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Park Steel & Iron Company, Plaintiff, vs. Borough of Neptune City, Defendant.	SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY LAW DIVISION DOCKET NUMBER: MON-L-3852-05 OPINION
65 Steiner Avenue, L.L.C, Plaintiff, vs. Borough of Neptune City, Defendant.	DOCKET NUMBER: MON-L-4082-05

Argued: April 3, 2008
Decided: May 7, 2008

James P. Rhatican, Esq. appearing on behalf of the plaintiff, Park Steel & Iron Company (Connell Foley LLP; Mr. Rhatican and Meghan B. Barrett, Esq. on the brief)

John H. Buonocore, Jr., Esq. appearing on behalf of the plaintiff, 65 Steiner Avenue, L.L.C. (McKirdy & Riskin, P.A.; Mr. Buonocore and Joseph W. Grather, Esq. on the brief)

Paul V. Fernicola, Esq. appearing on behalf of the defendant (Bowe & Fernicola, LLC; Mr. Fernicola, of counsel and Robert E. Moore, Esq. on the brief)

LAWSON, A.J.S.C.

This matter comes before the court as an action in Lieu of Prerogative Writs wherein Plaintiffs, Park Steel & Iron Company and 65 Steiner Avenue, L.L.C. (hereinafter, "Plaintiffs"), are challenging the determination of the Borough of Neptune City (hereinafter, "Defendant") which designated their properties as being within an area in need of redevelopment pursuant to N.J.S.A. 40A:12A-1 et. seq.

This court has reviewed the trial briefs, engaged in colloquy with counsel and reserved decision. The court holds that the area should not be designated as in need of redevelopment in that the Borough has not met its burden pursuant to the statute. The Court now enters the following findings of facts and conclusion of law pursuant to R. 1:7-4.

I. STATEMENT OF FACTS

By Resolution 2002-126 adopted August 12, 2002, the governing body of the Borough of Neptune City directed the Land Use Board to conduct an investigation as to whether an area of the Borough was an "area in need of redevelopment" pursuant to the criteria of Section 5 of the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 to -49 (LRHL). The Study Area measured approximately 17 acres and contains a total of 35 properties, which consists of the

following properties: Block 8, Lots 1-8, Block 9, Lots 1,2,3,11,12, and 13; Block 10, Lot 1; Block 11, Lots 1, 3.01, 5, 6, 13, and 14; Block 12, Lots 6, 10, 14, and 28; Block 13, Lots 1,2, and 5; Block 14, Lot 1; Block 15, Lot 1.01; Block 16, Lots 2 and 3; Block 17, Lot 5.01; and Block 18, Lot 1 of the Official Tax map for the Borough of Neptune City. The "Study Area" was an "area in need of redevelopment" pursuant to the criteria of the redevelopment laws outlined in N.J.S.A. 40A:12A-5.

The Study Area is bounded by Memorial Drive on the east; Evergreen Avenue to the north; Holly Avenue to the south-east; McClelland Place to the south-west; and intersected by Steiner Avenue from north to south. Plaintiff 65 Steiner Avenue, LLC is the owner of property located at Block 14, Lot 1 and consists of 1.87 acres. The property is an apartment complex with thirty-six (36) individual apartments constructed in the late 1960s. Plaintiff Park Steel & Iron Company is the owner of property located on Block 8, Lots 1,3, and 7 on the Borough's Official Tax Map. The business consists of three (3) buildings which serve as a fabrication plant, office building and storage building.

The Park Steel Property is improved with a light industrial facility. This is in keeping with the local

ordinance for the section of the Borough where the property is located which is zoned to permit industrial uses such as Park Steel's operations. The Borough's 1999 Master Plan references the industrial area in which the Property is located as "an important part of the Land Use of the Borough of Neptune City." Additionally, the Borough's Master Plan contemplates the continued industrial use of the area within which the Park Steel Property is located.

The Park Steel facility generates substantial revenue and they regularly pay real property taxes to the Borough. The property has never received any noise complaints, and no police activity has been reported in connection with the property. The facility has not had any accidents or reported safety hazards. Moreover, the property has not received any safety, health code, building code or zoning violation from the Borough prior to Park Steel's objection at one of the hearings. Subsequently, the property was issued a citation for uncut grass.

On or about August 2, 2004, the Land Use Board commenced a series of hearings which continued on the following dates: August 16, 2005; November 9, 2004; November 29, 2004; December 20, 2004; January 31, 2005; March 21, 2005; April 18, 2005; and May 23, 2005. At the initial August 2, 2004 hearing, the Land Use Board heard a

presentation by David Critelli, a real estate consultant who is not a licensed professional planner. (1T6, 15-18). Mr. Critelli explained the Borough's vision for the area was to redevelop the area as a transit village. (1T88, 5). He further stated that the Redevelopment area "is blighted because it looks rundown." (1T42:5-8).

At the conclusion of Mr. Critelli's testimony, the Land Use Board was prepared to adopt a resolution recommending that the Study Area be deemed an area in need of redevelopment without the benefit of a professional planner. One Board member, without the benefit of advice from a professional planner, stated that "[t]hat whole area is in need of redevelopment." (1T39:18-19). Another Board member also divulged the redevelopment investigation was to "entice" a private redeveloper with a large area for redevelopment. Another Board Member mentioned, "so, we want the best developer, and we will go out and get the best developer...But to entice them we have to offer a big parcel." (1T40:4-14).

After the initial hearing, numerous property owners in the area objected to this blight determination without the proper procedure. Therefore, the Land Use Board retained a professional planner to investigate the Study Area. A redevelopment investigation report entitled "Steiner Avenue

Redevelopment Area Assessment" (hereinafter the "Study Report") dated October 2004, was prepared by Victor Furmanec, P.P. and Andrew Janiw, P.P. of Beacon Planning and Consulting Services. The Study report formed the basis for the designation challenged herein. On November 9, 2004, the co-authors of the Study Report, Andrew Janiw, P.P. and Victor Furmance, P.P. (hereinafter "Borough Planners") appeared before the Land Use Board and presented the findings of their investigation. The Borough Planners' testimony indicated that their investigation consisted of a "walk-through" of the Study Area. The Borough Planners made limited inquiry of property owners or operators of businesses concerning the nature of their operations. In addition, a review of the hearing transcript and the Study Report revealed that Borough Planners conducted no interior building inspections. Furthermore, the Borough Planners did none of the following: did not study occupancy levels, employment, code violation or other routine redevelopment considerations; did not research the sale or leasing activity in the area; and did not present any evidence that there was a decrease in property value in the area or in the adjacent areas.

The Borough Planners' report characterized the Park Steel facility as one of the properties in need of

redevelopment under "5a","5e", and "5h" in the LRHL. This inclusion was based on the fact that the property had an obsolescent design and the statement that the property has been "minimally maintained, and its exterior exhibits substantial areas of rust and soot." The report also cited additional factors to support the claim that Park Steel's property was in need of redevelopment. These factors included the statement that the Property does not comply with applicable zoning standards, and that generally, such a designation is "consistent with smart growth planning principles." However, the facility has always been a permitted use in the Industrial Zone in keeping with the local zoning ordinance and the Master Plan. Despite, statements to the contrary in the Study Report, the Master Plan recommends that the area continue as an industrial area: "[c]onsideration was given to designating the area for Light Industrial uses. This could permit a variety of uses which would include commercial bus garages, construction companies, hardware and wholesale supply facilities, along with light manufacturing uses."

Scott Pilling, the owner of Park Steel, testified before the Land Use Board that the Park Steel design is not obsolete in the industry, but rather consistent with other steel fabrication centers across the country. Park Steel

based this assertion on photographs of other facilities through the country; however, Mr. Pilling had not visited any of these sites. Rather, the photographs were downloaded off the internet from the respective companies' websites.

In the Study Report, the Park Steel facility is described as having been "minimally maintained," however, Park Steel had recently put a new roof on the facility and constructed a new parking lot. Also, the Study Report stated there are two principal buildings on site instead of the single principal building permitted under the zoning ordinance. Park Steel maintains that while there are three buildings on the site, only one, the steel fabrication building, functions as a principal use. The other two buildings: a storage building and a small office function as accessory buildings permitted under the zoning ordinance.

In addition to Plaintiffs, other property owners in the area objected at the Land Use Board's hearings. However, on June 16, 2005, the Land Use Board adopted a Resolution recommending to the Borough Council that the Study Area, including the Park Steel Property and 65 Steiner Avenue, L.L.C., be designated an area in need of redevelopment. Counsel for Park Steel submitted a letter

to the Borough Attorney on July 25, 2005, reiterating its objections to the proposed redevelopment designation and directing the Borough Attorney's attention to perceived substantive defects in the Land Use Board's planners' testimony. Nevertheless, on August 8, 2005, in reliance on the Land Use Board's recommendation, the Borough Council adopted a resolution officially designating the Study Area as an area in need of redevelopment.

The "Steiner Avenue Redevelopment Plan" (hereinafter "Redevelopment Plan") was adopted by the Borough on December 16, 2006 by way of Ordinance 2006-14. Park Steel filed an action challenging the Borough's determination. Subsequent to the filing of the Complaint, Omega Service Maintenance Corporation ("Omega"), located at Block 8, Lot 2 in the Redevelopment Area, and adjacent to the Park Steel Property instituted a similar suit challenging the redevelopment designation. The Borough settled the Omega suit in a manner that allowed Omega to expand its existing light industrial facility on property adjacent to Park Steel. TSS, Raymond and Linda Schmalzigan (owners of Ray's Service Center), and 65 Steiner Avenue, L.L.C., all of whom owned properties located within the Redevelopment area, also filed suits challenging the redevelopment designation. All three suits were consolidated into the Park Steel

docket. At some point, TSS and Ray's Service Center have, like Omega, entered into settlement agreements with the Borough. Plaintiff Park Steel believes the terms of those settlement agreements mirror Omega's,; therefore, the owners have been permitted to continue and/or expand their current light industrial uses of their properties, or have been told that they can relocate within the redevelopment area.

Plaintiff 65 Steiner Avenue, LLC also has not entered into a settlement agreement and is bringing an identical action challenging the designation of its property as well as the designation of the entire area. The subject property is identified on the tax map as Block 14 Lot 1 consisting of 1.87 acres. The property is improved with a multi-family garden apartment complex which contains thirty-six individual apartments. Plaintiff's ownership of the property began in 1986 and it has been a source of residence for people of lower to middle income. Plaintiffs have filed this action in lieu of prerogative writs challenging the Borough of Neptune City's determination as arbitrary, capricious, or unreasonable.

II. APPLICABLE LAW

A. Redevelopment Law

For redevelopment purposes, the applicable law is the Local Redevelopment and Housing Law, N.J.S.A. 40A: 12A-1 to -49(the Redevelopment Law). The Redevelopment Law describes a municipality's powers to exercise its redevelopment and rehabilitation functions. N.J.S.A. 40A:12A-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.

The Redevelopment Law addresses the responsibilities of the governing body to the planning board. N.J.S.A. 40A:12A-7a, e, f. The planning board's report must identify inconsistencies with the master plan, and include recommendations as to those inconsistencies, as well as any other matters as the board deems appropriate. The governing body is not bound by the planning board's recommendations. It is the governing body's obligation to "review the report of the planning board and . . . approve or disapprove or change any recommendation."

"The municipal power to proceed under the redevelopment statute . . . is imbedded in our constitution." Tri-State Ship Repair & Dry Dock Co. v

City of Perth Amboy, 349 N.J. Super. 418,424 (App. Div. 2002) (citing N.J. Const. Art. VIII, § 3, ¶ 1), certif. denied, 174 N.J. 189 (2002). The viability of a property does not necessarily bar it from being included within a redevelopment area. Id. In Wilson v. City of Long Branch, 27 N.J. 360, 379, certif. denied, 358 U.S. 873, 79 S.Ct. 113, 3 L.Ed. 2d 104 (1958), our Supreme Court held that a redevelopment plan is not invalid for including homes or buildings that are substandard. The Court went on to say, property may be condemned and transferred for redevelopment to a private entity so long as the acquisition is deemed to be for a public purpose; that the private entity stands to profit does not invalidate the acquisition. Id. at 376.

B. Standard of review.

When a court reviews a municipality's designation of an area in need of redevelopment, there is a presumption of validity to the city's designation that applies. Levin v. Township Comm. of Bridgewater, 57 N.J. 506, 537, appeal dismissed, 404 U.S. 803, 92 S.Ct. 58, 30 L.Ed.2d 35 (1971); Concerned Citizens of Princeton, Inc. v. Mayor and Council of Princeton, Inc., 370 N.J. Super. 429, 452-53 (App. Div.), certif.

denied, 182 N.J. 139 (2004). The presumption of validity also applies to the adoption of a redevelopment plan, which "must be shown to be arbitrary or capricious, contrary to law or unconstitutional rather than merely 'debatable'." Downtown Residents for Sane Dev. V. City of Hoboken, 242 N.J. Super. 329, 332 (App Div. 1990).

In an action challenging a municipal redevelopment ordinance, the municipality will prevail by establishing "some reasonable basis for its legislative action." Id. The Appellate Division in ERETC, L.L.C. v. City of Perth Amboy, 381 N.J. Super. 268 (App. Div. 2005) held that it is not for a court to second-guess a local government's redevelopment decision. The Court went on to hold that it would sustain a town's decision so long as the decision is supported by substantial evidence. Id.

This court will interfere with the decisions of local governing bodies in actions in Lieu of Prerogative Writs only if the actions of the governing body were arbitrary, capricious or unreasonable, or if it was violative of statutory guidelines.

However, in Gallethin Realty Development, Inc. v. Borough of Paulsboro, 191 N.J. 344, 373 (2007), the Supreme

Court outlined a standard to be applied to redevelopment designation issues:

> Although issues of law are subject to *de novo* review, Hodges v. Sasil Corp., 189 N.J. at 210, 220-21 (2007), municipal redevelopment designations are entitled to deference provided that they are supported by substantial evidence on the record, N.J.S.A. 40A:12A-6(b)(5). The substantial evidence standard is not met if a municipality's decision is supported by only the net opinion of an expert. ERETC v. City of Perth Amboy, 381 N.J. Super. 268, 277-81 (App. Div. 2005)(overturning municipal action as based on insufficient evidence).
>
> In general, a municipality must establish a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met. Because a redevelopment designation carries serious implications for property owners, the net opinion of an expert is simply too slender a reed on which to rest that determination. Id. at 373.

C. The Designation

The purpose of the LRHL is to address:

> [C]onditions of deterioration in housing, commercial and industrial installations, public services and facilities and other physical components and supports of community life, and improper, or lack of proper, development which result from forces which are amendable to correction and amelioration by concerted effort of responsible public bodies, and without this public effort are not likely to be corrected or ameliorated by private effort. N.J.S.A. 40A:12A-2

Additionally, there must be proof that statutory blight conditions "predominate" within a Study Area.

Forbes v. Bd. of Tr. Of the Township of South Orange Village, 312 N.J. Super. 519 (App. Div. 1998)("Consequently, an area in which such properties predominated and which established its general character was eligible for the blight declaration.") Plaintiffs assert that there is no evidence in this record that blight conditions exist within the Study Area, much less "predominated" within the Study Area. However, Defendant maintains that the Study Report upholds a finding that the Study Area is in need of redevelopment.

Furthermore, Defendant Borough notes that neither the Park Steel Property nor 65 Steiner Avenue property is included in the Borough of Neptune City redevelopment plan and will not be taken via eminent domain. Nevertheless, the Plaintiffs have brought this action to ensure that their properties will not be part of the area in need of redevelopment. The Defendant avers that the Park Steel Property satisfied the following criteria N.J.S.A. 40A:12A-5 "a," "e," and "h." Additionally, the Study Report determined that the 65 Steiner Ave. Garden Apartments property satisfied the criteria of "d," "e," and "h."

The LRHL provides the following blight criteria; at least one of which must exist to support a finding of blight:

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.

b. The discontinuance of the use of buildings previously used for commercial, manufacturing, or industrial purposes; the abandonment of such buildings; or the same being allowed to fall into so great a state of disrepair as to be untenantable.

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 adoption of the resolution, and that by reason of its location remoteness, lack of means of access to developed sections or portions of the municipality, or 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, delirious land use or obsolete layout, or any combination or 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.

f. Areas, in excess of five contiguous acres, whereon buildings or improvements have been destroyed, consumed by fire, demolished or altered by the action of storm, fire, cyclone,

> tornado, earthquake or other casualty in such a way that the aggregate assessed value of the area has been materially depreciated.
> ...
>
> h. The designation of the delineated area is consistent with smart growth planning principles adopted pursuant to law or regulation. N.J.S.A. 40A:12A-5.

D. The Park Steel Property under criteria "a".

For a municipality to properly blight a property under criteria "a", substantial evidence must exist to support not only a finding that the buildings on the property are "substandard, unsafe, dilapidated or obsolescent," but those conditions must be "conductive to unwholesome living or working conditions." N.J.S.A. 40A:12A-5(a); see Spruce Manor Enterprises v. Borough of Bellmawr, 315 N.J. Super. 286, 297 (Law Div. 1998). The record demonstrates unequivocally that Park Steel Property is not "substandard, unsafe, dilapidated or obsolescent" and moreover, it is in no way "conductive to unwholesome living or working conditions."

The Defendant based their designation under criteria "a" upon their Study Report. The Report describes the exterior appearance of the Park Steel building and states that the design of the facility is obsolete. The Park Steel facility was not compared to others of its kind.

Further, the Report goes on to assert that the property has the appearance of being minimally maintained, and that there is rust and soot on the exterior of the facility. No other justification is set forth in support of the criterion "a" designation, and nothing is offered to suggest that these cosmetic conditions are conducive to unwholesome living or working conditions.

Victor Furmanec, a professional planner employed with Beach Planning provided testimony to the Board. Mr. Furmanec explained that the Park Steel property qualified under "a" because the building was 'obsolete.'" Mr. Furmanec stated that it was obsolete because of the use of corrugated metal sheets for the siding and roofing. (4T 16:3-7).

In Spruce Manor Enterprises, supra, Judge Orlando explored the LRHL's meaning of obsolescence and noted that obsolescence is not depreciation or wear and tear. Rather, the court stated, "obsolescence is the process of falling into disuse and relates to the usefulness and public acceptance of a facility." Id. at 295. Obsolescence is the process of becoming obsolete. Obsolete is defined as "no longer in use or no longer useful," Webster's Ninth New Collegiate Dictionary, 816 (1987). The Court applied this definition to the property at issue in Spruce Manor, and

summarily rejected the Borough of Bellmawr's contention that the property was not blighted based on evidence, the building was inhabited, and meets current standards regarding habitability.

Here, the Park Steel facility is not properly characterized as obsolete. It is a viable functioning business; it has never fallen into disrepair or disuse, and provides a service to the community. Moreover, Plaintiff Park Steel avers that the design of the Park Steel facility with corrugated metal roofing and siding is typical for steel fabrication facilities. Additionally, the Property has been maintained and its owner spent $60,000 in repairs shortly before the Assessment. The property is not unsanitary or substandard, having never received a code violation in all its years of operation.[1] Likewise, the Board's planning consultants offered nothing to suggest that the property is dilapidated, obsolete, or lacking in light, air or space. The property continues to function as a successful, revenue-generating business and does not qualify for redevelopment under criteria "a" of the LRHL.

E. 65 Steiner Avenue, LLC property under Criteria "d"

[1] The Court does note that the property was given a citation for overgrown weeds the day after Park Steel first protested the investigation of its Property for redevelopment purposes.

The Study Report cites criteria "d" as a factor in determining that the Garden apartments owned by 65 Steiner, L.L.C. N.J.S.A. 40A:12A-5(d) states:

> 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.** (Emphasis Added).

Here, the Study Report based its determination on the amount of police calls originating out of the 65 Steiner Ave. L.L.C.'s property. Between January 1, 2003 and August 18, 2004, the Borough of Neptune City Police Department responded to 115 calls at the property, which resulted in 9 arrests. Most of the calls were related to disorderly behavior, domestic disputes, and miscellaneous complaints. As stated in the Study Report, "Arrests stemmed from domestic disputes, assault, narcotics and drugs, and stolen motor vehicles. The relatively high number of calls and arrests, as compared to other properties in the study area, indicates the property has a deleterious impact on the community." (*citing* Study Report at 31-32).

However, these calls were eventually moved from criteria "d" to criteria "e" at the December 20, 2004 meeting. Mr. Janiw, an author of the Study Report, stated:

> "[O]ur findings with regard to police calls and code enforcement activities in the property...really belonged in the discussion of the criterion "e" which is a utilization of property. Whereas, criteria D relates to the arrangement of improvements in the property." (5T9:9-15).

Therefore, the only items applied under criteria "d" were the lack of landscaping to screen off the parking area from adjacent streets or to provide residents with a recreation area.

Plaintiff 65 Steiner Ave., L.L.C. contends the lack of a landscape amenity is not a statutory element of criteria "d." The Study Report is absent any reference to the terms in the statute such as "dilapidated," "obsolete," "overcrowded," or that property suffered from a "lack of ventilation, light and sanitary facilities." Additionally, the Study Report did not assert the property was a "deleterious land use," had a "faulty arrangement or design," had "excessive land coverage," or "had an obsolete layout." Absent these necessary specific findings the subject property cannot be qualified for inclusion under this section. See LBK Assoc. LLC v. Borough of Lodi, Docket No. BER-L-8766-03 (Law Div. 2005) (unpublished

opinion)(overturning redevelopment designation where evidence of satisfaction of was no more than "vague criticism of conditions upon superficial observations," and failed to demonstrate violation of any code or standard and the record contained a "complete lack of detailed specific proofs as to why this property should be designated in need of redevelopment.")

F. The properties under criteria "e."

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

> A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

In order for a property to be blighted under criteria "e," the Borough must present substantial evidence that the area is blighted. In Gallethin, the Supreme Court stated "N.J.S.A. 40A:12A-5(e) applies only to areas that, as a whole, are stagnant and unproductive because of issues of title, diversity of ownership, or other similar conditions." Id. at 348 (emphasis added). A property cannot be properly blighted under criteria "e" solely for being "not fully productive." Id.

In Gallenthin, the Supreme Court had occasion to examine the application of criteria "e" by municipalities engaging in the redevelopment process. The Court revisited the history and intent of the Blighted Areas Clause of the New Jersey Constitution, and concluded that the Legislature intended N.J.S.A. 40A:12A-5(e) to "apply to areas that, as a whole, are stagnant and unproductive because of issues of title, diversity of ownership, or other conditions of the same kind." Id. at 371. The Supreme Court specifically noted that the phrase "other conditions" in N.J.S.A. 40A:12A-5(e) is not to be used as a "universal catch-all that refers to any eventuality. Rather, it refers to circumstances of the same or like piece as conditions of title or diverse ownership." Id. As such, any property being operated in a less than optimal manner is not automatically "blighted". Id. at 365. Indeed, "if such an all-encompassing definition of 'blight' were adopted, most property in the State would be eligible for redevelopment." Id.

Here, the Park Steel property does not fit into this interpretation of criteria "e." The facility may be a less optimal use of the property, but that is an opinion without a factual basis for which it can stand. The site is occupied by a viable business with functional active

facilities. The property does not posses any title issues, because it has been owned by the same family for the past one hundred years. Thus, it does not qualify under criteria "e."

Furthermore, the Borough Master Plan and local zoning ordinances reflect a use of the property consistent with that of Park Steel. The 1999 Master Plan specifically recognizes the industrial area in which the Park Steel facility is located as "an important part of the Land Use of the Borough." A new "Light Industrial Zone" contemplated in the 1999 Master Plan envisions uses such as Park Steel. Plaintiffs maintain that the Study Report statement that the Park Steel Property is non-compliant with zoning standards is clearly without any evidentiary basis and is contrary to the undisputed facts. Therefore, the Defendant's characterization of the Park Steel property under criteria "e" fails to satisfy the requirements explained in Gallenthin and is contrary to local zoning policy.

In addition to the voluminous police calls at 65 Steiner Ave. L.L.C.'s property, the Study Report also characterizes the property for a lack of proper utilization.

> The property at Block 14 Lot 1 is an example of a property that exhibits a lack of proper utilization, given the borough's current zoning standards. The property contains a 36-unit multifamily residence on a 1.87 acre lot, giving a residential density of about 19 dwelling units per acre. However, a minimum lot area of two acres is required, and the maximum permitted density is eight dwelling units per acre. (Study Report at 34).

The subject property is a pre-existing non-conforming use which is unrelated to the statutory criteria set forth in the redevelopment laws. Therefore, the Court finds that the evidence presented is not sufficient to satisfy criteria "e."

G. The properties under criteria "h"

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

> h. The designation of the delineated area is consistent with smart growth planning principles adopted pursuant to law or regulation. N.J.S.A. 40A:12A-5.

The Study Report makes a sweeping designation that all the properties in the Study Area qualify under criteria "h". This criterion speaks to 'smart growth' in the area. The Report does not speak to how such smart growth principles could be achieved in regards to the Park Steel Property, 65 Steiner Avenue, or any other property for that matter.

H. The Area as a Whole is Not Properly Designated as an Area in Need of Redevelopment

The Supreme Court made it clear in Gallenthin, supra, that when designating an area in need of redevelopment, "the municipality must establish a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met." Id. at 373.

The Study Report identifies six parcels, including the Park Steel Property, that allegedly satisfy criteria "a" of the LHRL. The other properties identified in the report include the Charline Motel, located at Block 12, Lot 10, and the Ice House Property, which the Study Report characterizes in its analysis as exhibiting obsolescence and dilapidation due to cosmetic appearance. In addition to the Park Steel facilities, another light industrial facility was also characterized in the Study Report for satisfying criteria "a," due to exterior building conditions. The Study Report then concludes that these properties are properly blighted under criteria "a" because they are "characterized by buildings that are substandard, unsafe, unsanitary, dilapidated or obsolete." (citing The Study Report at 26). These findings fail to set forth any evidence to support a proper finding under criteria "a", a

method of determination which was specifically rejected in Spruce Manor. Additionally, Plaintiffs aver that absent the cosmetic complaints, the Study Report offers no substantial evidence to explain an arbitrary designation of two active light industrial properties as obsolete and/or dilapidated. The Land Use Board and the Borough Council relied upon this -analysis for the redevelopment recommendation; therefore, the redevelopment designation is defective.

Criteria "b" of the LHRL permits a property to be deemed in need of redevelopment in a situation where a property, previously used for "commercial, manufacturing or industrial purposes: has been abandoned or "allowed to fall into such a great state of disrepair as to be untenantable." N.J.S.A. 40A:12A-5(b). In the Neptune City project, only the Ice House property satisfies criteria "b," due to the fact that it has been abandoned for approximately ten years. (Study Report at 27).

Criteria "c" of the LHRL permits land to be blighted that is owned by a municipality or other certain governmental agencies, or unimproved land vacant for a least ten years, that by reason of its "location, remoteness, lack of means of access...or topography...is not likely to be developed through the instrumentality of

private capital." N.J.S.A. 40A:12A-5(c). The Study Report classified two small parcels as satisfying criteria "c." While one of the parcels is vacant, the Report's designation of these two small parcels under criteria "c" is again made without specific findings, but rather general comments in the analysis. (Study Report at 29).

Criteria "d" of the LHRL allows a property to be blighted where it can be shown that due to "dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout," then the properties are "detrimental to the safety, health, moral or welfare of the community." N.J.S.A. 40A:12A-5(d). The Study Report designates nearly fifteen properties in the Study area as satisfying criteria "d." In HJB Associates v. Borough of Belmar, No. A-6510-05T5 (App. Div. July 11, 2007) (slip op. at 5), the Appellate Division reversed this Court and held a designation under criteria "d" is not proper unless it has been shown that the conditions listed in the first part of criteria "d" are "detrimental to the safety, health, morals or welfare of the community." As was the case with the redevelopment study in HJB Associates, the Study Report fails to put forth any proof to support a finding that the

conditions of the criteria "d" properties are "detrimental to the safety, health, morals, or welfare of the community." Instead, in its "findings", the Study Report simply restates the statutory criteria for "d" and deems it to be met. This is not a proper application of the LRHL.

In Gallethin, the Supreme Court explained the proper application of criteria "e," wherein it applies to areas that "as a whole, are stagnant and unproductive because of issues of title, diversity of ownership, or other conditions of the same kind." Id. at 371. As to criteria "e," the Study Report finds that virtually all of the properties fall into this category, without any mention of existing title or ownership issues on those Properties. (Study Report at 31-34). Such an overly broad and erroneous application of criteria "e" demonstrates bad faith in relying on that criteria. The only finding made with regard to these properties is that they "lack proper utilization." Id. at 34. As decided by the Supreme Court in Gallenthin, this is not the appropriate standard for proper blight under criteria "e" and this Court cannot uphold any redevelopment designations based on such an application.

The Study Report classifies every property in the area as in need of redevelopment under criteria "h," a criteria

which permits properties to be blighted if they are "consistent with smart growth planning principles adopted pursuant to law or regulation." N.J.S.A. 40A:12A-5 (h). The Study Report concludes that this area falls under criteria "h," but was unable to cite any specific findings or explanation. The Court is unable to review this determination without specific findings; rather, the Report states that the "entire study area qualifies for designation as an area in need of redevelopment under this criteria." (Study Report at 40). This statement gives the Court little insight into the basis for such a determination.

Defendant contends that there was sufficient evidence on the record to justify the decision made by the Board. In Levin, the New Jersey Supreme Court held that redevelopment laws "[a]re concerned with area and not with individual properties." Levin 57 N.J. 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 the absence of palpable abuse of discretion or bad faith. Id. (*citing*, Wilson v. Long Branch, 27 N.J. at 379).

Defendant also mentions in its brief that a "drive through the area shows that it is need of redevelopment." While the area may have aesthetic flaws, that in itself is not justification to make it an area in need of redevelopment. In ERETC v. Perth Amboy, supra, the Appellate Division overturned a designation of redevelopment because the municipality's decision was not supported by credible evidence. Id. at 279. In that case, the Study Report gave a recitation of the statutory criteria and the proposed redevelopment plan, but the report lacked analysis of the statutory criteria as it applied to each property. Id. The Court finds the ERETC, supra, case similar to the case at bar. Here, the Study Report relied on by the Defendant did not contain the analysis of each property considering substantial evidence. Rather the report relied on irrelevant statements such as truck operations that take place between 7:00 a.m. and 7:30 p.m. (Tr 4 At 121:19-23.) Clearly, the Study Report was flawed when it relied on such statements to make its recommendation. Thus, the Court cannot uphold the Borough's designation of an area in need of redevelopment.

The Borough is free to continue to explore the possibilities of redevelopment within its borders; however,

proper procedure must be followed for the Court to uphold such a designation.

III. CONCLUSION:

Based upon the aforementioned reasons, the decision of the Borough of Neptune City is reversed.

Mr. Rhatican is directed to submit a proposed Form of Order in accordance with this Opinion within ten (10) days.