criteria sections "a", "c", "d" and "e" and therefore constitute the Recommended Areas of Redevelopment. "Oceanfront South" does not meet these criteria.
>
> Pa213; Pa291.

The Report went on to specifically categorize each of the sections of the proposed redevelopment zone. Oceanfront North, where the Appellants' Property is located, was characterized by:

> Haphazard, piece meal, and inefficient development. Obsolete layout and faulty design [which]deter private redevelopment and are detrimental to the welfare of the community. In a community chronically facing fiscal problems, these blocks (outside the property in which the Ocean Place Hilton is located) produce only a small fraction of the revenue that they should, inasmuch as they offer unique opportunities for oceanfront living and commercial development. Indeed, Oceanfront North stands in sharp contrast to the residential area to the south (the area rejected for redevelopment) where mid-rise residential projects yield comparatively high property taxes and house the affluent consumers needed by commercial areas. As an indication of Oceanfront North's potential, the Ocean Place Hilton (the result of

> previous use of redevelopment authority) is the largest property taxpayer in the City.
>
> Pa333-34.

In conclusion, the Report found that:

> In summary, analysis of Long Branch's "Oceanfront North" and "Broadway Corridor" areas results in the conclusion that they clearly meet the statutory criteria "a", "c", "d" and "e" (quoted earlier in this report), any one of which is required to designate them as "areas in need of redevelopment".
>
> Pa346.

Based upon the findings of the Planning Department and Atlantic Group and the Planning Board, the Council adopted Resolution 38-96, on January 23, 1996, which reviewed the Report, cited to the public hearings held by the Planning Board and the mailed and published notices of those meetings as required by statute, referenced the testimony and hearings conducted before the Planning Board and the fact that approximately fifty (50) people spoke at the beginning when the Planning Board adopted its resolution recommending delineating the areas described as the Oceanfront North and Broadway Corridor as areas in need of redevelopment. Pa35; Pa219; Pa511. These areas included all of Appellants' Property.

The Council also cited to the fact that the "overwhelming majority of comment at the public hearing concerned questions about the redevelopment process, along with comments in favor of

undertaking redevelopment and it appears that no formal written objections to designation of the delineated area as a redevelopment area were received on or before the time of the Planning Board hearing." Pa512. As a result, the Council found that there was "substantial evidence in support of its determination that areas delineated as Oceanfront North and the Broadway Corridor individually qualify as redevelopment areas and collectively qualify as a redevelopment area". Id.

Thus, the Council designated those areas as part of the redevelopment area and adopted the findings and report produced by the Planning Board. Id. Importantly, the Council did not, based upon the study and recommendation of the Planning Board, conclude that the Oceanfront South area was in need of redevelopment. As a result, this area was specifically excluded from the redevelopment plan of the City.

The Plan

On April 16, 1996, the Planning Board adopted Resolution __-96, which reviewed the redevelopment plans prepared by the Planning Board as per Resolution 38-96 adopted by the City on January 23, 1996. Pa35; Pa220; Pa514. The Planning Board specifically noted:

> [N]o objections were taken to the designation of the redevelopment areas as determined in Resolution 38-96 . . .
>
> Pa514.

Thus, the Planning Board found that the proposed Redevelopment Plan entitled "City of Long Branch, New Jersey, Oceanfront-Broadway Redevelopment Plan" dated April of 1996 conformed to the requirements of N.J.S.A. 40A:12A-7 and other provisions of the Local Redevelopment Housing Law. Pa220-21; Pa514.

The Plan was adopted by the City Council on May 14, 1996 via Ordinance 15-96. Pa221; Pa550. Pursuant to Section 4 of the Ordinance, the Redevelopment Plan constitutes an overlay zone for the area contained in the plan and the zoning map of the City was amended to designate the areas in the plan as the "Oceanfront-Broadway Redevelopment Zone". Id. The Council specifically directed in Section 5 of the Ordinance that "should there be any inconsistency between the ordinance and any prior ordinance with respect to the Redevelopment Plan adopted by the City the provisions and plan referenced therein prevail." Pa221; Pa551.

Pursuant to the Plan, the redevelopment area was broken into 5 subsections, Beachfront North (where the Appellants' property is located), The Pier/Village Center, Hotel Campus, Beachfront South, and Broadway/Gateway. Pa519.

Critically, Paragraph 8 of the Redevelopment Plan "Acquisition Plan" approved by the Planning Board in April, 1996 and the Council in May of that year, specifically states:

> It is the City's intention that property acquisition necessary to implement this Plan will be carried out by designated private redevelopers negotiating with property owners.
>
> **The City reserves the right to condemn property if private negotiations fail and the property or properties in question are judged essential to achieve objectives intended by the Plan.**
>
> Pa532 [emphasis added].

Thus, it was always an integral part of the plan that all of the properties in the redevelopment area, including the Appellants', were subject to acquisition by the City's power of eminent domain. **This has never changed from the designation of the area of Appellants' property as in need of redevelopment on January 23, 1996.**

The Plan at page 10 described the development of Beachfront North where it states:

> **d. Beachfront North: Low Rise-Medium Density Residential**
>
> Beachfront North is a sector composed of a Waterfront Recreation Zone (sites fronting the Promenade/Ocean Avenue, and a Beachside Residential Village. Building types that are "street based" and "street dependent" shall be required in the entire sector. A neighborhood character is to be established, emphasized by controlled street traffic, bike and walking paths, on-street resident parking and through-block alleys for garages and secondary parking.
>
> Development/design requirements for Beachside Village include:

(1) Create a transition between public and private spaces by introducing a hierarchy of access ways which move from regional to local to residential scale, and which are marked by identifiable "neighborhood gateways".
(2) Create a single cohesive neighborhood by connecting each existing East-West street with an extended Grant Street (North-South) as the primary "spine". Close North Broadway, Madison Avenue, and Ocean Terrace at Ocean Boulevard. Direct traffic away from Seaview Avenue, Cooper Avenue, and South Broadway.
(3) Create a block structure that replaces individual front driveways with shared mid-block alleys linked to garages. A 45-foot ROW. is required for residential streets, and 20-foot deeded R.O.W. for rear alleys. Existing 60-foot R.O.W's may accommodate diagonal (permit) parking.
(4) Create deeded pedestrian ways to the beach. 20-foot easements for pedestrian pathways required at locations to be specified during the developer selection process. Any existing or assembled sites that contain these paths are required to create and maintain such public pedestrian access ways.
(5) Create a Residential Parking Permit District. New development is to be restricted to providing no more than one on-site parking space per unit. Additional on-street parking space may be lease-purchased from the Parking Permit District.
(6) Building Design Guidelines to be prepared by the City to ensure that new developments do not conflict with desired residential scale and character.
(7) Permitted density to be at a consistent range between 12 du/acre and 15 du/acre (relative to site area).
(8) Maximum height 40 feet.
(9) Zero-lot development (no side setback).
(10) Minimum ground coverage: 40%
(11) Maximum ground coverage: 75%

(12) Balconies/terraces should be encouraged for buildings over two stories high.
(13) Townhouse or alley based clustered development are building types which meet the broad criteria listed above.
(14) Bed and Breakfast use to be permitted.
(15) Create a landscaped buffer surrounding the area. All non-conforming uses required to create an on-site buffer separation to minimize impact on residential neighborhoods (Setbacks and treatment to be delineated in Design Guidelines Handbook.)
(16) All uses, other than residential, are restricted and conditional in this area, subject to their impact on the residential neighborhood
(17) No commercial (strip) development is permitted on Ocean Boulevard fronting sites. No new curb cuts or access ways are allowed off Ocean Boulevard, unless specified in the sector plans.

Development/design requirements for Beachfront North area which is part of Waterfront Recreation Zone:

(1) All projects must address the Promenade/ocean Avenue as delineated in the Design Guidelines Handbook.
(2) Maximum permissible FAR: 0.25
(3) Maximum height: 40 feet
(4) A landscaped 30' setback required on west edge of site Setback on Ocean Avenue to be reviewed on a per case basis.
(5) Parking requirements must be satisfied by shared public on-site or off-site parking. Public (beach) parking is a permitted use on all sites in this Zone.
(6) One tree shall be planted for every five parking spaces provided.
(7) 20' easement for public pedestrian ways required at locations to be indicated in sector plans in the Design Guidelines Handbook.
(8) No residential uses permitted on all oceanfront sites between Hilton Hotel and Seven Presidents Park.

(9) Neighborhood retail and restaurants are permitted uses.
(10) All uses in the Waterfront Recreation Zone must adequately mitigate disturbance to the adjoining residential uses.

Development design requirements for the Armory Site:

(1) Maximum permissible FAR: 1.0. (Structured parking required for FAR over 0.3.)
(2) Maximum height: 40 feet.
(3) A landscaped 30' setback on all sides is required on the Armory site (treatment to follow Design Guidelines Manual.)
(4) The parking requirements for this site must be satisfied by a combination of dedicated on-site parking and shared (public) off-site parking.

Uses permitted are those reflected in the deed from the State of New Jersey, dated February 27, 1996. The reopened Ocean Avenue will suffice as primary access to the site. Cooper Avenue will become a neighborhood through-street with residential development only.

However, if the recreational use at the Armory has the high intensity of a regional destination., as measured by standard transportation analysis of traffic and destination patterns, Cooper Avenue will become a mixed use Frontage Street. Sites abutting Cooper Avenue up to 150' from the edge of R.O.W. will be subject to the following development criteria, and to Design Guidelines to be formulated by the city:

(1) Maximum permissible FAR: 1.0 (structured parking required for FAR over 0.3).
(2) Maximum height: 40 feet.
(3) Mandatory setback on Cooper Avenue (for diagonal parking and pedestrian path easement): 25 feet.
(4) Parking to be integrated with street R.O.W., and Cooper Avenue access plan as described in the sector plans in the Design Guidelines Handbook.
(5) 75% of approved FAR for each site must be

built within 100' of property line at Cooper Avenue, leaving buffered rear for long term parking.

(6) 20' mandatory landscaped buffer with alley facing residential development.

(7) No more than 25% of proposed built uses may be approved commercial/retail uses.

(8) Parking structures appropriately buffered may be a permissible nonconforming use on these sites, if not intruding on residential uses, and provided that they are in conformity with the City's shared parking requirements. Details per Design Guidelines and Parking Plan.

(9) Parking requirements for mixed commercial/residential development: two on-site spaces per dwelling unit; five spaces per 1,000 sf of commercial space.

Temporary Conditional Use:

The Cooper Avenue sites, described above, may be occupied by temporary surface parking lots for a period approved by the City (not to exceed three years), at the end of which the developer is to be required to develop designated sites per criteria described above. The city shall set specific terms when developers are designated or approved for these sites.

Pa528-31.

Therefore, as set forth above, it is clear that redevelopment of the Beachfront North area was always contemplated under the Plan.

The Plan specifically sets forth a process for determining and selecting developers. Section 11 of the Plan, page 16 enumerates specific qualifications and submissions which must be met and made by the developer. Pa535-36.

Parallel Actions

While all of this was happening, in July of 1997, the publicly funded replenishment of the beach along Long Branch began with the City providing $1.4 million and the State and Federal Government funding over more than $27 million. Pa222.

In October of 1997, a $2.2 million road project on Route 36, the main entranceway into the City, began. Id. The process only took 1 year to get to the point of construction due to the fast track status granted to the City by the State, normally it would take 7 to 10 years to get to the point of construction. Id.

In November of 1997, the first tangible sign of redevelopment was effectuated when the remaining portion of the burned out pier was demolished at a cost of over $700,000 to the City. Id.

In December of 1997, the City received $400,000 in grant money from the State Department of Transportation for design work on Ocean Boulevard, work necessary to the redevelopment process. Id.

Also during this time, the City received permit by rule approval from the Coastal Regulatory Agency of the State Department of Environmental Protection under CAFRA, the Coastal Area Facility Review Act. Id. This meant that the design guidelines and Redevelopment Plan were preapproved by CAFRA as

having met and exceeded CAFRA requirements. Therefore, if any developer built according to the guidelines and plan, no separate submissions to CAFRA other than a simple review to confirm the development, was required. This resulted in hundreds of thousands of dollars being saved by developers and years being saved in the time for permits and approvals to be reviewed and issued. Pa222. This occurred in May of 1997. Id.

The City's Redevelopment Plan has garnered national attention and acclaim since commencing, been the subject of glowing articles in the *New York Times, Asbury Park Press* and other periodicals and won awards. Pa223.

Implementation

The 1996 Redevelopment Plan also sets forth the procedure for selection of developers that the City would implement to employ an "open and competitive process' that included solicitation of potential developers through requests for proposals ("RFPs") and requests for qualifications ("RFQs"). Pa36. The active Redevelopment Plan and Design Guidelines were completed without any input from any potential developer. Id.

RFQ's were sent to over 250 potential developers both local and national. Pa37. Responses to RFQ's would come to the City and then distributed to its redevelopment consultant Thompson & Wood for evaluation of compliance with Design Guidelines and quality of the overall project. Id. The responses were also

distributed for evaluation of the financial viability of both the developer and the development project. Pa37. No attorneys received these proposals nor did any attorneys attend meetings with potential developers when the issues of redevelopment proposals were discussed. Id. Only after the Council's review and recommendation would a Memorandum of Understanding (MOU) be entered into this would result in negotiations towards a redeveloper's agreement. Id. It was at this stage that legal counsel first became involved in the process. Id.

On April 26, 1999, The Applied Companies ("Applied") responded to the City's RFP and RFQ with multiple proposals for the Redevelopment Area. Id. On June 1, 1999, the City entered a MOU with Applied for the redevelopment of a substantial portion of the Beachfront North sector of the Redevelopment Area. Pa 37, Pa38.

On February 22, 2000, the City selected Applied as the designated developer for the Beachfront North Redevelopment sector in the redevelopment zone of the City. Pa2.1; Pa38; Pa224. The design for Phase I of the project was approved in 2000. Pa2.1. Phase II in which the Appellants' property is located was not designed and approved until the summer of 2005. Pa46. The design work was negotiated by the Thompson Design Group and the City Administration without input from the attorneys from Ansell or Greenbaum Firm. Pa3; Pa641-49.

At the time the design for Phase II was approved, the Greenbaum firm was not representing the City in any developer designation work and specifically excluded itself from the Beachfront North and Beachfront South projects. Moreover, at this time the Ansell Firm had no conflicts as it had not represented K. Hovnanian for years. Pa39-46; Pa641-49.

The Joint Venture

In or around mid 2001, Applied made an independent decision to seek out a development partner in the Beachfront North project. Pa3. As certified to by Mr. Russo, Vice President of Applied, that decision:

> [W]as made solely by the Applied Development Company without any suggestion of same from the City of Long Branch or anyone else. The Applied Development Company has taken on development partners on projects throughout the State and does so for a variety of business reasons. In the case of Beachfront North, Applied sought a development partner to increase the capital base, spread the development risk and add additional expertise to allow the Applied Development Company to focus more attention on the more complicated mixed use Pier Village projects.
>
> Pa2.1.

Mr. Russo certifies that Applied unilaterally approached Matzel & Mumford about a potential partnership in Beachfront North in the late summer or early fall of 2001. Pa2.1-3. According to Mr. Russo, Matzel & Mumford was an ideal development partner for Applied "as Matzel & Mumford and the

Applied Companies had been partners in the development effort in Bayonne and there was a high regard for Roger Mumford." Pa2.1-3.

Applied and Matzel & Mumford (M&M) negotiated the deal points independently, Applied without any outside attorneys, utilizing only in house counsel. Pa3. Critically, there was no notification of these negotiations by Applied or M&M to the City or its redevelopment attorneys, the Greenbaum firm, or Ansell firm. Id. Neither the Greenbaum nor Ansell firms participated in any form or on behalf of any party with respect to the negotiations between Applied and M&M. Id.

Importantly, shortly after the Greenbaum firm learned of the joint venture between Applied and M&M, it recused itself from its representation of the City as redevelopment counsel due to its long time representation of K. Hovnanian, which owns M&M. Pa40; Pa668-72. Although there was not clearly an appearance of conflict or impropriety under Ethic Rules, the Greenbaum firm determined that due to the lack of clear standards for the application of RPC 1.7(c)(2), dealing with the appearance of impropriety, prudence dictated its withdrawal as redevelopment counsel for the City. Pa40; Pa668-72.

The Greenbaum Firm continued to provide limited legal services for a transitional period, in compliance with RPC 1.16(d), which requires that an attorney withdrawing from

representation do so in a manner that protects the client's interests, such as allowing sufficient time to engage new counsel and turnover pending matters. Pa40-41; Pa668-72. The Greenbaum Firm continued to handle pending condemnation actions before the Court in a limited aspect of a code enforcement action completely unrelated to any redevelopment activities. Pa41; Pa 668-72. Notably, the Greenbaum Firm alerted the Court and the parties in the condemnation matter as to its withdrawal and intention to transitionally conclude those matters, which was accepted by the Court. Pa670.

After the abolishment of the appearance of impropriety role in the fall of 2003, the Rule under which the Greenbaum Firm determined to withdraw from representation of the City, the Greenbaum Firm again commenced representation of the City as redevelopment counsel. Pa42; Pa670-71. It was specifically agreed between the Greenbaum Firm and the City, however, that the Greenbaum Firm would not have any involvement or play any role with respect to the selection of developers. Pa42; Pa670-71.

The Greenbaum Firm further entered an additional agreement with the City in April of 2005 to handle some of the anticipated condemnation actions in Beachfront North, Phase II. Pa43; Pa670-72. This agreement was in addition to and not part of the Greenbaum Firm's role as redevelopment counsel. Id. However,

before any services were provided under this agreement, the Greenbaum Firm withdrew from representation, based upon certain language from the concurring opinion in the case of Kelo v. City of New London, 125 S.Ct. 2655 (2005). Pa43; Pa671. The Greenbaum Firm did not withdraw because any conflict or impropriety existed, but because it did not wish to see the City forced to face any such allegations, even though baseless. Pa44; Pa672.

As to the Ansell Firm, as certified to by Mr. Aaron, it was unaware that M&M was a wholly owned subsidiary of K. Hovnanian due to the fact that the Ansell Firm never participated in any developer designation work as well as the fact that both M&M and K. Hovnanian had competing plans for development of Beachfront North. Pa646-47. Conflict checks were run on M&M at that time and none were found. Pa646. When it was discovered that M&M was a subsidiary of K. Hovnanian, a review was done to determine what work if any was being handled by the Ansell Firm on behalf of K. Hovnanian. Pa647. As certified to by Mr. Aaron, there were three (3) matters unrelated to the development of the City of Long Branch which had been handled by the Firm since 1996. Pa644-49. One of those was completed in April of 2000, the second in June 2002 and the third in December 2002. Id. Importantly, the last matter was actually tried in April 2002 but involved months of post trial motions and issues brought to

the Court resulting from an opinion of Judge Florence Peskoe who held a bench trial, in April of 2002. Id.; Pa638-40. That matter involved a convoluted complex case of easements in and around a community built on a peninsula in a lake by another K. Hovnanian subsidiary unrelated to the Long Branch redevelopment and included numerous Defendants. Id. Nonetheless, when the potential conflict was learned of, the City Administrator was immediately advised of the situation and informed that the Ansell Firm was in the process of winding up that matter, as allowed for pursuant to appropriate Ethics Rules. *See*, RPC 1.16(d).

After December 2002, the Ansell Firm had no relationships of any kind with K. Hovnanian company or any of its subsidiaries. Pa44; Pa646. Moreover, when it was learned that Denholtz and Associates would be submitting a proposal to become a designated developer in Beachfront South, as well as K. Hovnanian, the Ansell Firm recused itself from participation in representing the City in that regard, as did the Greenbaum Firm. Pa666-671. Denholtz was a partner in many real estate partnerships with Partners in the Ansell Firm. Pa643-49. Therefore, the City hired Mark Akins, Esq., in early 2002 to represent its interest in the review of those developer proposals and negotiation of the agreements with the ultimately designated developer. Id.

As certified to by Mr. Russo, Applied had a $2 million loan from Monmouth Community Bank, which existed for approximately six (6) months from August 8, 2002 to February 12, 2003, when that loan was repaid in full. Pa4. Moreover, that loan was personally guaranteed by principals of Applied, demonstrating no favoritism to K. Hovnanian. Pa4. A similar loan and arrangement occurred with regard to Beachfront North. Pa4.

Critically, at the time the Redevelopment Plan was adopted in 1996, no developer had been contacted by the City. In short, this was not a developer driven plan, with a municipality working and planning with a specific developer. This was a needs driven plan created by the City, with developers screened and selected from candidates, years after the designation of this area as in need of redevelopment and plan were adopted. Therefore, the judgment of the trial court dismissing this challenge to the designation of the area as in need of redevelopment should be affirmed.

LEGAL ARGUMENT

POINT I

APPELLANT APPLIED AN INCORRECT STANDARD OF REVIEW AS IT IS LIMITED TO DECIDING WHETHER LONG BRANCH'S ACTIONS WERE ARBITRARY AND CAPRICIOUS OR WERE SUPPORTED BY SUBSTANTIAL EVIDENCE, APPLYING A PRESUMPTION OF VALIDITY TO LONG BRANCH'S ACTIONS AND GIVING DUE DEFERENCE TO LONG BRANCH'S MUNICPAL DISCRETION

There is no merit or authority for Appellants' assertion that the findings of fact of the trial court should not be afforded deference by this Court. The trial court properly relied upon case law that the court's role is limited to deciding whether the City's designation of Appellants' Property was arbitrary and capricious. Additionally, the trial court recognized that a heavy burden was placed on the Appellants in seeking to set aside the designation of an area in need of redevelopment. Precedent dictates that redevelopment designations, like all municipal actions, are vested with the presumption of validity and the Court should defer to the City's municipal discretion. Levin v. Township Committee of Bridgewater, 57 N.J. 506, 537-539 (1971), Downtown Residents for Sane Dev. V. City of Hoboken, 242 N.J. Super. 329, 332 (App. Div. 1990); Bryant v. City of Atlantic City, 309 N.J. Super. 596, 610 (App. Div. 1998) ("a challenge to the validity of a municipal ordinance or action must overcome the presumption of

validity - a heavy burden"); Concerned Citizens of Princeton, Inc. v. Mayor and Council Borough of Princeton, 370 N.J. Super. 429 (App. Div. 2004), *cert. denied*, 182 N.J. 139 (2004). It has been firmly established that "community redevelopment is a modern part of municipal government." Levin, 57 N.J. at 540 (citing Wilson V. Long Branch, 27 N.J. 360, 392, *cert. denied*, 358 U.S. 873 (1958)) "Due to the presumption of validity, the Courts do not "'second guess' a municipal redevelopment action, 'which bears with it a presumption of regularity.'" Concerned Citizens, supra at 453 (quoting Forbes v. Board of Trustees of the Township of South Orange Village, 312 N.J. Super. 532 (App. Div.) (*cert denied*, 156 N.J. 411 (1998)).

The burden of proof is upon the Appellants to overcome the presumption of validity by showing that the required statutory criteria was not present and, therefore, the designation was not supported by substantial evidence, and constitutes arbitrary and capricious action. "In order for (plaintiffs) to prevail in setting aside the questioned Plan, the legislative decision made must be more than debatable, they must be shown to be arbitrary or capricious, contrary to law or unconstitutional." Downtown Residents for Sane Dev., 242 N.J. Super. 332. "When two actions are open to a municipal body, municipal action is not arbitrary and capricious if exercised honestly and upon due consideration,

even if an erroneous conclusion is reached." Bryant, 390 N.J. Super. at 610.

In Lyons v. City of Camden, 52 N.J. 89 (1968), the Court explained the review process as follows:

> Clearly the extent to which the various elements that informed persons say enter into the blight decision-making process are present in any particular area is largely a matter of practical judgment, common sense and sound discretion. It must be recognized that at times men of training and experience may honestly differ as to whether the elements are sufficiently present in a certain district to warrant a determination that the area is blighted. In such cases courts realize that the Legislature has conferred on the local authorities the power to make the determination. **If their decision is supported by substantial evidence, the fact that the question is debatable does not justify substitution of the judicial judgment for that of the local legislators.**
>
> Id. at 98 [emphasis added].

"Thus, judicial review of a redevelopment designation is limited solely to whether the designation is supported by substantial credible evidence." Concerned Citizens, supra at 452. Accordingly, courts have recognized not only that a municipality's redevelopment designation is entitled to a presumption of validity, but that the courts must defer to the judgment of the municipality in designating a redevelopment area and strictly limit its review to whether the determination was arbitrary and capricious. The court should be careful not to

substitute its own judgment for that of the municipality and re-evaluate the redevelopment designation anew.

Indeed, the great weight of authority demonstrates that municipal determinations as to what properties should be included in a redevelopment area are entitled to great weight. In Levin, supra, the Court entertained a challenge involving the municipal designation that certain land was "blighted" under the Blighted Area Act. N.J.S.A. 40:55-21.1 to 21.1, the predecessor statute to the LRHL. 57 N.J. 510. The wording of the section of the Blighted Area Act at issue in Levin, N.J.S.A. 40:55-22.1(e), is identical to that contained in N.J.S.A. 40A:12A-5e. Id.

In exploring the legislative origins of this subsection, the Court noted that the legislative reasoning behind the inclusion of N.J.S.A. 40;55-21.1(e) was that blighted area or areas in the process of becoming blighted existed in the State "by reason of inadequate planning of the area, or excessive land coverage... or deleterious land use ... or the unsound subdivision plotting and street and road mapping, or obsolete layout, or a combination of these factors[.]" Id. at 511 [internal citations omitted]. The Court found that through the enactment of N.J.S.A. 40:55-21.1(e), the Legislature had determined that the "redevelopment of such areas will promote the public health, safety, morals and welfare, stimulate the

proper growth of urban, suburban and rural areas of the State, preserve existing values and maintain taxable values of properties within or contiguous to such areas, and encourage the sound growth of communities." Id. (quoting from N.J.S.A. 40:55C-2 of the Redevelopment Agencies Law, N.J.S.A. 40:55C-1 to -39, since repealed).

Although the legislative purpose in passing these early statutes was principally to allow for slum clearance, the Court recognized that the Blighted Area Act "'goes far beyond the elimination of the perceptually offense slums.'" Id. at 514-15 (quoting Jersey City Chapter of the Prop. Owner's Protective Ass'n v. City Council of Jersey City, 55 N.J. 86, 97 (1969)). Moreover, the Court noted "that an area does not have to be a slum to make its redevelopment a public use nor is public use negated by a plan to turn a predominately vacant, poorly developed area into a site for commercial structures." Id. at 514.

In Levin, supra, the Court established the review standard as follows:

> Judicial review of a blight determination must be approached with an acute awareness of the salutary social and economic policy which prompted the various slum clearance and redevelopment statutes. To effectuate those policies, we are obliged to interpret the powers granted to the local planning board liberally and to accept its exercise of the powers so long as a necessarily indulgent

> judicial eye finds a reasonable basis, i.e., substantial evidence, to support the action taken. In short, while the board's discretion in administering the law is not unfettered, its vista is a broad one.
>
> [57 N.J. at 537].

Thus, the blight determination "is largely a matter of practical judgment, common sense and sound discretion." .Lyons, supra, 52 N.J. at 98. "We see no basis for interfering with the municipal view that (plaintiff's property) should be included in the blighted area (although not itself blighted). Levin, 57 N.J. at 539-40. It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete an integrated plan rests in the discretion of the legislative branch. Berman v. Parker, 348 U.S. 26, 35-36 (1954). Quoting this language from Berman v. Parker, 348 U.S. 35-36, the United States Supreme Court recently added "Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project".

Here, against this binding authority, there is substantial evidence for the determination that the neighborhood of

Appellants' Property was an area in need of redevelopment pursuant to the criteria set forth in N.J.S.A. 40A:12A-5. At the City Council meeting on January 23, 1996, it was determined that the area required redevelopment under N.J.S.A. 40A:12A-5. The area of Appellants' Property was characterized as:

> Hap hazard, piece meal, and inefficient development. Obsolete layout and faulty design [which] deter private redevelopment and are detrimental to the welfare of the community. In a community chronically facing fiscal problems, these blocks (outside the property in which the Ocean Place Hilton is located) produce only a small fraction of the revenue that they should, inasmuch as they offer unique opportunities for oceanfront living and commercial development. Indeed, Oceanfront North stands in sharp contrast to the residential area to the south (the area rejected for redevelopment) where mid-rise residential projects yield comparatively high property taxes and house the affluent consumers needed by nearby commercial areas. As an indication of Oceanfront North's potential, the Ocean Place Hilton (the result of previous use of redevelopment authority) is the largest property taxpayer in the City.

In their arguments concerning Judge Lawson's failure to grant the Anzalone's a plenary hearing at the trial court level, Appellants attempt to rewrite appellate practice by not only applying an incorrect standard of review, but also by tortured readings of the court rules. While appellants launch into an in-depth analysis of the meaning of the words "shall" and "may" in the context of R. 4:67-5, a blind eye is turned to the preceding sentences. The Rule states in its entirety:

> The court shall try the action on the return day, or on such short day as it fixes. If no objection is made by any party, **or** the defendants have defaulted in the action, **or** the affidavits show palpably that that there is **no genuine issue as to any material fact,** the court may try the action on the pleadings and the 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** at issue, and render final judgment. At the hearing or on motion at any stage of the action, the court for good cause shown may order the action to proceed as in a plenary action wherein a summons has been issued, in which case the defendant, if not already having done so, shall file an answer to the complaint within 35 days after the date of the order or within such other time as the court therein directs. In contested actions briefs shall be submitted.
>
> R. 4:67-5 [emphasis added].

Appellants focus their discussion on the sentence, "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 at issue, and render final judgment." Id.

Arguments regarding the mandatory or permissive use of the words "shall" and "may" in the statute are of no moment in this instance as the three "or" clauses must be read first in the text of the rule. Appellants' argument is flawed in that it supposes it is the job of the appellants themselves to decide whether there exists a genuine issue as to any material fact.

Such is not the place of appellants, nor is any weight given to the mere argument that there "may be genuine issues of material fact on which a hearing should have been conducted." *See*, Appellant's brief, p. 16. This was the role of the trial court; the assignment judge of Monmouth County in the current matter. As discussed in detail infra, there was no evidence presented (credible or otherwise) to the trial court by the Appellants to implicate R. 4:67-5 and to burden the court and the parties with further discovery into imagined conflicts.

In rejecting Appellants' challenges to the redevelopment designation at the return date of the Order to Show Cause hearing, the trial court only needed to find that the City made a "showing of some reasonable basis for its legislation action." Downtown Residents for Sane Dev., 242 N.J. Super. 338. The City made this showing and substantially more by the submission of substantial and credible evidence which was not even challenged by the Appellants.

POINT II

THE APPEAL MUST BE DENIED AS APPELLANTS FAILED TO ARGUE THAT THE OCEANFORNT REDEVLOPMENT ZONE DID NOT CONTAIN THE CONDITONS TO SATISFY CRITERIA "A" AND "C" OF N.J.S.A. 40A:12A-5.

The Anzalones' appeal seeks to have the Appellate Division reverse Judge Lawson's findings as to the validity of the redevelopment designation as adopted by the City of Long Branch. Appellants' brief is devoid of any arguments regarding the findings contained in the Report of Findings and expressly relied upon the City Council on January 23, 1996 that the area satisfied criteria "a" and "c" under section 5 of the Redevelopment Law. Pa295. Appellants' failure to even argue that the evidence presented by the City did not support the findings that the area met both criteria "a" and "c" is **fatal** to the Anzalones' appeal. While Appellants argue their individual property did not meet the statutory criteria of sections "d" and "e" of N.J.S.A. 40A:12A-5, as noted above, the City relied equally upon criteria "a" and "c" when designating the area containing Anzalones' property as in need of redevelopment in January 1996.

By failing to argue the City's reliance upon Criteria "a" and "c" was unsupported by substantial evidence, the Anzalones' silence constitutes an admission that the criteria of both "a" and "c" were in fact based upon credible and substantial

evidence, therefore, the Appellant Division must affirm the trial court's ruling.

The criteria to be met before a governing body may make the determination that an area is in need of redevelopment is contained in N.J.S.A. 40A:12A-5. Specifically, the City relied upon more than subsections "d" and "e" as argued by Appellants; the City additionally relied upon sections "a" and "c" in determining that the area was one in need of redevelopment. Pa302. Those criteria are:

> A delineated area may be determined to be in need of redevelopment if, after investigation, notice and hearing as provided . . . the governing body of the municipality by resolution concludes that within the delineated area any of the following conditions is found:
>
> a. 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 conducive to unwholesome living or working conditions.
>
> ***
>
> c. Land that is owned by the municipality, the county, a local housing authority, redevelopment agency or redevelopment entity, or unimproved vacant land that has remained so for a period of ten years prior to the adoption of the resolution, and that by reason of its location, remoteness, lack of means of access to developed sections or portions of such municipality, topography, or nature of the soil, is not likely to be

developed through the instrumentality of private capital.

d. Areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement 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.

e. 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 (a), (c), (d), (e).

The Report applied the statutory criteria as required by N.J.S.A. 40A:12A-6. Under Criteria a:

> The generality of buildings are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess any of such characteristics or are so lacking in light, air or space as to be conducive to unwholesome living or working conditions.
>
> N.J.S.A. 40A:12A-5(a); Pa303.

The Report discussed specific data compiled by the Planning Department regarding the properties in the area. Pa357-510. In order to accomplishing the compilation of this data, the Planning Department created a rating system for buildings as

outlined on page 8 of the Report. Pa304. Criteria was also developed to grade structures on the properties. Id.

The study by the Planning Department is summarized as follows: there are 694 total parcels in the study area, 237 are located in the Broadway Corridor, 403 in Oceanfront North and 54 in Oceanfront South. Pa305. Page 9 contains a breakdown of the percentages of vacant, good, fair, and poor properties in each area. Id. By way of example, in Oceanfront North, 148 or 37% of the properties were vacant while in Oceanfront South only 5 or 9% were vacant. Id. In Oceanfront North 110 or 27% of the properties were in fair condition and 75 or 19% were in poor condition, while in Oceanfront South 11 (20%) were in fair condition and only 2 (4%) were in poor condition. Id.

The Report next reviewed Criteria C of the statute:

> Land that is owned by the municipality, the County, or local housing authority, redevelopment agency or redevelopment entity, or unimproved vacant land and has remained so for a period of 10 years prior to the adoption of the resolution, and that by reason of its location, remoteness, lack of means of access to developed sections or portions of such municipality, topography, or, nature of the soil, is not likely to be developed through the instrumentality of private capital.
>
> N.J.S.A. 40A:12A-5(c); Pa306.

The Report concluded that of the Oceanfront North and Broadway Corridor study areas, which total 179.75 acres, 12% (or 21.96 acres) were tax exempt. Pa306. Of the 21.96 tax exempt acres,

19.56 are land owned by the municipality. Pa306. Specifically, Oceanfront North at that time included 24.3 acres of vacant land or 25% of the total area of that section. Id. Of these, an estimated 15 acres or 16%, was unimproved for a period of 10 years. Pa306-07. In the Broadway Corridor, the totals were even more stark, with 12.79 acres or 15% of the area being vacant for more than 10 years. Pa307. This is all but .57 of an acre remaining in that condition for that period of time. Id.

The Report also concluded that the entire area was unsuitable for private development because of inadequate road access; *i.e.*, "remoteness" and "lack of means of access". Pa307.

The Report next reviewed Criteria d of the statute:

> Areas with buildings or improvements which, by reason of dilapidation, obsolesce, overcrowding, faulty arrangement 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.
>
> N.J.S.A. 40A:12A-5(d); Pa308.

Applying this criteria, the Commercial Area Image Analysis, a tool used by communities to test their business district in terms of the factors that most influence the judgments of shoppers, prospective businesses, downtown employees, investors,

developers and tourists, was utilized. Id. The principal blocks in Long Branch commercial areas were rated in 13 criteria ranging from façade and sign conditions to parking lots and street scape maintenance. Id. The analysis had been applied to more than a dozen other communities, allowing a comparison of the relative attractiveness of Long Branch with other communities in terms of appeal to those who may spend or invest in the City. Id. The analysis sought to answer the following question "is this the kind of commercial environment that a prospective business operator will consider for running a profitable enterprise?" Id. A rating of about 2.5 indicates conditions are such that many would answer "yes". Id.

The areas studied in Long Branch, specifically lower Broadway, resulted in a rating of 1.20 with major problems in terms of parking lots, facades, vacant lots, buildings, street trees, sidewalk conditions and graffiti. Id. The Ocean Avenue commercial areas scored lower than any sub-area that had been rated anywhere previously by the Atlantic Group. Id. This means that 12 out of 13 conditions were rated "only poor or fair". Pa308-09. Moreover, these conditions have remained for more than 5 years, with the result being that high vacancy rates and marginal enterprises predominate. Pa309. The study found that "local business operators believe that the negative image produced by these two (2) areas [lower Broadway and the Ocean

and Laird Avenue amusement/business area] tends to give all of Long Branch, and certainly all of its commercial areas, a negative image in the public mind." Id.

The Report then reviewed and concluded that there was faulty layout which resulted "in great difficulty attracting and retaining tenants", due to a lack of vehicle and street traffic on Ocean Avenue, which had become a redundant artery, having been replaced by Ocean Boulevard 10 years before. Id.

The Report concluded that the use in the area was "not compatible with nearby residential blocks." Pa309. This was because the residential area "is adversely impacted by the poor appearance of nearby industrial and distribution buildings and parking facilities. Other adjacent land uses include electric power, gas works, a rubber company, auto body shops, carting and auto repairs." Pa309-10. The Report also found that, "[s]tructures built over the beach and occupied only the short tourist season are unattractive and give the area the appearance of severe negligent. These deleterious land uses are in contrast to those below North Bath Avenue, where property values are strong and yield high revenues for the City." Pa310.

In reviewing the obsolescence of the area, the Report found that the Broadway Corridor which was a historic route to the Oceanfront ferry, piers, amusements and hotels, has deteriorated over time. Id. This was the result of investments in Route 36

and Ocean Boulevard which took vehicular traffic away from Broadway. Pa310. Stores closed, buildings were demolished, and the strength of the businesses remaining diminished, reducing Broadway's commercial strip as a destination. Id. Moreover, the Report found that the Broadway street scape had not been brought up to date with all frames of lighting, trees, banners and other touches that "modern downtowns" provide to draw customers and attract tenants. Id.

The Report then applied Criteria e:

> A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of real property therein and other conditions, resulting in a stagnant and unproductive 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); Pa311.

The Report found that there was a stagnant and unproductive condition of land in the area. Pa311.

The Report concluded "in its current state the proposed redevelopment area does not come close to being in a 'fully productive condition'". Id. The lack of property taxes generated within the area were found to be strong evidence that the area represents "a 'growing lack or total lack of property utilization . . . resulting in a stagnant and unproductive condition of land'. . ." Id. The Report cited to the fact that

immediately south of the proposed redevelopment area, in the Oceanfront South area, average property taxes of $2.14 per square foot of private land were generated. Pa311. However, within the proposed redevelopment area (which included the Defendants' properties) less than ¼ of this amount was produced. Breaking it down by section, the taxes per square foot in Oceanfront North were $0.50 and $0.40 in the Broadway Corridor. Id.

The Report also found that there was a large degree of diverse ownership in the proposed redevelopment area where among 334 properties in Oceanfront North, 57% were less in size than 7,500 square feet, the minimum residential lot size permitted by code. Pa311-312.[1] In contrast, the Oceanfront South area included only 4 such undersized lots. Pa312.

The Report concluded that the evidence of diverse ownership in the area was overwhelming. Pa311. In Oceanfront North, 101 of the 334 properties or 30% were vacant land. Pa312. Of the 334 properties, 69 or 21% remained vacant for over 10 years. Id. In fact, the Report found that 17% of the properties in the Oceanfront North and Broadway Corridor area had been vacant for 10 years or more with 23% vacant at the time of the report, an increase of 6% further evidencing "a growing lack . . . of

[1] It appears that page 16 is missing from the Report, however a review of the Report leads to the conclusion that there was a typographical error and there was no page 16 but simply misnumbering of the pages.

proper utilization of areas caused by…diverse ownership of real property therein." Id. This lack of proper utilization results in deterring private investment which would make the area more productive and "potentially useful and valuable for contributing to and serving the public health, safety and welfare, the Report concluded. Id. The Report also found that the Oceanfront North and Broadway Corridor areas were not being properly utilized and cited to a study by Thompson & Wood and the Atlantic Group that an estimated 276 additional dwelling units could be developed in the area, which at that time contained only an estimated 200 such units. Pa313.

The Report also found that while within the Oceanfront North area there were 101 vacant properties comprising 24.3 acres 15 of which had been vacant for over 10 years. Id. In contrast, there were only 3 vacant land properties in Oceanfront South. Id. Importantly, both areas offer approximately 1 mile of beachfront to investors, indicating the strong underutilization of the Oceanfront North area, especially in contrast to the section immediately to the south, within the City. Id.. Moreover, from the recent studies and reviews by Thompson & Wood and the Atlantic Group, it became clear that the principal economic development asset of the City was (and is) "the view of the ocean from nearby residential windows". Id. Therefore, the fact that only 200 such units existed in

Oceanfront North, while 754 units existed in Oceanfront South, simply confirmed the lack of productiveness of the area.

The Report also indicated that there was a lack of investment within the areas under review. Pa314. From 1990 to 1995 citywide construction permits totaled 4,745. Id. **Only 2 of these were in the proposed redevelopment area, including the MTOSTA area.** Id. [emphasis added]. The Report concluded that this record "is stark evidence that the proposed redevelopment area has not attracted investor confidence, 'resulting in a stagnant or not fully productive condition of land . . .'." Id.

In conclusion, the Report found that:

> An analysis of Long Branch's "Oceanfront North" and "Broadway Corridor" areas results in the conclusion that they clearly meet the statutory criteria "a", "c", "d" and "e" (quoted earlier in this report), any one of which is required to designate them as "areas in need of redevelopment".
>
> Pa315.

Based upon the findings of the Planning Department and Atlantic Group and the Planning Board, the Council adopted Resolution 38-94, on January 23, 1996, which reviewed the Report, cited to the public hearings held by the Planning Board and the mailed and published notices of those meetings as required by statute, referenced the testimony and hearings conducted before the Planning Board and the fact that approximately 50 people spoke at beginning when the Planning Board adopted its resolution

recommending delineating the areas described as the Oceanfront North and Broadway Corridor as areas in need of redevelopment. Pa35; Pa219; Pa511. These areas included all of Appellants' Property.

The Council also cited to the fact that "the overwhelming majority of comment at the public hearing concerned questions about the redevelopment process, along with comments in favor of undertaking redevelopment and it appears that no formal written objections to designation of the delineated area as a redevelopment area were received on or before the time of the Planning Board hearing." Pa512. As a result, the Council found that there was "substantial evidence in support of its determination that areas delineated as Oceanfront North and the Broadway Corridor individually qualify as redevelopment areas and collectively qualify as a redevelopment area." Id.

Thus, the Council designated those areas as part of the redevelopment area and adopted the findings and report produced by the Planning Board. Importantly, the Council did not, based upon the study and recommendation of the Planning Board, conclude that the Oceanfront South area was in need of redevelopment. As a result, this area was specifically excluded from the redevelopment plan of the City.

The plain language of the statute is that a redevelopment designation is appropriate where the governing body concludes,

by resolution that **"any"** of the conditions set forth in N.J.S.A. 40A:12A-5a to -5h exist. Appellants presented no argument that there was not substantial credible evidence to support the application of criteria "a" and "c" set forth in N.J.S.A. 40A:12-5 when the City Council concluded that the area should be designated a redevelopment zone. Accordingly, there is no basis to invalidate the redevelopment designation for the purported failure to follow the proper statutory procedures and the trial court's determination should be affirmed.

POINT III

THE CITY HAS PROVIDED SUBSTANTIAL EVIDENCE TO SUPPORT ITS DESIGNATION OF THE AREA IN NEED OF REDEVELOPMENT UNDER CRITERIA "A", "C" "D" AND "E" AS FOUND BY JUDGE LAWSON.

Appellants argue that the City failed to establish the evidence needed to support a finding in favor of redevelopment. The New Jersey Supreme Court has noted that the legislative enactments designed to encourage and effectuate redevelopment "warrant liberal judicial construction in order to effectuate the beneficent legislative design. Levin, 57 N.J. at 512. This liberal construction continues to apply since the enactment of the LRHL. *See*, Concerned Citizens, 37 N.J. Super. at 443. ("The case law demonstrates the LRHL has been liberally and flexibility interpreted precisely so that it can be adopted to meet the diverse redevelopment needs of all New Jersey

municipalities.") As previously noted, a municipality's redevelopment designation is vested with a presumption of validity. Levin, 57 N.J. at 537; Concerned Citizens, 370 N.J. Super. 429.

Appellants failed to overcome this presumption of validity since:

> **[W]e review this record not merely to inquire whether there are legitimate bases for differing opinions**, but in the context of whether the objectors have produced enough facts to raise a possibility that the legislative determination was clearly unrelated to valid municipal concerns and thus **arbitrary, capricious, or illegal**.
>
> Downtown Residents, *supra*, 242 N.J. Super. at 338 [emphasis added].

Indeed, in his written opinion of June 22, 2006, the Honorable Lawrence M. Lawson, A.J.S.C., found that the City of Long Branch supported its redevelopment determination and followed appropriate steps in making that determination:

> The City conducted a preliminary study determining that the area is in need of redevelopment pursuant to N.J.S.A. 40A:12A-1, et seq. The City referred the matter to the Planning Board for investigation and review under N.J.S.A. 40A:12A-5 and held public meetings with proper notice. The governing body determined the area was an area in need of redevelopment under N.J.S.A. 40A:12A-6b(5) . . .
>
> Da144a.

There is no question that the proper procedure was followed by the City, as reflected by Judge Lawson's findings. While

Appellants repeatedly accuse the Assignment Judge of Monmouth County of engaging in an "incomplete review" which should be given "no deference" (*See*, Appellant's brief p. 16) not once are the shortcomings of Judge Lawson's analysis specifically addressed. The attacks against Judge Lawson's professionalism are supported by nothing other than Appellants' self-serving conclusionary statements. Instead, wild allegations and spurious conclusions are presented to the Appellate Division in a shotgun approach, devoid of any evidential support whatsoever. Indeed, large sections of Appellants' brief contain no citations to the record whatsoever. For example:

> 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 compensate 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.**
>
> *See*, Appellants' Brief, p. 20-21 [emphasis added].

Without factual support from the record presently before this court, these statements amount to nothing more that unsubstantiated allegations.

The most cursory and basic review of the written opinion of Judge Lawson reveals a detailed review of not only the procedural history of the matter, but also a thorough review of the long running struggle by the City of Long Branch to spur the redevelopment of its oceanfront. First and foremost, it is clear that the Anzalones are not the only party challenging the Long Branch Redevelopment Project and the condemnation of properties. As stated in Judge Lawson's opinion, the court considered the briefs and heard oral arguments not only in the Anzalone matter, but in **eleven (11)** other interrelated (yet unconsolidated) matters. Da42a. In order to properly consider all issues at play in these matters, Judge Lawson reserved decision for approximately **three (3) months** to properly sift through the relevant issues present in all the matters. Da41a. The court went so far as to visit the properties to perform its

own inspection. Da42a. It is incredible for Appellants to accuse Judge Lawson of making "improper legal conclusions" when Appellants themselves fail to refute those findings with factual evidence from the record. Appellants attempt to substitute their own opinion for that of Judge Lawson.

The findings by Judge Lawson were supported by the factual record and cited to in the written opinion of June 22, 2006. Pa35a. In addition to referencing the City's earliest redevelopment efforts in the 1980's, the written opinion provides an in-depth review and analysis of the January 1996 Report by the Long Branch Planning Department. Da44a.

Judge Lawson noted the factors relied upon by the City in the Report, including the area's poor travel flow, low visibility for commercial enterprises, and high vacancy rates. Da69a-70a. In relation to the criteria of N.J.S.A. 40A:12A-5(d), Judge Lawson held:

> Under 5(d), the City found that the area north of N. Bath Avenue received a low rating in terms of commercial viability. High vacancy rates and marginal enterprises were found to be predominant in this area. The study found that Ocean Avenue had become largely un-traveled due to the addition of Ocean Boulevard. Thus, commercial buildings lack needed visibility resulting from the faulty layout which deters commercial investment. The study found that the residential area also suffered from the poor appearance of nearby commercial buildings. Ultimately, the City's report found the obsolete layout and faulty design deter

> private redevelopment and are detrimental to the welfare of the community.
>
> These findings are evidence that criterion 5(d) has been met, and the City found that these conditions were detrimental to the safety, health, morals or welfare of the community as mandated . . .
>
> Id. [internal citations omitted].

Appellants have failed to present the necessary evidence to overcome the presumption of validity attached to municipal determinations, as the City's determination that the MTOTSA properties was an area in need of redevelopment was neither arbitrary, capricious, nor illegal. *See*, Downtown Residents, *supra* at 332.

It is also clear that Appellants cannot meet the burdens imposed by section 5(e). The Report filed on behalf of the City found a significant increase in the amount of vacant land in the subject area for the ten (10) years proceeding the study.

> Under 5(e), the study found an increase in vacant land from 17% to 23% in the redevelopment area (including Oceanfront North and Broadway Corridor). This sharp increase, the study found, is indicative of a growing lack of utilization which deters private investment. Ultimately, the City concluded that private investment would make the area more productive and contribute to the public health, safety and welfare.
>
> **This finding is also supported by substantial evidence and shall not be overturned.**
>
> Da70a [emphasis added].

Again, Appellants point to no evidence to refute these specific findings by the City and cannot meet the heavy burden of showing that the City's determination was unsupported by substantial evidence and thus arbitrary, capricious, illegal, or unconstitutional. *See*, Downtown Residents, *supra* at 332.

While Appellants state that their property was in "good condition" at the time of the taking, such an argument is specifically addressed by the takings statute and of no moment. N.J.S.A. 40A:12A-3 states:

> A redevelopment area may include lands, buildings, or improvements which of themselves are not detrimental to the 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.

The condition of Appellants' Property will work to their benefit in determining the fair market value of the Property, however the condition of the Property does not prevent inclusion within the Redevelopment Zone. N.J.S.A. 40A:12A-3. In order to determine whether Appellants' Property was properly included within the Redevelopment Area, however, the Property cannot be viewed in a vacuum. Rather, the trial court correctly viewed the designation of the Property in the context of the entire Study Area. The determination of whether an area qualifies as in need of redevelopment must be based upon the consideration of

the whole area not individual properties. The courts in New Jersey recognize that the "patent purpose (of redevelopment law) deal with substantial areas as distinguished from individual properties." Wilson v. City of Long Branch, 27 N.J. 360, 378 (1958) *cert. denied*, 358 U.S. at 873. "(C)ommunity redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building." Wilson, 27 N.J. at 380. "[T]he process contemplated by the law cannot be accomplished by means of individual selection of property. It must proceed in terms of redevelopment of areas." Lyons, 52 N.J. at 99 (quoting, Wilson).

The New Jersey Supreme Court noted in Levin that the "redevelopment laws are concerned with areas and not with individual properties." Levin at 539. "So long as the area designated as blighted is the portion of the municipality which, in the judgment of the appropriate local body, falls within the broad terms of the definition laid down by the Legislature, the courts will not interfere in an absence of a palpable abuse of discretion or bad faith." Id. (citing Wilson v. Long Branch, 27 N.J. at 379).

In discussing the importance of focusing on and planning for redevelopment of an entire area rather than individual properties, the court in Levin referred with approval to the testimony from the town's experts, stating that "piece meal

development . . . would be likely to destroy any chance of achieving its maximum economic potential. This potential can only be reached by a replanning of the entire area without regard to the present lot layout and street pattern and by developing it as an integrated hall". Id.

Accordingly, the City's determination to designate the area as in need of redevelopment was based upon substantial evidence based upon the study conducted that conditions delineated in the LRHL existed and the declaration of blight was not arbitrary and capricious. As noted above, the court must consider the Appellants' Property in the context of the entire Study Area. Giving the substantial evidence supporting the redevelopment designation pursuant to subsections a, c, d and e, the trial court correctly concluded that Appellants failed to satisfy their significant burden of demonstrating that the redevelopment designation was arbitrary or capricious.

POINT IV

THE TAKING OF APPELLANTS' PROPERTY IS CONSISTENT WITH THE REDEVELOPMENT AND SERVES A LEGITIMATE PUBLIC PURPOSE.

The sole basis for Appellants' arguments that the City's actions are inconsistent with the City's Redevelopment Plan is the contention that "The Anzalones' property falls in an area which was marked as Residential Infill. Yet without justification the City moved to condemn the properties,

replacing these homes with high-price condominiums." *See*, Appellants' brief p. 18.

A review of the Plan itself and the guidelines adopted thereunder, makes it clear that that was **never** the case. Pa516. On page 1 of the Plan it is stated that "[t]he overall goal is to bring about a compact and integrated ensemble of public and private places that support year-round uses related to living, working, and recreation and visitation. All of the area covered by the Plan has been found to be in need of redevelopment." Pa519. Further on page 1, the Plan states:

> The Plan sets out the City's objectives for redevelopment, describes how redevelopment rights will be awarded to private redevelopers, specifies relocation policies, and states how tax incentives may be applied to achieve needed improvements.
>
> Id.

On page 3, under General Objectives, the Plan sets forth numerous objectives. Pa521. These objectives include:

> b. Create value in land and enterprise for public and private interests through high-yield projects that exploit ocean views from residential and commercial development and public spaces.
>
> c. Strengthen retail trade and City revenues by increasing year-round population by creating housing types that will attract a diversified market, primarily of small households.
>
> e. Increase employment opportunities for residents, stabilize taxes and increase

maintenance and amenities as part of a better quality of life.

g. Improve the city's image by replacing vacant lots and poorly maintained buildings with new, carefully designed buildings, both commercial and residential.

k. Conserve sound, well-maintained single-family housing to the extent possible, and encourage residential development through infill

Id.

On page 10, the Plan discusses specific objectives for the Beachfront North area. Pa528. This section is entitled "Beachfront North: Low Rise-Medium Density Residential." Id. These objectives include closing North Broadway, Madison Avenue, and Ocean Terrace at Ocean Boulevard. Id. Directing traffic away from Seaview Avenue, Cooper Avenue and South Broadway, and creating a "single cohesive neighborhood" by connecting each existing East-West street with an extended Grant Street (North-South) as the primary "spine". Id.

At Section 8 of the Plan "Acquisition Plan" the City specifically reserves "the right to condemn property if private negotiations fail and the property or properties in question are judged essential to achieve objectives intended by the Plan." Pa532.

The Beachfront North Design Guidelines Handbook states:

> [T]his sector will be comprised of a Beachfront recreation area facing the promenade and a low rise, medium-density beachside community with **both infill and planned residential development opportunities.**
>
> Pa584 [emphasis added].

Moreover, as designated by the design guidelines for the Beachfront North sector, the Plan for the area required new development "to a minimum threshold density of 15du/acre" as opposed to the 5du/acre which existed at the time. Pa585. Thus, it was always part and parcel of the Plan that the Appellants' property would be subject to eminent domain, if necessary to achieve the objectives of the Plan. While the City certainly empathizes with the Appellants' objection to that result, it nonetheless does not change the position that the City has the legal authority and standing to complete the Plan through the utilization of its power of eminent domain.

In addition, construction of condominium units would still meet the "Sector Objectives" which Appellants rely upon. Pa584. It states:

> The goal for quiet residential streets is to create frequent entrances and "eyes on the street" (with transitional elements such as bay windows, porches, balconies and overhangs) that separate private community zones.
>
> ***
>
> Controlled vehicular access, deeded pedestrian and bike paths to the beach,

permitted residential parking, combined parking

Pa584.

The Appellants provide no evidence or basis that the re-designation of the zone in which the Property is located, merely the insinuation that condominium units do not qualify as residential.

Again, in an action challenging a municipal redevelopment ordinance, the municipality will prevail by establishing "some reasonable basis for its **legislative** action." Downtown Residents, *supra* at 332 [emphasis added]. As the decision as to the utilization of the Property was made by the City of Long Branch, that decision is entitled to the same presumption of validity as the determination of redevelopment itself. Levin, *supra* at 537.

As held by Judge Lawson:

> [T]his court must defer to a governing body's determination to use its power of eminent domain to condemn property unless there is an affirmative showing of fraud, bad faith or manifest abuse. Twp. of W. Orange v. 769 Associates, 172 N.J. 564, 571; 800 A. 2d 86 (2002). "In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation'." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 241 (1984) (*citing* United States v. Gettysburg Electric R. Co., 160 U.S. 668, 680 (18967)).

> The City maintains that either residential infill or planned residential development was always a part of the Redevelopment Plan. The City chose to use a planned residential development and condemn the MTOTSA properties pursuant to its powers. The courts are constrained to defer to the governing body and "it is only the taking's purpose, and not the mechanics, that must pass scrutiny under the Public Use Clause." Midkiff, supra 467 U.S. at 244.
>
> Da83a-84a.

While it seems counsel for the Appellants has read, at least in part, the case of Kelo v. City of New London, 545 U.S. 469, 125 S.Ct. 2655 (2005) Appellants have simply chosen to ignore the Supreme Court's opinion which stands in direct contradiction to Appellants' arguments regarding the purpose of the taking. *See*, NJ RPC 3.3(a)(3) ("A lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling known to the lawyer to be **directly adverse** to the position of the client . . .").

Petitioners in Kelo shared characteristics with the Anzalones:

> Petitioner Wilhelmina Dery was born in her For Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago . . . There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, **they were condemned only because they happen to be located in the development are**a.
>
> Kelo, *supra* at 2660.

The petitioners in Kelo were painted in just as sympathetic a light as the petitioners in the present matter. The redevelopment plan under review in Kelo closely resembles the plan the City has adopted:

> The development plan encompasses seven parcels. Parcel 1 is designated for a waterfront conference hotel at the center of a "small urban village" that will include restaurants and shopping. This parcel will also have marinas for both recreational and commercial uses. A pedestrian "riverwalk" will originate here and continue down the coast, connecting the waterfront areas of the development. Parcel 2 will be the site of approximately 80 new residences organized into an urban neighborhood and linked by public walkway to the remainder of the development, including the state park. This parcel also includes space reserved for a new U.S. Coast Guard Museum. Parcel 3, which is located immediately north of the Pfizer facility, will contain at least 90,000 square feet of research and development office space. Parcel 4A is a 2.4-acre site that will be used either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina. Parcel 4B will include a renovated marina, as well as the final stretch of the riverwalk. Parcels 5, 6, and 7 will provide land for office and retail space, parking and water-dependent commercial uses.
>
> Kelo, *supra* at 2659.

The intent of the City of New London in adopting this redevelopment plan was to:

> [C]apitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract. In addition to

> creating jobs, generating tax revenue, and helping to build momentum for the revitalization of downtown New London, the plan was designed to make the City more attractive and to create leisure and recreational opportunities on the waterfront and in the park.
>
> Id. [internal quotations omitted].

As in this matter, the petitioners in Kelo challenged the validity of the takings, arguing that "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." *See*, p. 24 of Appellant's brief. Appellants offer no evidence or even an analysis of the law cited in their brief. While Appellants suggest "the Court should carefully examine the true purpose of the taking", Id., Appellants offer no explanation or theory that the purpose the City of Long Branch sought to serve by redevelopment was anything but public. Again, the Supreme Court has roundly rejected these arguments:

> [T]his Court long ago rejected any literal requirement that condemned property be put into use for the general public. Indeed, while many state courts in the mid-19th century endorsed "use by the public" as the proper definition of public use, that narrow view steadily eroded over time. Not only was the "use by the public" test difficult to administer (e.g., what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society. Accordingly, when this Court began applying the Fifth Amendment to the States at the close of the

> 19th century, it embraced the broader and more natural interpretation of public use as "public purpose."
>
> Kelo, *supra* at 2662 [internal citations omitted][internal footnotes omitted].

See also, Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98 (1954) ("The concept of the public welfare is broad and inclusive . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary."); *see also*, Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 104 S.Ct. 2321 (1984) (wherein the Supreme Court allowed the transfer of fee title from lessors to lessees in order to eliminate "the social and economic evils of a land oligopoly").

The City had the authority to contract with a private entity for redevelopment. New Jersey Courts have recognized that a public interest "may be better served by private enterprise" undertaking redevelopment. Jersey City Redevelopment Agency v. Costello, 252 N.J. Super 247, 257 (App. Div. 1991). *See also*, Wilson v. City of Long Branch, 27 N.J. 360, 376 (1958) (quoting The United States Supreme Court in Berman v. Parker, 348 U.S. 26, 33-34 (1954), and rejecting claims that redevelopment carried by private enterprise constitutes a taking from one businessman to benefit another and stating that "public and maybe as well or better served through an agency of private enterprise and through a development of

government"); *accord* Levin v. Township of Bridgewater, 57 N.J. 506, 544 (1971). The Supreme Court has reaffirmed that redevelopment carried out through private enterprise is appropriate in recently rejecting similar claims in Kelo v. City of New London, 125 S.Ct. 2655 (2005).

In its final review of New London's redevelopment plan, the Court found;

> 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 revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, ad recreational uses of land, with the hope that they will form a while great than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in Berman, to resolve the challenges of the individual owners, not on a piecemeal basis, **but rather in light of the entire plan**. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.
>
> Kelo, *supra* at 2665 [emphasis added].

As stated above, Judge Lawson found that the City of Long Branch followed the statutorily required path to a public taking

and reserved decision in the current matter to hear arguments regarding the entire MTOTSA area. Appellants arguments as to "public use" were rejected by the United States Supreme Court.

Here, it is clear that the City of Long Branch complied with the strict requirements of the Local Redeveloping House Law, N.J.S.A. 40A:12A-1, et. seq. (the Redevelopment Law) which describes a municipality's powers to exercise its redevelopment and rehabilitation functions. Id. at Section 4a(1), (2), (3), (4). Those powers include ordering a preliminary study, determining that an area is in need of redevelopment, adopting a redevelopment plan, and determining that an area is in need of rehabilitation. Id.

Moreover, as required by the law, the governing body referred the matter to the Planning Board for investigation and review as to the criteria under N.J.S.A. 40A:12A-5. (*See* Statements of Facts, *supra*). The Planning Board held public hearings, with notice. Pa219-221. The Report of the Planning Board to the governing body resulted in the determination and delineation of the area deemed in need of redevelopment under N.J.S.A. 40A:12A-6b(5). The Council based its determination upon the specific and substantial evidenced amassed by the Planning Board, the Planning Department and the Atlantic Group. Id. Thus, under N.J.S.A. 40A:12A-6b(5), the determination "shall be binding and conclusive upon all persons effected by the

determination . . ." This includes the Appellants, who do not dispute that their properties are located in the Redevelopment Area or that they received notice and actively participated in that process, without objection.

Even the United States Supreme Court has recently upheld the ability of a municipality, based upon the specific state law involved, to engage in eminent domain proceedings where the property may be ultimately transferred to a private developer, in order to achieve the worthy goals of redevelopment for the municipality. *See*, Kelo v. New London, 125 S.Ct. 2655 (2005). ("Given the comprehensive character of the Plan, the thorough deliberation that proceeded its adoption, and the limited scope of our review, it is appropriate for us, as it was in Berman, to resolve the challenges of the individual owners, not on a piece mail basis, but rather in light of the entire Plan. Because that Plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.") Moreover, the assertion by the Appellants in the matter at bar that economic development does not qualify as a public use was also rejected by the Supreme Court in Kelo. Id. Thus, Appellants' arguments that the plan at bar improperly benefits a private concern, fail.

POINT V

THERE ARE NO CONFLICTS OF INTEREST, ACTUAL OR OTHERWISE, WHICH WOULD SERVE TO VOID THE REDEVELOPMENT PLAN OF TO THE CITY OF LONG BRANCH

First and foremost, Respondent the City of Long Branch objects to any reference or inclusion by Appellants as to the privileged document which had been erroneously produced and is the subject of a pending appellate motion by Respondent the City of Long Branch. Respondent also notes that Appellants' characterization of the subject document as "public record" **directly contradicts** the prior representations by William Ward, Esq. in correspondence contained in the papers regarding that motion for the return of erroneously produced privileged documents. As stated in that motion, the City's inadvertent production of a privileged document through its attorneys during the course of its production of a four (4) volume Appendix comprising of 674 pages is not a waiver of the attorney-client privilege as there has been no authorized or voluntary relinquishment or abandonment of the lawyer-client privilege by the City. Appellants' Brief in Support of their Appeal is not the proper forum for such discussion. As such, any references to said document must be ignored by this court and should be stricken from Appellants' brief.

Appellants argue that actual and apparent conflicts exist as a result of the law firms of Ansell Zaro Grimm & Aaron (Ansell Firm) and Greenbaum Rowe Davis Ravin & Smith (Greenbaum Firm) representation of the City. As the Court is aware, the Ansell Firm and a Senior Partner, James G. Aaron, Esq., have been City Attorneys since 1994. The Greenbaum Firm has been specially appointed redevelopment counsel to the City beginning in 1995 and continuing periodically thereafter.

The basis for Appellants' contention that a conflict of interest existed is due to the fact Applied, the designated developer for the Beachfront North sector of the redevelopment area, formed a joint venue with Matzel & Mumford ("M&M"), a subsidiary of K. Hovnanian.

A. The Greenbaum Firm

As set forth in greater detail below, the above joined venture with M&M that resulted in the purported conflict or appearance of conflict that occurred years after every relevant decision had been made by the City leading up to the designation of the redevelopment area, the adoption of the Redevelopment Plan and any amendments, and the current condemnation action involving the Appellants' Property. Accordingly, any purported conflict could not possibly have had any undo influence upon the City's determination to acquire the Appellants' Property and did not taint the current condemnation action.

The following is the summary of the relevant historic events of the redevelopment activities and action by the City leading up to the current condemnation actions:

1. August 8, 1995, the City adopted a resolution directing the Planning Board to conduct an investigation to determine whether the redevelopment area, including Defendants' properties, qualified as an area in need of redevelopment under the Redevelopment Law. Pa21.

2. January 1996, an investigation of the redevelopment area was conducted and a report of such investigations prepared, concluding that the majority of the study area, including the Defendants' properties, qualified as an area in need of redevelopment. Pa214.

3. January 16, 1996, the Planning Board conducts a public hearing after which it recommends to the City Council the designation of the redevelopment area, including the Defendants' properties. Pa219.

4. January 23, 1996, the City adopts a resolution designating the redevelopment area as recommended by the Planning Board. Pa220.

5. May 14, 1996, the City Council adopts the Redevelopment Plan, which contemplates the possible of acquisition of Appellants' properties. Pa221.

6. 1997-1998, the City forwards well over 200 requests for qualifications to potential developers. Pa37.

7. February 22, 2000, the Applied Companies is designated redeveloper for the Beachfront North area and a redevelopment agreement is entered into between the City and Applied. Pa38.

8. January 23, 2001, the City Council adopts an ordinance authorizing the condemnation of Defendants' properties. Pa39.

Thus, by January 23, 2001, at the latest, every relevant determination made by the City leading up to the acquisition of Appellants' Property have been made. The purported conflict created by M&M joint venturing with Applied to develop Beachfront North did not arise until June of 2002. According, Appellants' claims that a purported conflict tainted the condemnation process or evidences the exercise of undo influence by the Greenbaum or the Ansell Firms is not support by the facts and is without merit.

As indisputably set forth above, no purported conflict could taint the current condemnation proceedings or allowed for undo influence by the Greenbaum or Ansell Firms upon the City's determinations and actions. Nonetheless, the City addresses those allegations below.

It was not until that joint venture agreement was consummated that Applied and M&M advised the City of the existence of the venture. As certified to by Mr. Russo, Vice President of the Applied (Russo), that joint venture was negotiated between Applied and M&M directly, without outside counsel and without notice to the City, the Ansell or Greenbaum firms. Pa21.

At that point the Greenbaum Firm recused itself based upon the then existing ethical rules governing attorneys which addressed conflicts in terms of an appearance thereof, under R.P.C. 1.7(c)(2). Pa669-679. Although there was not clearly an appearance of conflict or impropriety under the Ethics Rules, the Greenbaum Firm determined that due to the lack of clear standards for application of R.P.C. 1.7(c)(2), dealing with appearance of impropriety, prudence dictated that it withdraw as redevelopment counsel for the City. Id.

The Greenbaum Firm continued to provide limited legal services for a transitional period, in compliance with R.P.C. 1.16(d), which requires that an attorney withdrawing from representation do so in a manner that protects the client's interests, such as allowing sufficient time to engage new counsel and turnover pending matters. Pa670. The Greenbaum Firm continued to handle pending condemnation actions before the Court and a limited aspect of a code enforcement action completely unrelated to any redevelopment activities. Pa668-671. Notably, the Greenbaum Firm alerted the Court and the parties in the condemnation matters as to its withdraw and intentions transitionally and conclude those matters, which action was accepted by the Court. Pa670.

Thereafter, as the Court is aware, a commission headed by former Justice Pollack recommended and ultimately on September

10, 2003, the Ethical Rules were changed to remove the "appearance" language and replace it with an actual conflict standard. Thus, in November, 2003, the Greenbaum Firm again began to represent the City as redevelopment counsel, although it recused itself from any direct dealings with any entity in which K. Hovnanian and/or M&M was involved to avoid "an actual conflict" and played no role and had no involvement in connection with developer selection or negotiations. Pa671. In fact, since resuming its role as redevelopment counsel, the Greenbaum Firm has had virtually no involvement with any matters relating to Beachfront North, but has limited its representation to matters in the Broadway Arts Center area and Pier issues. Pa671.

The Greenbaum Firm entered into an additional agreement with the City in April of 2005 to handle some of the anticipated condemnation actions in Beachfront North, Phase II. Id. This agreement was in additional to and not part of the Greenbaum Firm's role as redevelopment counsel. However, before any services were provided under this agreement, in July of 2005, the Greenbaum Firm withdrew from representation under the April 2005 agreement, based upon certain language from the concurring opinion and case of Kelo v. The City of New London, 125 S.Ct. 2655 (2005). Id. Notably, the Greenbaum Firm did not withdrawn because it believed that a conflict or impropriety existed, but

because it did not wish to see the City forced to face any such allegations, even though baseless. Id.

From that time until the end of 2005, the Greenbaum Firm continued to provide limited services under its agreement with the City as redevelopment counsel, relating to the Broadway Arts area and affordable housing issues. Pa672. The Greenbaum Firm has not renewed any contracts to provide services as redevelopment counsel and, since the end of 2005, is no longer retained as redevelopment counsel for the City. Id.

Thus, it is clear that it was **impossible** for any conflict, actual or otherwise, to have existed when the Greenbaum Firm was representing the City as redevelopment counsel. This is because Applied was approved as a designated redeveloper in February 2000, years before a joint venture was formed with M&M, which is the basis for the Defendants' argument of conflict. As certified to by Messrs Turner and Woolley, Applied was approved as a designated developer, after going through a vetting and review process which involved over 275 requests for qualifications being sent by the City to developers. Ultimately eighteen (18) developers were sent requests for proposals, who were then vetted down to Applied. This review of potential developers was undertaken by the politically neutral Developer Selection Committee. Pa36-37. **Most importantly, no conflict is alleged to have existed at the time the redevelopment study was**

undertaken and plan adopted in 1994, 1995 and 1996. Thus, there is simply no basis for the Court to find that there was any conflict of interest or undue influence on the City Administration or Council at the time the Redevelopment Plan was adopted. Similarly, there is no basis for any conflict to be found to have existed at the time Applied was approved as a designated developer in February, 2000. Finally, as a result of the prophylactic actions of the Greenbaum Firm, no conflict existed even after the point of Applied's joint venturing with M&M.

As to the Appellants' assertion that a conflict existed based upon Arthur Greenbaum, Esq.'s position on the Board of Directors of K. Hovnanian, this argument fails for precisely the same reasons noted above. Although Mr. Greenbaum has served on the Board for K. Hovnanian since 1992, no purported conflict existed until June of 2002, after all of the relevant underlying decisions leading up to and supporting the validity and authority of the current condemnation actions had already been made. Thus Mr. Greenbaum's position on the Board of K. Hovnanian resulted in absolutely no potential for undo influence or to otherwise taint the condemnation process.

The above notwithstanding, it should be noted that Mr. Greenbaum never discussed the Long Branch redevelopment at any Board meeting, never had any discussions with any

representatives with K. Hovnanian or Long Branch concerning the Long Branch redevelopment and never performed any legal services for the City of Long Branch. Pa665-673.

B. The Ansell Firm.

As to the Ansell firm, as certified to by Mr. Aaron, that firm finished all of its work for K. Hovnanian by December 2002. As stated, there was no conflict at the time of the redevelopment study and the adoption of the Redevelopment Plan by the Council of the City in 1996, as K. Hovnanian was not involved in that process and there was no appearance of conflict under the prior Ethical Rules. Moreover, when Applied was designated as the redeveloper for the Beachfront North section of the redevelopment area in February 2000, there was no appearance or actual conflict either.

As to the time frame when M&M entered into the joint venture with Applied, in June of 2002, Mr. Aaron clearly certifies that the Ansell Firm played no part in that transaction. It is clear that the Ansell Firm had no knowledge of the fact that M&M was a subsidiary of K. Hovnanian. Pa646. When the Ansell Firm learned that M&M was affiliated with K. Hovnanian, in July of 2002, the only matter which the Ansell Firm was handling for K. Hovnanian was post trial motions dealing with a decision entered by Judge Peskoe, on recall, involving K. Hovnanian at Wall Township IV, Inc. under Docket

No. MON-C-287-96. That matter had been tried via bench trial before Judge Peskoe in late April of 2002. However, as a result of post trial motions to clarify the written opinion of Judge Peskoe, the matter was not "closed" until December of 2002. This was a limited winding up procedure contemplated and allowed, under R.P.C. 1.16, which requires a withdrawing attorney to end its representation in a manner "to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel." Based upon the Ansell Firm's knowledge of that the case and the fact that the remaining issues were limited to post-judgment relief, relating to a judgment obtained through the Ansell Firm's representation, it was determined that it was appropriate and necessary to finalize representation with respect to those issues pending before the Court. Pa637.

The Appellants' reference to brochures and marketing materials of the Ansell Firm which indicate K. Hovnanian to be "a representative client" is a red herring. A close review of that information clearly indicates that the list is "Past and Present Representative Clients". Da126a. Obviously the Firm is "touting" companies it presently and previously represented. For example, the Firm has not represented the Borough of Eatonton or the East Brunswick Sewerage Authority for years. Central Jersey Bank & Trust which no longer even exists, is

nonetheless listed as a "representative client". The point being, that the list was illustrative of the Firm's works over the seventy-five (75) plus years it has been in existence.

In support of their position, Appellants cite to numerous cases all of which are distinguishable. In City of Atlantic City v. Comedy Investments, 148 N.J. 55 (1997) the Court cites to Pole Town Neighborhood Council v. City of Detroit, 410 Mich. 616 (304) N.W. 2d 455, 459 (1981) for the proposition that a Court must apply a heightened scrutiny review of a claim that public interest is the predominate interest being advanced in a condemnation. Importantly, that citation was in terms of whether or not certain parties should have been allowed to participate in valuation proceedings to present evidence of market value. Noticeably absent from that consideration was an alleged conflict of interest of any attorneys or other parties or a claim that the Redevelopment Plan was inappropriate or unenforceable.

The same is true with regard to Township of Lafayette v. Board of Chosen Freeholders of the County of Sussex, 208 N.J. Super. 468 (App. Div. 1986) in which a contract entered into between the Township and the County was found to be void as a result of County Counsel being the President of a bank and his law firm handled almost all of the legal work for the bank whose largest stockholder controlled corporations which had options to

purchase the site in question. The Court found that the appearance of a conflict required the voiding of the contract. Importantly, in that action, the test was whether or not there was an interest "creating a potential for conflict". Id. at 473 [citations omitted]. In that action, the attorney's relationship to the seller of the property being purchased by the County he also represented was "too close a call" for the Court to ignore.

This is distinguishable from the matter at bar, where there is not even an allegation of a conflict or appearance of a conflict in 1994, 1995 and 1996 when the Redevelopment Plan was implemented and approved by the Council. Nor is there any allegation of a conflict being present at the time Applied was approved as the designated developer. In fact, there is no allegation of any conflict existing by appearance or otherwise, until after Applied entered into its joint venture agreement with M&M of which neither the City, the Greenbaum or Ansell firms were aware. At that time, the Greenbaum Firm took appropriate steps to recuse itself from representation of the City and the Ansell Firm was unaware of the potential conflict.

Similarly, Appellants' reliance on Wilson v. Long Branch, 27 N.J. 360 (1958) is misplaced. Wilson is relied upon for the proposition that an attorney's conflict of interest can be fatal to a blight declaration if there was an opportunity to influence

municipal action being taken. However, the case does not stand for this proposition. In Wilson, the court addressed allegations that certain members of the Planning Board should have been disqualified because of personal or pecuniary interests, citing to N.J.S.A. 40:55-1.4. However, the Wilson court found that the Mayor, who voted for the blight resolution as a member of the governing body and was a director and stockholder of a bank which held some mortgages in the area was "not a sufficient reason to bar him from performing his official duties." Wilson, *supra* at 396. Other suggestions as to disqualification to the various member did not supply basis for such a ruling. Id.

The Wilson court also held that the claims that the City solicitor "improperly participated in the proceedings before the Planning Board thereby invalidates its resolution" were unsupported. Id. The Court found that each body had its own attorney but nonetheless the City solicitor appeared at the hearings and advised the Planning Board as to procedure and rulings on evidence. Id. While the Court found that the "intrusion was improper" the Court ruled that "since no prejudice seems to have resulted to the Plaintiffs, we do not find it fatal to the validity of the proceedings." Id. at 396.

In the case at bar, the opposite is true. At the time of the adoption of the Plan there was (1) no input from attorneys

in the process of (a) plan design; or (b) design guidelines being created; and (2) there were no conflicts real or imagined as K. Hovnanian had no developer's rights within the City and it played no role whatsoever in any decisions of the Mayor, Council or the Planning Board.

The case of Newton v. Demas, 107 N.J. Super. 346 (App. Div. 1969) relied upon by Appellants is distinguishable from the present matter. Newton involved an engineer for a municipality preparing plans for a developer whom he knew or should have known would use those plans to apply to that same municipality "and on which he would be required to pass judgment" was a conflict of interest and required voiding the contract with the engineer. Id. at 350. In other words, the engineer was reviewing the appropriate plans which he himself had drafted. Obviously, this is a clear conflict of interest and required the voiding of the contract entered into with the developer. Importantly, that action was brought in the context of the engineer seeking remuneration for work he did for the developer, not an action with regard to the activities of the municipality in reviewing and approving or declining those plans. In fact, in the Newton matter, the project had been abandoned. Id. at 349.

Based upon the foregoing, there is simply no basis factually, legally, or otherwise for the Court to conclude that

any conflict, actual or apparent, existed at any time in this process. There was certainly no basis for an allegation of any conflict existing at the critical time frames involved in this process; i.e. the study and adoption of the Redevelopment Plan more than ten (10) years ago. The logical leap taken by movant that because a conflict allegedly existed in 2002 that the plan adopted in 1996, six (6) years before, is somehow void or voidable is unfounded and not supported in the trial court record. Moreover, the actions of the Greenbaum and Ansell firms from 1994 to 2002 are not challenged. The challenge comes for actions alleged to have occurred almost six (6) years after the Redevelopment Plan was put into place by the City Council and years after the relevant developer agreements were entered into and properties to be condemned enumerated in ordinances. Therefore there is no basis to void or question the validity of the Plan itself.

As Judge Lawson stated in his written opinion as to the allegations regarding Matzel & Mumford:

> Importantly, the decision to condemn MTOTSA properties was made either in 2000 pursuant to Ordinance 9-00, or at the very least in 2001 via Ordinance 2-01. The addition of Matzel & Mumford, a subsidiary of K. Hovnanian was made on June 25, 2002 by way of Resolution 226-02. Any allegations that Greenbaum, Smith & Davis or Ansell Zaro Grimm & Aaron who represent or represented the City and also represented K. Hovnanian influenced the decision to condemn the

> subject properties are tenuous because the decision to condemn was made well over a year before the addition of M&M.
>
> The peculiar timing of any negotiations that may have paved the way for the addition of M&M and the decision to condemn the MTOTSA properties would present the potential for a conflict if the City or either law firm was involved in those negotiations. However, no evidence of that situation has been brought before the court and none can be adduced from the relevant facts.
>
> ***
>
> In sum, although the potential for a conflict would have existed if there was any evidence that the City or either law firm were a part of the negotiations or discussions involving the partnership between Beachfront North LLC and M&M, no such evidence is before the court.
>
> Da75a-76a; 78a.

As to the argument posited by the Appellants regarding the alleged conflict centering around the Monmouth Community Bank, the New Jersey Supreme Court has held that:

> Although there need be only the potential for conflict to justify disqualification, there cannot be a conflict of interest where there do not exist, **realistically**, contradictory desires tugging the official in opposite directions.
>
> Paruszewski v. Twp. of Elsenboro, 154 N.J. 45, 59 (1998) [citations omitted][emphasis added].

Appellants attempt to create a conflict where, factually, one does not exist. The timeline of the chain of events in the City's redevelopment disproves Appellants' arguments that a

conflict of interest existed. Therefore the trial court's ruling should be affirmed.

POINT VI

THE CITY ENGAGE IN BONA-FIDE NEGOTIATIONS WITH APPELLANTS AND THE DELEGATION OF AUTHORITY WAS NOT AN IMPROPER USE OF THE CONDEMNING AUTHORITY'S DISCRETION

The specific requirements necessary to conduct the bona fide negotiations under the Eminent Domain Act of 1971, N.J.S.A. 20:3-6, are as follows:

> No action to condemn shall be instituted unless the condemnor is unable to acquire such title or possession through bona-fide negotiations with the prospective condemnee, which negotiations shall include an offer in writing by the condemnor to the prospective condemnee holding the title of record to the property being condemned, setting forth the property and interest therein to be acquired, the compensation offered to be paid and a reasonable disclosure of the manner in which the amount of such offered compensation has been calculated, and such other matters as may be required by the rules. Prior to such offer the taking agency shall appraise said property and the owner shall be given an opportunity to accompany the appraiser during inspection of the property. Such offer shall be served by certified mail. In no event shall such offer be less than the taking agency's approved appraisal of the fair market value of such property. A rejection of said offer or failure to accept the same within a period fixed in the written offer, which shall in no case be less than 14 days from the mailing of the offer, shall be conclusive proof of the inability of the condemnor to acquire the property or

possession thereof through negotiations . .
.

New Jersey decisional law has interpreted the requirements of bona fide negotiations, as contained in the Eminent Domain Act of 1971. N.J.S.A. 20:3-6. The Courts have held that the condemnor must provide reasonable disclosure of all appraisals on the subject property obtained by the condemnor, the manner in which the condemnor's offer of compensation has been calculated as well as information upon which the condemnor bases its fair market value offer. State by the Commissioner of Transportation v. Morristown, 129 N.J. 279 (1992). That has been done in this matter. While the condemnor must at least consider credible evidence offered by the property owner, the condemnor is not required to concur with the owner's position. Morris County v. Weiner, 222 N.J. Super. 560, 567 (App. Div. 1988). The burden of proof is on the property owner to show negotiations were not bona fide. Essex County Improvement Authority v. RAR Development Associates, 323 N.J. Super. 505, 515-16 (Law Div. 1999); *cited with approval*, Township of West Orange v. 769 Associates, LLC, 172 N.J. Super. 92, 102 (App. Div. 2001); *see also*, State v. Totowa Lumber & Supply Company, 96 N.J. Super. 115, 124 (App. Div. 1967). The Court has stated:

> The party claiming that the government has conducted itself in bad faith or in a fraudulent manner has the burden of proof in

> challenging the exercise of eminent domain . . .
>
> Furthermore, evidence showing that the government acted in bad faith must be **clear and convincing** . . .
>
> Essex County Improvement Authority v. RAR Development, *supra* at 516 [emphasis added].

In State, By Commissioner of Tranportation v. Carroll, 123 N.J. 308 (1991), the Supreme Court held "the issue is how much appraisal information meets the 'reasonable disclosure' requirement of N.J.S.A. 20:306". Id. at 320. The Carroll Court ruled that "[t]he reasonableness of pre-negotiation disclosure centers on the adequacy of the appraisal information; it must permit a reasonable, average property owner to conduct informed and intelligent negotiations." Id. at 321. In Carroll, the Court found that the State had complied with the pre-litigation requirements under N.J.S.A. 20:3-6 and set forth the minimally required information to be given to the owner in holding:

> The appraisal's description of the valuation method, its inclusion of "comparable" sales and its specific rejection of other valuation methods; *i.e.*, the income and cost approaches, imparted minimally sufficient information to the property owner.
>
> Id. at 321.

In State v. Rollin, 183 N.J. Super. 584 (Law Div. 1982) the court addressed the meaning of "reasonable disclosure" under the statute. The Rollin court held:

> This term "reasonable disclosure" has been construed in the case of State v. Meisler, 128 N.J. Super. 307 (Law Div. 1974), where the Court noted:
>
> > The manner of calculation is a rather vague standard, but should be construed as requiring, at least, a breakdown between land and improvements, if any; any allocation made for damage to the remainder if less than an entire parcel is taken; and a specification of the appraisal method or methods, i.e., comparable sales, reproduction less depreciation, or capitalization of income.
>
> Id. at 595

The Rollin court specifically held "this is all that the statute requires under negotiations". Id. at 571. Moreover, as stated by the court in State v. Mehlman, 118 N.J. Super. 587 (App. Div. 1972), "it is not our function to designate what method of appraisal should be used . . ."

Judge Lawson made explicit findings of fact as to the lack of cooperation of the Appellants with the City:

> Negotiations are a two way street. Where, as here, the Condemnees make it clear that they do not intend to sell their properties, negotiations are rendered a practical impossibility. Thus, **the court cannot find that the City failed to engage in bona fide negotiations.**
>
> Da89a-90a [emphasis added].

Therefore, Appellants' have failed to provide this court with evidence which would necessitate a reversal of Judge Lawson's findings that no conflicts of interest tainted the adoption of the Redevelopment Plan.

POINT VII

THE TRIAL COURT CORRECTLY DENIED APPELLANTS' REQUEST FOR A PLENARY HEARING

This prong of Appellant's arguments is clearly the last ditch effort to **again** throw all prior allegations and conclusions at the feet of this court in the hopes the Appellate Division will perform the analysis Appellants' failed to perform. While this point heading had a logical role in Appellant's motion for a Stay of the underlying condemnation proceedings, filed on October 6, 2006, its cut-and-paste inclusion in Appellants' current brief amounts to mere repetition and parroting of Appellants' own arguments. Appellants' allegations had no impact in Point I, nor do they have impact in Point VI.

In support of their argument, Appellants rely upon County of Bergen v. S. Goldberg & Co., 39 N.J. 377 (App. Div. 1963), "[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." Id. at 380.

In addition, Appellants' reliance upon State v. Orenstein, 124 N.J. Super. 295 (App. Div. 1973) is misplaced. The language cited by Appellants states:

> 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 issues must be presented to an decided by the court before it enters judgment appointing condemnation commissioners. State v. N.J. Zinc Co., 40 N.J. 560, 572 (1963).

Appellants' arguments must fail in light of the decision made by Judge Lawson at the trial court level:

> Pursuant to its powers under N.J.S.A. 40A:12A-5a, the City adopted a plan to implement the redevelopment which requires the condemnation of the MTOSA properties. It is not the court's province to question the wisdom of that plan as long as it is supported by a public purpose. See Midkiff, *supra* , 467 U.S. at 244.
>
> Of note, no challenge was made in 1996 when Ordinance 15-96 was properly introduced and passed after proper notice; no challenge was made in 2000 when Ordinance 9-00 was introduced and adopted after proper notice; and, no challenge was made in 2001 when Ordinance 2-01 was introduced and adopted after proper notice.
>
> The condemnees had the burden of showing that the determination is not supported by substantial evidence. Id. at 537. They have not made such a showing in the matter *sub judice*. Nor have they demonstrated fraud, bad faith or manifest abuse.

> Therefore, no plenary hearing is warranted on this issue as the condemnees have not raised issues of factual dispute. Rather, they contend on legal grounds that the City did not have a public purpose for the subject condemnations. I find that they did.
>
> Da85a-86a.

R. 4:67-5 provides that:

> The Court shall try the action on the return day, or on short day as it fixes. If no objection is made by any party, or the defendants 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 . . .
>
> [emphasis added].

In the matter at bar, Appellants continue to base their request for a plenary hearing on a legal, not factual basis. Therefore, the City respectfully requests that this Court affirm the decision of the trial court to dismiss Appellants' challenge to the designation of this area as in need of redevelopment.

CONCLUSION

Based upon the foregoing reasons, it is respectfully requested by Plaintiff/Respondent, City of Long Branch, that this Court deny the appeal and affirm the trial court's ruling.

BOWE & FERNICOLA, LLC
Attorneys for
Plaintiff/Respondent,
City of Long Branch

Paul V. Fernicola, ESQ.

Dated: December 18, 2006

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