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Attorneys for Defendant
110 Washington Street Associates

TOWNSHIP OF BLOOMFIELD, a public body corporate and politic of the State of New Jersey, Plaintiff, vs. 110 WASHINGTON STREET ASSOCIATES, a partnership of the State of New Jersey, comprised of MELVIN FISCHMAN; ARNOLD FISCHMAN; ARCHIE SCHWARTZ, CO.; RUTLEDGE REALTY; JANE AND JOHN DOES 1 through 10 (fictitious name defendants), ABC BUSINESS ENTITIES 1 through 10 (fictitious name defendants), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – ESSEX COUNTY DOCKET NO. ESX-L-2318-05 Civil Action (In Condemnation) **ORDER OF DISMISSAL**

THIS MATTER having been opened to the court upon by Complaint and Order to Show Cause filed by Plaintiff, Township of Bloomfield (Catherine E. Tamasik, Esq., appearing) and on cross-motion for dismissal of the action filed by Carlin and Ward, P.C. (James M. Turteltaub, Esq. appearing), attorneys for Defendant, 110 Washington Street Associates, and the Court

having considered the moving papers in support of 110 Washington Street Associates motion, and the Court having considered any opposition and argument of record in this matter, and for good cause shown,

IT IS on this 3rd day of August, 2005,

1. **ORDERED** that all Counts of Plaintiffs' Complaint be dismissed ~~with prejudice~~;

2. ~~**FURTHER ORDERED** that Plaintiffs shall pay 110 Washington Street Associates costs as provided for in N.J.S.A. 20:3-26(b), and~~

3. **IT IS FURTHER ORDERED** that a copy of this Order be served upon the Plaintiff within 7 days of the date hereof.

Patricia K. Costello
HONORABLE PATRICIA K. COSTELLO, A.J.S.C.

Rule 1:6-2(a)

This Motion was:

_____ Unopposed

__✓__ Opposed

Rule 1:6-2(f)

___ On 8/3/05, the Court made findings of fact and conclusions of law explaining its disposition of this motion. Said findings of fact and conclusions of law were:

___✓ Written – attached letter opinion.

___ Oral.

___ The Court has not made findings of fact and conclusions of law explaining its disposition of this motion.

SUPERIOR COURT OF NEW JERSEY
ESSEX VICINAGE

PATRICIA K. COSTELLO
ASSIGNMENT JUDGE

50 W. MARKET STREET
ESSEX COUNTY COURTS BUILDING
NEWARK, NJ 07102
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August 3, 2005

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Re: Township of Bloomfield v. 110 Washington Street
Docket No: ESX-L-2318-05

Dear Counsel:

This matter comes before the Court by way of a Complaint for condemnation and an Order to Show Cause filed by The Township of Bloomfield (hereinafter "Plaintiff") and a Cross-Motion to Dismiss filed by the owner of the property, 110 Washington Associates (hereinafter "Defendant"). I have reviewed the papers submitted and the oral arguments of counsel.

The procedural history and the undisputed facts are as follows:

Defendant filed an action in Lieu of a Prerogative Writ on March 3, 2005, the relevant counts of which were dismissed by way of summary judgment on May 27, 2005 by the Honorable Claude Coleman. Plaintiff filed this Complaint on March 17, 2005. The Defendant filed an Answer on June 7, 2005.

Defendant has owned the property since May 1980. On February 7, 2000, Defendant entered into a sale agreement with Frameware, Inc. for the subject property (hereinafter "Frameware"). The sale was contingent upon Frameware obtaining a Certificate of Occupancy from Plaintiff. On or about April 1, 2000, Frameware filed an application with the Bloomfield Planning Board (hereinafter "Planning Board") for approval to conduct a light manufacturing concern on the property. In April or May 2000, the Bloomfield Township Zoning Official advised

Frameware it needed to apply to the Zoning Board of Adjustment (hereinafter "Zoning Board") because either he or the Township had determined Frameware needed a use variance to accomplish its purpose.

Frameware accordingly filed an application before the Zoning Board for the use variance on June 1, 2000. The Zoning Board held hearings on August 10, 2000 and September 14, 2000. Testimony included evidence of the proposed use, and the fact that the property had been vacant since 1992.

On or about September 5, 2000, Plaintiff adopted a Resolution requesting that the Planning Board conduct a preliminary investigation to determine whether a certain area of Bloomfield Township including the subject property, qualified as an area of redevelopment in accordance with the Local Redevelopment and Housing Law (hereinafter "LRHL"), N.J.S.A. 40A: 12A-1, et. seq. Pursuant to the Council's resolution, a Redevelopment Area Study (hereinafter "Study") was prepared for the Planning Board by Heyer, Gruel & Associates, PA, (hereinafter "Heyer Gruel") dated November 2000.

The Zoning Board approved Frameware's application for a use variance on September 14, 2000. It also determined that the advice given by the Zoning Official to the effect that a use variance was required was erroneous. It directed the Zoning Official to issue permits and a Certificate of Occupancy. On October 12, 2000, the Zoning Board took actions to rescind the approval on the basis that it had no jurisdiction to take the prior action and elected to refer the applicant back to the Planning Board. Defendant appealed the rescission to the Law Division and the Zoning Board was reversed on June 20, 2001. Frameware, however, terminated the sales contract during the interim, due to the delay.

At all relevant times, the same attorney represented Plaintiff, the Zoning Board and the Planning Board. Steven Martino, Esq. was counsel to the Planning Board when it advised the applicant to apply to the Zoning Board, to the Zoning Board when it held hearings and determined to grant a variance although it deemed the application unnecessary, and to the Zoning Board when it reversed that decision, citing an alleged lack of jurisdiction to hear and decide the application. He also represented the Zoning Board on the appeal, wherein the reason for the reversal was that the Board had been erroneously advised by its counsel.

On November 16, 2000 and November 22, 2000, in accordance with Section 6 of the LRHL, the Planning Board published notice of a public hearing to be held on December 5, 2000. On December 5, 2000, the Planning Board held a hearing to determine whether the delineated study area qualified as a redevelopment area pursuant to LRHL. Mr. Martino presided over the redevelopment hearing, in his capacity as counsel to the Planning Board. In addition, the Township Council retained Brian Chewcaskie, Esq., who guided the Planning Board members through the steps of redevelopment. On December 18, 2000, the Council adopted a resolution agreeing with the findings of the Planning Board and declared that the area is "an area in need of redevelopment" pursuant to LRHL. Heyer Gruel and the Township continued to work on the Redevelopment Plan consistent with the Study. A draft of the Redevelopment Plan was completed in January 2002. Heyer Gruel and the Township forwarded a draft to the Planning Board for its review and recommendations. On September 30, 2003, at a public hearing, the Planning Board approved the Redevelopment Plan. Following the Planning Board's action, on October 7, 2003, the Township adopted Ordinance No. 03-34, the Redevelopment Plan.

The Defendant challenges the Plaintiff's underlying basis for this condemnation. The Defendant argues that the taking is for private and not public purpose in violation of the U.S. Const., amend. V and N. J. Const., article 1, §20. This argument is without merit. The New Jersey Supreme Court held that a primary purpose of the above provision is to "enable certain private corporations affected with public interest to obtain private property where this is necessary to further the general welfare." American Tel. & Tel. Co. of New Jersey v. Ranzenhofer, 128 N.J.Super. 238, 244 (App. Div.1974).

> In Wilson v. Long Branch 27 N.J. 360, 376 (1958), the court held:
> . . . . This permissive authorization is expressly sanctioned by our 1947 Constitution, Art. VIII, Sec. III, par. 1. As has been indicated, the ultimate taking of the land is clearly for a public use, i.e., elimination of the blight and redevelopment of the area for the welfare of the community as a whole (citations omitted). The acquisition is not for the use of a private corporation (if one is engaged); rather, such corporation is used to accomplish the public purpose (citation omitted). The private corporation, by its contract to redevelop, represents the means as distinguished from the end itself. And the possibility that some profit may eventuate therefrom does not render the means unlawful (citations omitted).

See also Kelo v. City of New London, ___U.S.___, 125 S.Ct. 2655, ___ L.Ed. 3d ___ (2005). Accordingly, the Plaintiff is authorized to condemn property for private development as long as the development serves a public purpose. Eliminating blight is such a purpose.

Defendant argues that the Plaintiff failed to establish evidence to support the determination that this property was in need of redevelopment. Furthermore, the Defendant contends that the basis giving rise to the determination was formed from improper actions and self-serving conduct.

Defendant argues that the Study is not in accordance with N.J.S.A 40A:12A-5(d) and (e) which states:

> A delineated area may be determined to be in need of redevelopment if, after investigation, notice and hearing . . . the governing body of the municipality by resolution concludes that within the delineated area any of the following conditions is found:
>
> . . . 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. (Emphasis added).

The Study described the subject property (in some points in conjunction with other lots) as follows:

> Block 220
> *General Description*

. . . Block 220 currently contains...a vacant industrial building/warehouse... The lots have an irregular layout and vary greatly in size, shape and bulk dimensions.

Redevelopment Criteria

Block 220 qualifies for designation as an "area in need of redevelopment" under criteria d and e of the LRHL. The industrial building/warehouse on lot 35 . . . have been vacant for a period of several years and are boarded up. They are in poor condition and show signs of external deterioration on the facades. The building on lot 35 has limited potential for continued industrial use, as evidenced by its long-term vacancy and lack of high ceilings which are a prerequisite for modern storage and distribution facilities. The lot itself is constrained by its flag lot layout, which makes it isolated and forces truck traffic to enter and exit through the B-2 zone and in close proximity to houses on Washington Street. The lots exhibit faulty arrangement due to their irregular shape, inconsistent setbacks and uncoordinated building location. ...The presence of vacant buildings, faulty lot arrangement and inconsistent setbacks results in the underutilization of property in Block 220. The condition is exacerbated by the existence of diverse and fragmented property ownership, which hinders efforts to upgrade properties, modernize structures and make streetscape improvements.

. . . This lot contains a one-story masonry industrial/warehouse building formerly used by International Playthings, Inc. The building has been vacant for a period of several years and is constrained by its isolated location and limited access through the B-2 zone. The property is part of an isolated flag-shaped tract with limited frontage on a public street which impedes truck access necessary for industrial activity. This forces all trucks to enter and exit through the B-2 zone to Washington Street, which contains residence on the north side. The property also suffers from a lack of maintenance and contains overgrown vegetation and broken payment. (Redevelopment Study at 12-14)

Defendant contends that the Study has certain flaws, because it does not support a finding that the condition of the subject property is detrimental to the public health, safety and welfare within the meaning of the statute.

This finding is necessary in order to sustain Plaintiff's condemnation. The actions of the municipality in a condemnation proceeding are presumed to be valid. Levin v. Township Comm. of Twp. Of Bridgewater, 57 N.J. 506, 537-539 (1971), Forbes v. Board of Trustees of South Orange Village, 312 N.J. Super. 519, 532 (App. Div.1998), certif. denied 156 N.J. 411 (1998), and Concerned Citizens of Princeton, Inc. v. Mayor and Council of the Borough of Princeton, 370 N.J. Super. 429, 452-453 (App. Div. 2004). Nonetheless, the municipality must act upon the prerequisite facts and findings in order for its actions to be upheld.

In order to make a determination that a property is detrimental to the public health, safety and welfare within the meaning of the statute, there must be something more than a mere finding that it meets the description in N.J.S.A 40A:12A-5(d) or is underutilized as required by N.J.S.A 40A:12A-5(e). There must be substantial evidence that the condition noted "... is detrimental to the safety, health morals or welfare of the community." Spruce Manor v. Borough of Bellmawr, 315 N.J. Super. 286, 294 (Law Div. 1998). The position taken by Plaintiff that proof of any enumerated condition also automatically constitutes proof of a detriment is not supported by case law.

The record in this case is devoid of any finding that the property is detrimental to the public health, safety or welfare. In essence the municipality took the brief description of the property (which arguably was underutilized, vacant and externally neglected as a result of the municipalities' own actions – see supra), and concluded without any further analysis that this condition equated to a detriment to the public health, safety and welfare. Cf. Kimberline v. Planning Board of City of Camden, 73 N.J. Super. 80 (App. Div. 1962) (municipality acted upon facts that 79% of dwellings had been inspected and detailed reports showed deficiencies); Stahl v. Planning Board of Township of East Brunswick, 173 N.J. Super. 419 (App. Div. 1979), certif. denied 84 N.J. 462 (1980) (extensive records before municipality supporting facts that 67% of dwellings lacked heat); and Hirth v. City of Hoboken, 337 N.J. Super. 149 (App. Div. 2001) (facts demonstrated that 75% of the undeveloped land was unused or underused, vacancies had been present for more than 10 years, assessed land valuations had eroded 26% in seven years, and jobs had declined precipitously in the area).

No analysis is present in this case. The issue was not addressed in the Study, and was not addressed in testimony before the Planning Board. In the absence of any substantial evidence that the condition of the property was detrimental, Plaintiff argues that the property could have been properly condemned as part of the larger development scheme, even if it were itself viable. That may be so, but that theory was not the articulated basis for Plaintiff's actions here. The record made before it in the quasi-judicial action must support the actions taken by the Plaintiff. See Hirth v. Hoboken, 337 N.J. Super. 149, 166 (App. Div. 2001).

The only possible bases articulated for declaring this property in need of development were its irregular lot/restricted access, low ceilings, vacancy, and external deterioration. The irregular lot was noted in the survey, but other than the fact of its slightly off-rectangular dimensions (referred to as "flag-shaped"), nothing about the shape is described as noteworthy or negative. The lack of high ceilings appears to disqualify the property from a use that was never contemplated. The limited access noted at the time of the survey was a result of the Plaintiff's reversal of its decision to grant a variance, which was subsequently reversed. The vacancy was in large part if not wholly attributable to the same action, and at oral argument counsel for Plaintiff conceded that the exterior was probably neglected as a direct result of the property being unoccupied. Thus, none of the criteria has been connected to health, safety or welfare, and several are of the Plaintiff's own making. Therefore the Plaintiff's action cannot be sustained at this juncture and the application to dismiss or in the alternative hold a hearing must be addressed.

The Defendant argues that the conditions complained of as being the basis for the need to redevelop Defendant's property were improperly created by Plaintiff's actions and cannot form the basis for the taking. The Defendant argues that the Redevelopment Study's conclusion that the property's vacancy demonstrates its need for redevelopment is improper because of the Plaintiff's behavior in denying Frameware's Certificate of Occupancy. Plaintiff argues that the Defendant must be collaterally estopped from challenging the Plaintiff's underlying basis for this condemnation because the challenges have been already adjudicated. This claim is rejected.

The partial summary judgment by Judge Coleman does not preclude Defendant's defenses by either collateral estoppel or res judicata. In Preze v. Rent-a-Center, 375 N.J. Super. 63, 76 (App.Div.

2005), the court provided the prerequisites necessary to apply the bar of collateral estoppel, which included:

> (2) There was a full and fair opportunity to litigate the issue in the prior proceeding; (3) A final judgment *on the merits* was issued in the prior proceeding. (Emphasis added)

The summary judgment was solely based on the fact that the action in lieu of a prerogative writ was filed beyond the 45-day limitation of actions set forth in N.J.S.A 40A:12A-6(d) and R. 4:69, and not on substantive grounds. Accordingly, I find that the Defendant is not collaterally estopped from raising its defenses because the Plaintiff failed to establish the elements.

Similarly, one element of res judicata is that "the judgment in the prior action must be valid, final, and on the merits." Watkins v. Resorts International Hotel and Casino, 124 N.J. 412-13, (1991). Therefore, for the same reason, res judicata does not apply.

It should be noted that on July 20, 2005, during oral argument on a consolidated case before Judge Coleman, even counsel for the Plaintiff argued to the court the property owners would have an opportunity to raise the same issues in any condemnation proceeding before this Court.

The Defendant argues that the attorneys' conflicts of interest in dual representation of both the Planning Board and the Township have tainted the determination that the subject property is in need of redevelopment. Clearly, the attorneys should not have represented both public entities at the same time. Such representation is expressly barred by statute. N.J.S.A. 40:55D-24. In addition, there are numerous opinions criticizing the same conduct.

> A municipal family frequently includes a municipal attorney, who serves as counsel to the governing body; . . . an attorney for the board of adjustment; and an attorney for the planning board. The avoidance of the appearance of impropriety in holding more than one of those positions has been a matter of continuing concern to this Court. In re Opinion 452 of the Advisory Committee on Professional Ethics, 87 N.J. 45, 48 (1981).

The concern is founded in the principle that attorneys who represent public bodies must be scrupulous in giving unbiased advice. In Opinion No. 67, 88 N.J.L.J. 81 (1965), Opinion No. 117, 90 N.J.L.J. 745 (1967) it was made plain that a municipal attorney cannot represent any board or agency in the same town when a possibility of conflict might arise. Specifically, a municipal attorney cannot also represent a planning board because the two bodies may have different views of the same subject. Similarly, an attorney may not accept a position as counsel to a municipal planning board when a member of his firm is the attorney for the municipality. Opinion No. 149, 92 N.J.L.J. 185 (1969). A municipal attorney cannot serve as counsel to the planning board to advise it in preparation for a master plan, because the advice "may vary depending on the policy and approach of the agency and the governing body because of the differences in their respective responsibilities and functions." Opinion No. 117, 90 N.J.L.J. 745 (1967). An attorney for a municipal planning board may not act as counsel to the same town's zoning board, since "[E]ach agency is referring matters to the other and where the likelihood of discord is present, there would be a conflict of interest if the same attorney were to advise both boards on a matter wherein they differ." Opinion No. 127, 91 N.J.L.J. 262 (1968) and Opinion No. 164, 92 N.J.L.J. 831 (1969) referring to an attorney seeking to represent both the Planning Board and a Zoning Board stating "Accordingly, it is our opinion that the potential of conflict between the two boards is so inherent in their different duties, that an attorney should not undertake to represent both boards in the same municipality."

The entire statutory scheme contemplates independence and the possibility of disagreement between and among the public entities, in order to have each examine the issues from its own perspective. Only in that way can the entire process be fair to the public and to the condemnee. "The power of condemnation being in derogation of private property rights, it is required to be strictly construed and all statutory prerequisites must be established to sustain its exercise." New Jersey Highway Auth. v. Currie, 35 N.J. Super. 525, 540, 114 A.2d 587 (App.Div. 1955). In fact, courts should carefully watch condemnation proceedings because there "may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause. Kelo v. City of New London, __ U.S. __, __ 125 S.Ct. 2655, 2699, __ L. Ed. 3d __ , __ (2005).

Clearly, a conflict existed in the dual representation. Plaintiff urges that the standard should be actual taint, and argues that an examination of the record of

the public meeting of the Planning Board in May 2000 reveals that there was no improper conduct. Plaintiff relies on the facts that the planner and author of the Study provided the testimony, and the lawyers made no statements on the record.

The chronology and the facts however give rise to an appearance of conflict and impropriety that cannot be sanctioned. The Zoning Official, whose Board was represented and advised during the relevant time period by Mr. Martino, issued contradictory advice to Frameware, first stating that the Zoning Board, and not the Planning Board, had jurisdiction over the type of application being made. The Board then took jurisdiction over the application, held hearings and rendered a decision, although noting that the application should have gone to the Planning Board. Ultimately, the Zoning Board rescinded its decision upon the advice of Mr. Martino, declaring that it did not have jurisdiction. In between the two hearing dates before the Zoning Board, the Plaintiff, while represented by the same attorney, passed a resolution to request the Planning Board, also advised by the same attorney, to investigate whether the same property was subject to Redevelopment. (The Council and Planning Board also retained another attorney to advise them both during the redevelopment process.)

While the Study was being prepared at the request of the Planning Board, the Zoning Board rescinded its prior approval of the use variance, which had the result of leaving the property vacant and by logical extension, neglected, and with a limited access. These very conditions appear as a putative basis for redevelopment in the Study.

While the Study was being prepared, Mr. Martino represented the Zoning Board on appeal, taking the position that the approvals issued by the Zoning Board should be rescinded and the applicant sent back to the Planning Board, essentially to restart the process. This position clearly was opposite to the direction originally given to the applicant by the Zoning Official. The applicant received contradictory direction from two boards, both represented by the same attorney. The diverse positions taken caused a delay in the completion of the application process to the detriment of the owner and gave rise to the very conditions cited in the Study, and relied on by the Boards. The tortuous and complex path this process took and the interconnected relationships lay bare the very dangers in having municipal boards charged with different and independent functions operate under the same attorney.

Based on the above ruling it is unnecessary to address Defendant's request for an evidentiary hearing. It is also unnecessary to address Defendant's request that all actions in furtherance of Plaintiff's redevelopment should be stayed pending final resolution of its challenge to the redevelopment and condemnation.

Accordingly, the Complaint is dismissed. An Order is attached. Although the proposed Order requested a dismissal with prejudice, there is no basis stated in the brief to support a determination that the dismissal should be with prejudice, so that phrase has been stricken. In addition no legal argument was made by either side about the applicability of N.J.S.A. 20:3-26(b) and therefore that provision is stricken. Counsel are to pick up any exhibits within two weeks.

Very truly yours,

Patricia K. Costello

PATRICIA K. COSTELLO, A.J.S.C.

PKC:ksd
Cc: File