44-2-0546

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6868-03T2
A-6930-03T2
A-7095-03T2
A-7126-03T2

TOWNSHIP OF NORTH BERGEN,

Plaintiff-Respondent,

v.

SPYLEN OF NORTH BERGEN, INC.,
1428 OF NORTH BERGEN, INC.,
LIN CELLULAR COMMUNICATIONS (NY)
LLC d/b/a CINGULAR WIRELESS,[1]
TONNELLE U.S.A., INC. t/a
TONNELLE WINE & LIQUORS and
PARSHAVNATH, INC.[2],

Defendants-Appellants,

and

SHIVA PROPERTIES,

Defendant-Respondent,

and

LASALLE NATIONAL BANK, ABC OF
NORTH BERGEN, INC., TONNELLE 74 LLC,
THE REAL ESTATE EQUITY COMPANY,
SHOPRITE OF NORTH BERGEN, INC.,

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[1] Formerly known as Cellular Telephone Company d/b/a AT&T Wireless.

[2] Defendant, Parshavnath, Inc., which operates a Dunkin' Donuts on the site filed an appeal, but withdrew its appeal prior to oral argument after reaching an agreement with the Township.

K-MART CORPORATION, Q.P. MORTGAGE CENTER, VARILEASE CORPORATION, SENTRY FINANCIAL CORPORATION, PATHMARK STORES, INC., MARSHALLS OF MA, INC., OMNIPOINT COMMUNICATIONS, INC., FRANCHISE MORTGAGE ACCEPTANCE CO., LLSGURPRETT SINGH t/a EL DORADO FURNITURE, DIGITAL TECHNOLOGIES, INC., COASTAL TELECOM CORPORATION and STATE OF NEW JERSEY,

Defendants.

Argued: March 16, 2005 Decided: JUN 13 2005

Before Judges Newman, Axelrad and Holston, Jr.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, L-6587-03.

Kevin J. Coakley argued the cause for appellants Spylen of North Bergen and 1428 of North Bergen, Inc. (Connell Foley, attorneys; Mr. Coakley of counsel and on the brief and James P. Rhatican, on the brief).

Thomas Olson argued the cause for appellant Tonnelle U.S.A., Inc. (McKirdy & Riskin, attorneys; Edward D. McKirdy, of counsel; Mr. Olson, on the brief).

Christopher John Stracco argued the cause for appellant Cingular Wireless (Pitney Hardin, attorneys; Mr. Stracco and Janet R. Bosi, on the brief).

Bryan Muhlstock argued the cause for respondent Township of North Bergen (Gittleman, Muhlstock & Chewcaskie, attorneys; Steven D. Muhlstock, on the brief).

John J. Curley argued the cause for respondent Shiva Properties.

PER CURIAM

These four consolidated appeals involve a condemnation action by the Township of North Bergen (Township). The condemnees are four tenants of a shopping center (defendants) owned by Shiva Properties (Shiva), which is not contesting the condemnation and has filed a brief in support of the Township's position. Defendants are Tonnelle U.S.A., Inc. t/a Tonnelle Wine & Liquors which operates a liquor store and subleases to a check cashing business on its premises; Spylen of North Bergen, Inc., which operates a Wendy's from a free standing building on the site; and Cellular Communications (NY) LLC d/b/a Cingular Wireless, f/n/a AT&T Wireless (Cingular), which maintains a cellular phone tower on a small utility building in a corner of the site. The properties and leasehold interests in question were condemned as part of a redevelopment project, pursuant to the Local Redevelopment and Housing Law (LRHL), N.J.S.A. 40A:12A-1 to -49. The site in question (the Shiva site) represents approximately one-sixth of the area designated for redevelopment by the Township in 1999. The remainder of the redevelopment area has been, or is being, developed for use by a Lowe's and a Target store. The Township seeks to complete the

project by condemning the properties on the Shiva site to make way for a Home Depot store. Defendants seek a reversal and dismissal of the condemnation action or, in the alternative, a remand for an evidentiary hearing.

On appeal, defendants contend that they were entitled to an evidentiary hearing; that there is not substantial evidence in the record to support the in need of redevelopment, or blight, declaration; that the blight declaration has grown "stale" as a result of changed circumstances, namely, construction of the Lowe's and Target stores; that the condemnation is not for a public purpose; and that the condemnation actions as to defendant Cingular conflicts with the Federal Telecommunications Act and should, therefore, be dismissed. We reject defendants' contentions and affirm.

I.

The site in dispute in these appeals, the Shiva property, is located in the southeast portion of Block 457A, lots 1-17, 27A 31B, 32 and 33, 34A and 35A. The site is approximately 10.58 acres comprising approximately 134,000 square feet and is located on the northwest corner of Tonnelle Avenue, between 74th and 76th streets. The southern portion of the Shiva site, comprising seventeen of the lots, contains a Dunkin' Donuts and a Wendy's. To its north is a 9.6 acre tract, encompassing six

of the lots, containing a shopping center occupied by a K-Mart, a Marshalls and a liquor store.

Tonnelle U.S.A., Inc. (Tonnelle) operates a liquor store on the property designated as 7401-7501 Tonnelle Avenue. Tonnelle has a subtenant which operates a check-cashing business within the leased premises. Tonnelle became a tenant in July 1999, and invested $150,000 in the business upon taking occupancy. Spylen of North Bergen, Inc. and 1428 of North Bergen, Inc. (Spylen) operate a Wendy's restaurant pursuant to a thirty-five year lease which commenced in 1980. Neither K-Mart nor Marshalls has filed an appeal.

South of the redevelopment area, at the corner of Tonnelle Avenue and 69th street, is a multiplex movie theater and a Pathmark supermarket. A mixture of commercial and industrial uses exist farther south along Tonnelle Avenue. North of the study area is the Tonnelle Plaza shopping center which contains a Shop-Rite supermarket, a McDonald's and an assortment of retail stores. Farther north along Tonnelle Avenue is a mixture of commercial and industrial uses. East of the study area is a mix of commercial and residential uses. West of the study area is mainly industrial uses and undeveloped land.

In late 1998 or early 1999, the Township learned of New Jersey Department of Transportation (NJDOT) plans to widen

Tonnelle Avenue. In light of that prospect, and given that the area in question contained various abandoned uses, the Township's governing body, its Board of Commissioners (Commissioners), adopted a resolution on March 24, 1999, authorizing the Township's Planning Board (Board) to determine whether the area should be studied as a possible area in need of redevelopment. The Board, in turn, authorized Burgis Associates, Inc. (Burgis) to undertake the study.

Burgis submitted a report to the Board, dated May 6, 1999, recommending that the study area be designated as an area in need of redevelopment. The report concluded:

> [T]he character of [the] study area is dominated by the vacant Evan Picone warehouse at the north end of the area, and the underutilized Crown, Cork & Seal building at the south end. These properties have extensive frontage on Tonnelle Avenue and occupy 35 percent of the land in the study area. The streetscape of these properties is unattractive and occupies a significant proportion of the area's Tonnelle Avenue frontage.
>
> The study area would benefit from a comprehensive redevelopment improving parking and circulation within the area. A coordinated approach to improving these properties is desirable and would facilitate a vast improvement along the Tonnelle Avenue corridor.

The report addressed the requisite statutory redevelopment criteria contained in N.J.S.A. 40A:12A-5. It found that the

area's development characteristics indicated obsolescence, overcrowding, faulty arrangement or design and excessive land coverage detrimental to the safety and welfare of the community. In addition, the report found a lack of proper use in the area resulting in a stagnant or not fully productive condition of the land contrary to the public welfare. Specific examples were given in support of this conclusion:

> 1. These buildings, Crown Cork & Seal, and Evan Picone, exhibit signs of deterioration and are not fully productive. The Crown Cork & Seal building ... presents an uninviting facade along the Tonnelle Avenue roadway frontage. There is a minimal front yard setback along Tonnelle Avenue and the yard is enclosed by a chain link fence. The front facade of the building consists of a solid expansive wall with no windows. Debris exists along the base of the fence and contributes to a neglected appearance. The rear of the property consists almost entirely of an asphalt paved area. There is insufficient delineation between the parking area and the adjoining 70th Street right of way. Curbing, where it exists, is deteriorated. The parking area is enclosed by a chain link fence and there is no landscape amenity. Garbage and debris exist around the perimeter of the fencing. Graffiti is visible on the north side of the building, adjacent to the 74th Street right of way. The rear portion of the building has several windows which have been broken and replaced with plywood. Site visits conducted for this report indicate that activity at the site is minimal and it is not fully productive.
>
> 2. The Evan Picone ... building ... is vacant. It also exhibits an appearance of

deterioration and neglect. The chain link fence along the southern side of the parking lot (adjacent to the K-Mart shopping center) has collapsed. Several windows on the building are broken, and only some have been replaced with plywood. Signage adjacent to the vehicular site driveway on Tonnelle Avenue is discolored. There is an old guardhouse along the Tonnelle Avenue frontage which adds to the abandoned character of the site. The side and rear portions of the site consist of asphalt parking areas with no landscaping. The rear parking area is littered with large piles of debris, likely the result of illegal dumping.

3. The A.R. Knitwear Co. site abuts the Crown Cork & Seal building to the west. The building contains virtually no windows. There is no organized layout for parking and no landscaping. Parking stalls are not delineated and the current arrangement requires vehicles to back out directly into the 74th Street right of way. The area between the A.R. Knitwear and Crown, Cork & Seal buildings is fenced and gated, making it difficult to observe activity from the street. This lack of visibility contributes to safety concerns.

4. Most of the study area is characterized by excessive land coverage and obsolete layout. These factors combine to degrade the character and vitality of the area. The obsolete layout of the area contributes to haphazard circulation and parking arrangements which pose traffic safety issues....

5. The physical condition and aesthetics of the buildings in the area lends to the image that the area is in decline. For example, the K-Mart shopping center has a deteriorated freestanding sign along Tonnelle Avenue with no on-site landscaping.

> The facade is outdated and approximately 17,000 [square feet] is vacant. Virtually the entire site is paved and debris exists in the rear portion of the site. The Wendy's and Dunkin Donuts sites are also virtually entirely paved with parking extending up to the sidewalk along Tonnelle Avenue. These conditions adversely affect the vitality of this portion of ... Tonnelle Avenue.
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> 6. The study area is characterized by a growing lack of proper utilization contributing to stagnation which does not promote the public health, safety and welfare. The largest buildings in the area ... are unoccupied or underutilized and exert a strong influence of stagnation on the study area.
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> . . . .
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> 8. It is noted that billboards are not permitted in the township, although one exists in the study area. There is also outdoor storage of equipment without any screening, which contributes to an unattractive appearance. Redevelopment would enable new development advancing the goals of the master plan.

On May 19, 1999, the Board held a public hearing at which it heard testimony from Burgis's representative, Donna Holmqvist, who prepared the report, as well as two members of the public. The Board thereupon adopted a resolution recommending to the Commissioners that the study area be designated an area in need of redevelopment. Specifically, the Board found that the designation was in accord with the Township's master plan and that

> the area qualifies as a redevelopment area in accordance with N.J.S.A. 40A:12A-5d in that the area contains buildings or improvements which by reason of dilapidation, obsolescence, overcrowding, faulty arrangements or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout or any combination thereof are detrimental to the safety, health, morals or welfare of the community.

On May 26, 1999, the Commissioners held a meeting and thereafter adopted a resolution determining that the entire study area was an area in need of redevelopment. In setting forth their determination, the Commissioners relied on the Burgis report. In addition, the Commissioners authorized the Board to solicit requests for proposals for the redevelopment of the site. In accord with this instruction, the Board adopted a resolution on June 16, 1999, authorizing Burgis to prepare the necessary request for proposals, and on July 27, 1999, adopted a resolution authorizing a formal request for proposal from Forest City Treeco (Treeco), a potential redeveloper.

Burgis sent the Board a letter dated September 8, 1999, setting forth the proposed zoning regulations for the redevelopment area. At a hearing on September 14, 1999, the Board treated the September 8, 1999 letter as a redevelopment plan and voted to recommend the plan, and Treeco as redeveloper,

to the Commissioners. A formal resolution was adopted memorializing this approval on the same date.

On October 13, 1999, the Commissioners approved an ordinance adopting the September 8, 1999 letter as the redevelopment plan, and amended the Township's zoning ordinance to: eliminate the I-Industrial designation for the affected lots, extend the C-2 Highway Commercial District to encompass the lots on Blocks 455 and 457 and a number of lots in Block 457A, and define the term "regional commercial center" as a "group of commercial buildings planned, constructed and managed as an integrated entity for the purpose of providing retail and service commercial uses on a regional basis," setting forth the requirements therein. On October 27, 1999, the Commissioners adopted a resolution designating Treeco as redeveloper.

Burgis issued an amended planning report/redevelopment plan for the area on November 8, 1999. The report included the proposed redevelopment regulations for the area set forth in its September 8, 1999 letter. The report noted that "[i]t has been determined that the study area would benefit from a comprehensive redevelopment improving parking and circulation within the area. A coordinated approach to improving these properties is desirable and would facilitate a vast improvement along the Tonnelle Avenue corridor." The report further noted

that the redevelopment plan was consistent with the following goals and objectives of the Township's master plan: expanding the tax base to promote the Township's economic wellbeing, promoting safe and efficient circulation, and promoting the full economic potential of the land where commercial development is appropriate. Finally, the report contained the following recommendation:

> The redevelopment plan is designed to serve as the basis for the revitalization of this portion of the township. The plan identifies suitable uses as well [as] indicating the manner in which the site may be redeveloped. Significant roadway improvements along Tonnelle Avenue are contemplated as part of redevelopment, which will benefit the community. Zoning to implement the redevelopment is also provided. It is designed to enhance the use of the site by permitting a mix of uses, improving vehicular and pedestrian circulation and parking configurations, and ensuring the provision of substantive landscape and aesthetic amenities, while establishing a comprehensive, integrated approach to redevelopment which will result in an attractive and complementary use of the property. The plan is designed to complement and implement the specific goals, objectives and policy statements set forth in the Township Master Plan which apply to the study area.

On November 10, 1999, the Board passed a resolution recommending adoption of the November 8, 1999 "revised redevelopment plan."

Lowe's Companies, Inc. (Lowe's) signed a lease to build a home improvement center on the Evan Picone site, and obtained

site plan approval in April 2000. On April 12, 2000, the Board adopted a resolution rescinding its previous designation of Treeco as redeveloper, and authorizing requests for proposals for redevelopment of the remaining portions of the area. On August 8, 2000, the Board passed a resolution which recommended designating Related Retail Corporation (Related Retail) as redeveloper. On August 9, 2000, the Commissioners passed a resolution accepting that recommendation. The Township entered into a redevelopment agreement with Related Retail on January 31, 2001, which was amended in May 2002.

In April 2001, Related Retail reached a tentative agreement with K-Mart under which K-Mart would construct a "Super K-Mart" on the Crown Cork & Seal lot. However, several months later, due to entering bankruptcy, K-Mart notified Related Retail that it would not be purchasing the site. K-Mart did not emerge from bankruptcy until May 2003, and the automatic stay was lifted in August 2003. Ultimately, the Target Corporation purchased the Crown Cork & Seal site for construction of a Target store.

Burgis sent the Board a letter, dated March 6, 2002, detailing certain zoning changes to the redevelopment area. Subsequently, Related Retail provided a proposed amended plan for redevelopment which was reviewed by Burgis and approved by the Board on June 25, 2002. On July 10, 2002, the Commissioners

adopted an ordinance amending the redevelopment ordinance passed on October 13, 1999. Specifically, the ordinance incorporated Burgis's redevelopment plan of November 8, 1999, and the March 6, 2002 letter, and set forth the particulars of the Tonnelle Avenue Redevelopment Project, including purpose, proposed land uses, identification of property, relation to the Township's master plan, amendments to the zoning ordinance and use and bulk requirements. The ordinance amended the definition of a "regional commercial center" to include single commercial buildings in excess of 100,000 square feet. In addition, the ordinance gave the Township, as the "redevelopment entity," the authority to proceed with the plan by way of acquisition and condemnation, and required that provisions for the temporary and permanent relocation of businesses and persons located within the redevelopment area be made.

On December 16, 2002, the Township took title to the Crown Cork and Seal property and immediately conveyed the property to Target Corporation, as designee of Related Retail, for the construction of a Target store. On December 19, 2002, Related Retail authorized the Township to commence condemnation proceedings for acquisition of the Shiva property, and to approve Home Depot as assignee and transferee of the property. In March 2003, representatives of Related Retail and Spylen met,

at which time Related Retail advised that it was considering two plans for redevelopment of the Shiva site, one where all the existing leases would be condemned and all the improvements on the Shiva site demolished for construction of a "big box" retail store, and the other where some of the existing tenants, including Splyen, would be retained at an increased rent.

An appraisal report requested by the Township in August 2003 valued the Shiva site, as of May 26, 1999, at $11 million. At some point in August 2003, the Township offered to purchase the Shiva property. On August 20, 2003, the Commissioners adopted a resolution designating Home Depot as redeveloper of the Shiva property as part of "Phase II" of the redevelopment project. The resolution further noted that the site plan proposed by Home Depot was consistent with the redevelopment plan and was approved.

On August 26, 2003, a hearing on Related Retail's application for the Home Depot site plan approval and minor sign variance was held by the Board. The proposal was for a 119,000 square-foot home center and a 27,000 square-foot garden center, which would include 486 parking spaces and comprise approximately eleven acres. Shiva and Tonnelle appeared and objected on the grounds that Related Retail was not a "developer" and because of claimed lack of written notice. On

September 16, 2003, the Board adopted a resolution granting site plan approval.[3]

Under the site plan, a twenty-four foot wide strip of land was dedicated to the DOT for the proposed improvements to Tonnelle Avenue. In addition, vehicular and pedestrian connections between the site and the Lowe's and Target sites were provided. The proposed Home Depot is set back seventy feet further than the current configuration of the site. The plan also calls for landscaping in the form of sixty-five trees and over 350 shrubs and ornamentals around the perimeter of the parking lot.

Alfred Coco, a civil engineer and professional planner, testified at the Board hearing as to the absence of a stormwater collection and detention system at the site, and the site plan's proposal to direct the stormwater run-off into an underground detention basin at the southeast corner of the site. Coco indicated that the westerly one-third of the site drains uncontrolled over a rock slope to the lower-lying properties, and that the drainage system on the remainder of the site is insufficient. Coco further stated that aisle widths and

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[3] Shiva Properties and Tonnelle filed actions in lieu of prerogative writs challenging the site plan approval, which were dismissed with prejudice by Judge Camille Kenny on February 6, 2004. There is no indication in the record that these orders were appealed.

distance between parking spaces do not conform to current zoning requirements, and thus are not a safe design. Coco described the site as currently having only intermittent striping for drivers, no grass and virtually no landscaping. Coco indicated that the plan reduced the impervious coverage, currently approximately 95%, by 10%, or one acre, and that landscape islands will be placed at the end of the parking aisles to identify the driveways.

In September 2003, the Township filed with the Department of Community Affairs a Workable Relocation Assistance Plan for the redevelopment project. The plan was approved in late March 2004. The Township has received $2 million in Urban Enterprise Zone funds from the State in connection with this project.

In a certification, Peter Steck, a professional planner retained by Tonnelle and Marshalls, concluded that the Shiva site did not meet the statutory criteria for an area in need of redevelopment. Specifically, Steck viewed Burgis' comments on the site in its May 6, 1999 report as "primarily cosmetic criticisms which are easily mitigated." In addition, he viewed negatively the proposed Home Depot from a planning perspective.

In addressing defendants' challenge to this condemnation proceeding Judge D'Italia considered a threshold argument raised by the Township that the attack was untimely because defendants

did not initiate a prerogative writs action within the forty-five day period as set forth in Rule 4:69-1. Rejecting the timeliness argument, Judge D'Italia had this to say:

> While defendants may be barred from direct challenges to the municipal actions which are the predicate for the instant action, they are not barred from raising defects in earlier proceedings by way of defense to an action which seeks to condemn their interests in the subject property. Nothing in R. 4:73 or N.J.S.A. 20:30-11 [sic] conditions defenses in condemnation actions on timely objections to underlying municipal action or timely suits in lieu of prerogative writ[s].
>
> Nor are defendants time barred by N.J.S.A. 40A:12A-6. ... The governing body making the blight determination must send notice of the determination to any person who filed an objection. Moreover, the governing body shall take no action to acquire any property in the redevelopment area by condemnation for 45 days following the determination. N.J.S.A. 40A:12A-6(b)(6). This delay is to afford any person filing a written objection opportunity to seek review by action in lieu of prerogative writ. N.J.S.A. 40A:12A-6(b)(7). This statute does not, however, mandate that a party must file objections with the Planning Board in order to be entitled to judicial review of a blight determination. By the same reasoning, a non-objecting party should not be deemed to have waived its right to challenge a blight determination as a defense to a condemnation action in the absence of an express legislative statement to that effect. The designation of an area in need of redevelopment does not mandate condemnation of every parcel in the area and it would be manifestly unfair to require every owner and interested party (tenant,

> subtenant, lienholder, or contract purchaser) to bring a Superior Court action in order to protect against the possibility of condemnation at some undetermined future time.
>
> [(citations omitted); (footnote omitted).]

Judge D'Italia went on to rule that the relevant sections of the Burgis Report provided substantial evidence of the conditions set forth in N.J.S.A. 40A:12A-5(d) to support the determination that the site was in need of redevelopment. He added:

> In these circumstances, it is not for the Court to second-guess municipal action, which carries with it a presumption of regularity. I am satisfied that the determination that the study area was in need of redevelopment was supported by substantial evidence and was within the ambit of the practical judgment, common sense and sound discretion accorded to local authorities.
>
> I recognize that the extent of deterioration, obsolescence, and lack of productivity of the Crown, Cork & Seal and Evan Picone sites was greater than that of the Shiva property. There is no escaping, however, that these sites flank the Shiva property and together present a continuous frontage along a major thoroughfare in the Township. The Burgis Report notes that the Shiva property has no landscaping, the facade is outdated, 17,000 square feet of the Mall was vacant, the entire site is paved, and [] parking for the Wendy's and Dunkin' Donuts sites extend up to the sidewalk. Although the report does not itself spell out why the extensive paving presents an adverse condition, the testimony

> at [the site plan] hearing ... explained that the impervious coverage results in poor and unsafe drainage of the site, with most water from the front of the site draining onto Tonnelle Avenue itself and that from the rear of the site and from the roof of the building onto neighboring properties.

Judge D'Italia found defendants' argument that the need for redevelopment had grown stale as a result of the construction of the Lowe's and Target stores on the adjoining site to be without merit. He stated:

> These facts do not vitiate the initial designation of the area as one in need of redevelopment nor do they bar complete implementation of the Redevelopment Plan. First, there is no evidence that the conditions described by the Burgis Report as extant at the Shiva site in 1999 have changed. Vague expressions by some tenants of their willingness to make improvements are too little too late. Moreover, as tenants they are powerless to effect substantial changes in the overall site without the consent of Shiva, which is content to have its property taken and redeveloped by the redeveloper. Second, partial success of a redevelopment plan, as evidenced here by the voluntary improvement of the Crown Cork and Evan Picone parcels, does not warrant abandonment of the remaining area included in the original blight declaration.

Judge D'Italia found the contention that the clearing of blight was not for a public purpose, but rather to benefit private enterprises, Home Depot, to be unpersuasive. In rejecting defendants' argument, Judge D'Italia stated:

> Defendants' contention that the premises are being condemned for private rather than public use also lacks merit. The purpose of the taking is the elimination of blight and redevelopment of an area for the welfare of the community as a whole. The fact that the redevelopment will result in the sale of the premises to new occupants does not make the purpose of the redevelopment any less public.

The court also found that Steck's certification did not alter its conclusion:

> Steck's certification acknowledges that the Burgis Report recognized that the entire study area should be developed in an integrated manner. As such, his opinion actually provides support for [] Burgis'[s] conclusion that the entire study area is in need of redevelopment. To the extent that Steck's certification states otherwise, it constitutes merely a difference of opinion which is insufficient to overcome the presumption of municipal regularity.

II.

As a threshold issue, the Township maintains that defendants are procedurally barred from challenging the redevelopment ordinances and the redevelopment plans enacted in May 1999, October 1999 and July 2002, because they failed to bring a timely challenge to each of these municipal actions by way of an action in lieu of prerogative writs. The Township asserts it has suffered prejudice as a result because of the extent of the progress on the redevelopment project. It also points to concerns regarding the judicial process if it is held

that a prerogative writs action is not the exclusive method of challenging redevelopment ordinances, namely, piecemeal litigation and the need for claim and issue preclusion determinations. The Township concedes that changed circumstances/staleness, however, may be raised. Therefore, what is in dispute in this instance is whether defendants may raise Issues III and V, involving compliance with the statutory criteria set forth in N.J.S.A. 40A:12A-5 and the process utilized to adopt the redevelopment ordinances and plans.

Rule 4:69 governs challenges to municipal actions, Pressler, Current N.J. Court Rules, comment 2 on Rule 4:69 (2005), and requires that a challenge to a determination of a land use board or a governing body approving or disapproving such a determination, by way of an action in lieu of prerogative writs, be brought within forty-five days. R. 4:69-6(b)(3). That time period may be relaxed where the interest of justice so requires. R. 4:69-6(c). Thus, in the context of a challenge to a redevelopment determination, the time limitation has been relaxed where the matter was of "sufficient public interest," and where the plaintiffs alleged numerous violations and misapplication of the LRHL. Concerned Citizens of Princeton, Inc. v. Mayor and Council of the Borough of Princeton, 370 N.J. Super. 429, 447 (App. Div.), certif. denied, 182 N.J. 139

(2004). In another challenge to a redevelopment determination, this court noted that the right to seek judicial review of administrative action is of constitutional dimension and that, as a result, courts are reluctant to foreclose such review on procedural grounds, particularly given that judicial review of administrative action may serve not only the private interests of the appellant, but also broader public interests. Hirth v. City of Hoboken, 337 N.J. Super. 149, 160 (App. Div. 2001). In general, R. 4:69-6 seeks to give "an essential measure of repose to actions taken against public bodies." Washington Tp. Zoning Bd. of Adjustment v. Washington Tp. Planning Bd., 217 N.J. Super. 215, 225 (App. Div.), certif. denied, 108 N.J. 218 (1987).

In support of its position, the Township relies on N.J.S.A. 40A:12A-6(b)(7) which states:

> If a person who filed a written objection to a determination by the municipality pursuant to this subsection shall, within 45 days, after the adoption by the municipality of the determination to which the person objected, apply to the Superior Court, the court may grant further review of the determination by procedure in lieu of prerogative writ; and in any such action the court may make any incidental order that it deems proper.

The Township views the forty-five day reference in the statute as requiring that any challenge to a redevelopment

determination be made by way of a prerogative writs action. By its own language, the statute only applies where a written objection has been filed to a blight determination. No such objection was filed in this matter. Putting aside any logical inconsistency in requiring only those who file written objections to be bound by the forty-five day time period, nonetheless, a distinction can be made between a failure to challenge a redevelopment determination and challenging such a determination in the context of a defense to a condemnation action.

A court hearing a condemnation action has jurisdiction of "all matters incidental thereto and arising therefrom, including ... jurisdiction to determine the authority to exercise the power of eminent domain." N.J.S.A. 20:3-5. Thus, in a relevant out-of-state case, Redevelopment Agency of the City of Fresno v. Herrold, 150 Cal. Rptr. 621, 625 (Ct. App. 1978), the court held that a California statute requiring that an action attacking the validity of any redevelopment plan be brought within sixty days after the adoption of the ordinance adopting or amending the plan applied only when a party is attacking the legality of the redevelopment plan as originally adopted, not when a party is questioning the implementation of the plan with respect to its property in a condemnation action. Here, defendants are

challenging the implementation of the redevelopment plan with respect to the property in which they have a leasehold interest. Defendants are not precluded from raising such a defense as a result of their failure to challenge the redevelopment determination and plans.

Moreover, defendants were not given notice of the relevant Board hearings. The LRHL requires that planning boards give notice of such hearings to all persons "who are interested in or would be affected by a determination that the delineated area is a redevelopment area" by way of publication in a newspaper of general circulation in the municipality once each week for two consecutive weeks. N.J.S.A. 40A:12A-6(b)(2) and (3). Notice by mail is only required to be made to the property owner, N.J.S.A. 40A:12A-6(b)(3), and defendants did not receive such notice or claim that they were so entitled. If, acting upon the planning board's recommendation, the governing body adopts a resolution delineating a redevelopment area, it is required to give notice of such a determination only to those who filed written objections. N.J.S.A. 40A:12A-6(b)(5). Further, it is unclear from the record whether the requisite notice by publication was made with respect to the board hearings in question. However, we need not resolve this issue on the basis of the previous discussion.

Finally, the Township warns that permitting defendants to challenge the blight declaration and the redevelopment plans and ordinances will lead to piecemeal litigation and require courts to address such questions as claim and issue preclusion. However, the Township's argument is merely hypothetical as these issues are not presented here. The challenges in question have all been raised in the context of this condemnation action. See Rukab v. City of Jacksonville Beach, 811 So. 2d 727, 733 (Fla. App. 2002) (finding no legal or factual support for the proposition that the prior decision involving a challenge to the blight determination was legally binding on the condemnees in a condemnation action under the doctrines of res judicata, collateral estoppel or stare decisis). Moreover, a court hearing a condemnation action may consider "all matters incidental thereto and arising therefrom," including whether the condemnor has the authority to exercise the power of eminent domain. N.J.S.A. 20:3-5.

We reject the Township's argument that defendants' challenge to the in need of redevelopment declaration and plans, and their claim that the condemnation is not for a public purpose, cannot be raised in these appeals.

III.

Defendants argue that they were entitled to an evidentiary hearing below because of disputed issues of fact regarding the Burgis report.

"An action in condemnation shall be brought in the Superior Court in a summary manner pursuant to R. 4:67." R. 4:73-1. Summary actions typically proceed by way of complaint and order to show cause. R. 4:67-2. The hearing is usually held on the return day for the order to show cause in the following manner:

> If no objection is made by any party ... or the affidavits show palpably that there is no genuine issue as to any material fact, the court may try the action on the pleadings and affidavits, and render final judgment thereon. If any party objects to such a trial and there may be a genuine issue as to a material fact, the court shall hear the evidence as to those matters which may be genuinely in issue, and render final judgment.
>
> [R. 4:67-5.]

The aim of the summary proceeding is to expedite the litigation "by short-cutting procedural steps to the end that the merits will be tried at the earliest time consistent with fairness." County of Bergen v. S. Goldberg & Co., 39 N.J. 377, 380-81 (1963). Where a genuine issue of material fact is present, the issue should be "tried in an appropriate way." Id. at 381.

Here, defendants fail to point to any genuine issue of material fact. Rather, they dispute the legal significance of the facts, primarily, whether the conditions found by the Township satisfied the in need of redevelopment criteria set forth in the LRHL at the time they were found, and at the time this condemnation action was instituted.

Tonnelle cites Bridgewater Tp. v. Yarnell, 64 N.J. 211, 214-15 (1974), in support of its position. However, Bridgewater Tp. merely held that, in the circumstances of that case, where an evidentiary hearing was held it was improper to reach a decision based on only one side's presentation of evidence.

No genuine issue of material fact was in dispute which would have called for an evidentiary hearing. Judge D'Italia properly tried the matter as a summary action under Rule 4:67.

Spylen contends that the decision below failed to comply with Rule 1:7-4(a). That Rule requires that the court in a non-jury action, by opinion or memorandum decision, "find the facts and state its conclusions of law." R. 1:7-4(a). Judge D'Italia's written opinion was far from conclusory. The court addressed the relevant facts and tied them to its legal conclusions.

Spylen asserts that the trial court failed to analyze the LRHL criteria and whether the Township satisfied the criteria.

However, Judge D'Italia did engage in such an analysis. Whether the court should have applied the criteria to the Shiva property in isolation from the remainder of the redevelopment area is a legal question, not a basis for finding a violation of Rule 1:7-4(a).

IV.

Defendants argue that the Township failed to satisfy by substantial evidence the in need of redevelopment criteria set forth in N.J.S.A. 40A:12A-5, as applied to the Shiva property. Rather, according to defendants, the Township focused on conditions at the Evan Picone and Crown Cork & Seal sites, while making "manufactured and superficial" criticisms of the Shiva site. Defendants further claim that the Shiva property was not "necessary" to the overall redevelopment project.

The decision of municipal authorities that the area in question is in need of redevelopment is presumed to be valid; to succeed, the party attacking the determination has the burden of overcoming that presumption and demonstrating that the determination is not supported by substantial evidence. Levin v. Township Committee of Bridgewater Tp., 57 N.J. 506, 537, appeal dismissed, 404 U.S. 803, 92 S. Ct. 58, 30 L. Ed. 2d 35 (1971). "Absence of such support would indicate arbitrary or capricious action." Lyons v. City of Camden, 48 N.J. 524, 533

(1967). If the in need of redevelopment determination 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." Lyons v. City of Camden, 52 N.J. 89, 98 (1968).

The authority to develop blighted areas is constitutionally based: "The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken." N.J. Const. art. VIII, § 3, ¶ 1. Based on this authorization, the State enacted the Blighted Area Act, N.J.S.A. 40:55-21.1 to -21.14, in 1949. In 1992, the LRHL was enacted to replace and unify what had by then become a patchwork of separate laws, including the Blight Act and accompanying tax abatement statutes. Forbes v. S. Orange Tp. Bd. of Trustees, 312 N.J. Super. 519, 523-24 (App. Div.), certif. denied, 156 N.J. 411 (1998); N.J.S.A. 40A:12A-2(d). The LRHL substituted the term "an area in need of redevelopment" for the former "blight" standard, but the two terms are interchangeable, id. at 529, and the current term has been held to be synonymous with the New Jersey Constitution's use of "blighted areas." Concerned Citizens, supra, 370 N.J. Super. at 436, 456.

In relevant part, N.J.S.A. 40A:12A-5 provides:

A delineated area may be determined to be in need of redevelopment if ... 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 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 untenable.

. . . .

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 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.

If the condition of the land meets the specifications of any one of these subsections, the need of redevelopment determination is "unassailable." Levin, supra, 57 N.J. at 510. The question of whether any of the statutory criteria have been met is a legal one. Winters v. Township of Voorhees, 320 N.J. Super. 150, 153 (Law Div. 1998); Spruce Manor Enters. v. Borough of Bellmawr, 315 N.J. Super. 286, 295 (Law Div. 1998).

There is substantial evidence in the record to support the conclusion that the Shiva site meets the conditions set forth in N.J.S.A. 40A:12A-5(d), namely, obsolescence, faulty arrangement and design, and excessive land coverage detrimental to the safety and welfare of the community. Cf. Forbes, supra, 312 N.J. Super. at 530-31 (unproductive and inaccessible rear areas of commercial properties fronting on main streets met standards of N.J.S.A. 40A:12A-5(d) and (e)).

As was stated in the May 1999 Burgis report:

> 4. Most of the study area is characterized by excessive land coverage and obsolete layout. These factors combine to degrade the character and vitality of the area. The obsolete layout of the area contributes to haphazard circulation and parking arrangements which pose traffic safety issues....
>
> 5. The physical condition and aesthetics of the buildings in the area lends to the image that the area is in decline. For example, the K-Mart shopping center has a deteriorated freestanding sign along

> Tonnelle Avenue with no on-site landscaping. The facade is outdated and approximately 17,000 [square feet] is vacant. Virtually the entire site is paved and debris exists in the rear portion of the site. The Wendy's and Dunkin Donuts sites are also virtually entirely paved with parking extending up to the sidewalk along Tonnelle Avenue. These conditions adversely affect the vitality of this portion of [] Tonnelle Avenue.

In addition, with respect to parking, both the May and November 1999 Burgis reports determined that "the study area would benefit from a comprehensive redevelopment improving parking and circulation within the area. A coordinated approach to improving these properties is desirable and would facilitate a vast improvement along the Tonnelle Avenue corridor." In addition, Coco testified at the site plan hearing that the aisle widths and distance between parking spaces at the site do not conform to current zoning requirements, and therefore are not a safe design. Coco also noted the intermittent striping, 95% impervious coverage and lack of grass and landscaping. Moreover, Coco focused on drainage problems at the site, namely, the absence of a stormwater collection and detention system, and uncontrolled drainage onto Tonnelle Avenue and adjacent, low-lying properties.

Defendants question whether it was permissible for the Township and the trial court to rely on the proceedings before

the Board on the Home Depot site plan application to buttress the Township's claim that the statutory criteria was met. Concerned Citizens, supra, speaks to this issue. There, this court held that the trial court did not abuse its discretion in permitting the municipality to supplement at trial the record made before a planning board with respect to a redevelopment determination in response to allegations of lack of good faith during the redevelopment proceedings. 370 N.J. Super. at 464-66. This accords with the general proposition that when a blight determination is challenged, for purposes of ascertaining whether the determination is supported by substantial credible evidence, the review is not confined to the record made below. Lyons, supra, 48 N.J. at 533. Moreover, as we recently decided in Deegan v. Perth Amboy Redevelopment Agency, 374 N.J. Super. 80, 83-85 (App. Div.), certif. denied, 183 N.J. 271 (2005), challenges to a redevelopment plan and an ensuing site plan approval may be considered in conjunction. Thus it was not improper for the trial court to rely on the evidence in the site plan proceedings to support its substantial evidence determination.

Defendants' reliance on Spruce Manor, supra, is misplaced. There, the question was whether the apartment complex could be designated as an area in need of redevelopment on the ground

that it did not conform with present day design standards. 315 N.J. Super. at 288. In contrast, the Shiva site is not disparaged because of particular design standards, but rather the overall condition of the site.

Defendants further contend that the Shiva site was not "necessary" to the overall redevelopment plan. Redevelopment areas and plans may include properties which are not blighted. As the LRHL notes:

> 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.
>
> [N.J.S.A. 40A:12A-3.]

Even if the Shiva site were not found to be blighted, it could still be included within the redevelopment area. As our Supreme Court has noted, the LRHL is

> concerned with areas and not with individual properties. The fact that single parcels in the area are useful and could not be declared blighted if considered in isolation is basis neither for excluding such parcels nor for invalidating a declaration of blight. 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.
>
> [Levin, supra, 57 N.J. at 539 (citation omitted).]

See also Berman v. Parker, 348 U.S. 26, 35, 75 S. Ct. 98, 104, 99 L. Ed. 27, 39 (1954) ("Property may [] be taken for [] redevelopment which, standing by itself, is innocuous and unoffending.... If owner after owner were permitted to resist [] redevelopment programs on the ground that [their] particular property was not [in need of redevelopment], integrated plans for redevelopment would suffer greatly.").

Defendants rely on Pequonnock Yacht Club, Inc. v. City of Bridgeport, 790 A.2d 1178, 1181 (Conn. 2002), where the property in question, a two-acre private yacht club and marina, was part of a fifty-acre redevelopment area. The original renewal plan in 1970 did not provide for the acquisition of the subject site, but was included as part of an amendment to the plan in 1998. Ibid. The owner of the site indicated that it was willing to work with the developer to assimilate the property into the overall plan, but the city consistently rejected the owner's efforts to negotiate. Id. at 1182. The court noted that under Connecticut law property must be "essential" to the development in order for it to be included, and that the public entity must consider whether the property could be successfully integrated

into the overall plan for the area in order to achieve its objective. Id. at 1184. Thus, if the property could be integrated, "it is logical to conclude that the acquisition is not essential." Id. at 1185.

Rejecting the city's arguments that the site was necessary to the overall success and financing of the plan, as well as to open up the waterfront to public access, the court focused on the city's refusal to consider integrating the site into the redevelopment rather than seeking to condemn it:

> [T]he agency provided no reasons to explain why the present condition and use of the plaintiff's property was detrimental to the development plan. The city provided no specific reasons, other than to enhance desirability of the area to investors, as to why the plaintiff's property, which both parties stipulated to be in good condition, is essential to the accomplishment of the redevelopment plan.
>
> Further, the plaintiff had communicated on multiple occasions its desire and willingness to make changes to its property in order to have the property incorporated into the final redevelopment plan. . . . We conclude that it is unreasonable for a redevelopment agency . . . arbitrarily to reject repeated requests to negotiate some form of assimilation into the overall redevelopment plan when the subject property is in good condition and is economically viable.
>
> [Id. at 1187 (footnote omitted).]

Aside from the fact that the negotiation aspect is irrelevant here because defendants were not the property owners, and the "integration" standard noted has yet to be enunciated as a fundamental part of this State's redevelopment and condemnation law, the main distinguishing feature between Pequonnock Yacht Club and this case is that there was no dispute in Pequonnock that the property in question was in "good condition." The property was not determined to be in need of redevelopment because of its condition, but rather primarily because it was essential to the financing of the plan. That is not the case here. The condition of the Shiva property creates the "necessity," namely, the alleviation of the blight as part of redevelopment of the entire area.

There is substantial evidence in the record to support the Township's in need of redevelopment determination.

V.

Defendants contend that the in need of redevelopment declaration is stale based on changed circumstances, namely, the Target and Lowe's developments, which has corrected most, if not all, of the blight identified by the Township. Defendants also assert that the situation is "fundamentally different" now from 1999 because the Township abandoned the regional mall concept in favor of big box retail stores.

Defendants rely on out-of-state authority in support of their staleness argument. In Aposporos v. Urban Redevelopment Comm'n of the City of Stamford, 790 A.2d 1167 (Conn. 2002), the plaintiffs acquired property in 1977 on which they operated a diner, in an area of the city affected by a 1963 renewal plan, which did not identify the property as property to be acquired. Id. at 1169. In 1988, the city amended the plan largely in response to the construction of a mall in another part of the city, and the plaintiffs' property was recommended for acquisition. Id. at 1169-70. In 1999, the city sought to acquire the property through condemnation. Id. at 1171. In seeking to enjoin that effort, the plaintiffs argued that while a valid finding of blight was made in 1963 when the redevelopment plan was adopted, the finding was now "stale" and did not relate to the redevelopment area identified for acquisition in the 1988 amendment. Id. at 1174. The court held that it would be illogical and unfair to require a redevelopment agency to determine that the level of blight that existed at the time that a redevelopment plan was adopted existed at each stage of the implementation of the plan. Id. at 1175. However, because of the twenty-five-year passage of time, by which time the blight eradication objectives of the original plan largely had been achieved, and the fact that the 1988 amendment was a

response to a discrete economic condition that did not exist in 1963 and had distinct objectives, the court held that the 1988 amendment constituted a new redevelopment plan which required a renewed finding of blight. Id. at 1176-77.

We are not faced with a twenty-five-year interval between a declaration of blight and an amendment thereto, or even an eleven-year interval between the amendment and the exercise of eminent domain. Even assuming the irrelevance of the long time interval, the court in Aposporos distinguished that case from a case where the modification was adopted only three years after the original plan, and was intended to alleviate the same conditions and had the same objectives as the original plan, with only a change in scale. Ibid. In addition, the court in Aposporos explicitly noted that its decision did not require a renewed finding of blight where the redevelopment authority is merely completing a redevelopment project as initially planned. Id. at 1177. The four to five years involved in this case, and the condemnation in question, seek to alleviate the same conditions and have the same objectives as originally planned, with only a change in scale. Thus, Aposporos supports the Township's position, not that of defendants.

In Charleston Urban Renewal Auth. v. Courtland Co., 509 S.E.2d 569, 571-72 (W.V. 1998), an area of the city in which the

condemnee's property was located was declared blighted and one year later a renewal plan providing for the acquisition of that property was adopted. Condemnation proceedings were not initiated until eleven years later. Id. at 572. While noting that the condemnee was not challenging the validity of the initial determination of blight, the court rejected the condemnee's defense that the statutory prerequisites of blight were no longer present, noting that

> the viability of an incremental, multi-year, integrated plan for the overall redevelopment of a [] blighted area would be fatally compromised if challenges to the continued need for and legitimacy of the plan based on allegedly changed circumstances were allowed as defenses to a condemnation petition--each time an urban renewal authority seeks to acquire property to accomplish the purposes of the plan.
>
> [Id. at 576.]

The court concluded that absent extraordinary circumstances, implementation of an ongoing redevelopment plan through use of the power of eminent domain may not be challenged simply on the basis that the blighted conditions which provided the initial basis for the adoption of the plan no longer exists. Ibid. See also Batmasian v. Boca Raton Cmty. Redevelopment Agency, 580 So.2d 199, 201 (Fla. App. 1991) (rejecting condemnee's argument that public entity could not exercise its power of eminent domain in 1989 because blight which may have

existed in 1980 no longer existed, the court stating: "A logical consequence of the implementation of a redevelopment plan in any particular area is that some conditions of blight which once existed will be eliminated.").

In Matter of Condemnation by Urban Redevelopment Auth. of Pittsburgh, 544 A.2d 87, 88 (Pa. Commw. Ct. 1988), aff'd, 594 A.2d 1375, cert. denied, E-V Co. v. Urban Redevelopment Auth. of Pittsburg, 502 U.S. 1004, 112 S. Ct. 638, 116 L. Ed. 2d 656 (1991), the proposed taking was not filed until some ten years after the redevelopment plan was approved. The condemnees argued that an updated determination of blight was required nearer to the time of the taking because "substantial changes and renewed vitality" in the area had rendered the original blight determination "stale." Id. at 90. The court disagreed that a renewed finding of blight was required, noting that there had been ongoing redevelopment activities in the area for the ten-year period and that the changes and renewed vitality were the result of that ongoing activity. Ibid.

As in Charleston and Pittsburgh, the redevelopment in question is an ongoing, multi-year, integrated plan for the overall redevelopment of an area. The "renewed vitality" was the result of the ongoing activity; as such, the redevelopment would be "fatally compromised" had defendants been permitted to

argue as a defense to condemnation that the statutory prerequisites of blight were no longer present. Moreover, the conditions of blight found at the Shiva site in the 1999 declaration still exist.

Defendants contend that the Township failed to condemn the properties within a reasonable amount of time. See Lyons, supra, 52 N.J. at 100 (public entity must proceed with "reasonable dispatch" under the circumstances to condemn after a need of redevelopment determination is made). As just described, public entities have waited far longer than the four and-a-half years in this matter to condemn. Moreover, in this instance, there was a change in redevelopers and K-Mart's bankruptcy with which to contend. In addition, the adjoining sites in the redevelopment area were being developed during this time. This is not an instance where the Township declared blight and then "sat on its hands." We reject the staleness argument.

VI.

Defendants contend that the condemnation is unconstitutional because it is not for a public purpose, but for the benefit of a private party, Home Depot. Furthermore, defendants assert that the condemnation would serve purely commercial interests because the reasons for the condemnation

have been obviated by the redevelopment of the surrounding properties. They maintain that the taking was not "necessary," and therefore not for a public purpose, because Related Retail originally set forth plans to retain the Shiva property in conjunction with the improvements on the adjacent sites.

Under both the United States and New Jersey Constitutions, private property may be taken only for "public use." U.S. Const. amend. V; N.J. Const. art. I, § 20. It is an established maxim of constitutional law that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 241, 104 S. Ct. 2321, 2329, 81 L. Ed. 2d 186, 197 (1984) (quoting Thompson v. Consol. Gas Corp., 300 U.S. 55, 80, 57 S. Ct. 364, 376, 81 L. Ed. 510, 524 (1937)). The question of whether the condemnation of private property in order to foster economic growth and development is a public use is before the United States Supreme Court in Kelo v. City of New London, 843 A.2d 500 (Conn.), cert. granted, __ U.S. __, 125 S. Ct. 27, 159 L. Ed. 2d 857 (2004) and oral argument was heard on February 22, 2005. No decision has been forthcoming. This requirement is also part of New Jersey's condemnation law. N.J.S.A. 20:3-2. "The power of eminent domain must always be exercised in the public interest and

without favor to private interests." City of Atlantic City v. Cynwyd Inves., 148 N.J. 55, 73 (1997). However, that a private party may benefit from the taking does not render the taking private and not for public use. Township of W. Orange v. 769 Associates, 172 N.J. 564, 573 (2002). See also Pappas, supra, 76 P.3d at 11 ("The focus of the inquiry is whether the plan or project serves the public purpose, not whether the condemned property is eventually owned by a public or private entity.")

Our courts have adopted a liberal view as to the meaning of "public use," State Highway Comm'r v. Totowa Lumber & Supply Co., 96 N.J. Super. 115, 119 (App. Div. 1967), applying a flexible, deferential standard. 769 Assocs., supra, 172 N.J. at 572. That view considers "public use" to be synonymous with "public benefit," "public advantage" or "public utility," meaning anything that "tends to enlarge resources, increase the industrial energies, and ... manifestly contributes to the general welfare and prosperity of the whole community." Id. at 573 (quoting 2A Nichols The Law of Eminent Domain § 7.02[2] (3d ed. rev. 1990)).

As opposed to the in need of redevelopment determination, a reviewing court will not upset a municipality's determination to use its power of eminent domain to condemn a property unless there is an affirmative showing of fraud, bad faith or manifest

abuse. 769 Assocs., supra, 172 N.J. at 571. Thus, a court 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." Midkiff, supra, 467 U.S. at 241, 81 L. Ed. 2d at 197. Despite some prior confusion, our Supreme Court has now made clear that where there is a "public use" issue, a "heightened scrutiny" standard of review does not apply to what is a manifest abuse of discretion standard. 769 Assocs., supra, 172 N.J. at 577-78.

In the instance of the LRHL, the public interest is inherent in the law itself. See Levin, supra, 57 N.J. at 540-41 ("Nor is it questionable that the ultimate taking of such land for redevelopment for the benefit of the community as a whole is a constitutional taking for 'public use'.") Therefore, absent fraud, bad faith or manifest abuse, the in need of redevelopment determination itself satisfies the "public purpose" requirement. As was stated in Levin:

> Once a proper declaration of blight is made, there is no substance to the contention that the result of the governmental action in selecting a redeveloper is to take property from one individual and turn it over to another in violation of the due process requirements of the Federal Constitution.... In this event, the private developer is really the instrumentality used to accomplish the public purpose. And the possibility that some profit may eventuate

> therefrom does not render such means unlawful.
>
> [Id. at 543.]

99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp.2d 1123 (C.D. Cal. 2001) is instructive on this point. There, the city enacted a redevelopment ordinance and plan in 1983 in which it was noted that the area in question was plagued by inadequate public improvements and facilities, faulty subdivision planning and flood hazards. Id. at 1125. In 1988, the city began plans to develop a regional shopping center at the site, the cornerstone of which was to be a large retail shopping center with anchor stores. Ibid. The center eventually contained stores like Costco, Wal-Mart, Circuit City, and the plaintiff store, which moved in in 1998, as a lessee. Id. at 1125-26. In the meantime, the city's power of condemnation had lapsed, so in 1997 it renewed such rights by amending the redevelopment plan. Id. at 1125-26. However, it made no new findings of blight, relying on its prior 1983 findings. Id. at 1126. Almost immediately after the plaintiff store had moved in, Costco, which was located right next door, advised the city of its need to expand the size of its operations by expanding into the space occupied by the plaintiff store. Ibid. When the city and the property owner were unable to negotiate a deal, the city unsuccessfully sought to purchase

the plaintiff's leasehold. Ibid. The city then sought to condemn the property. Id. at 1126-27.

In granting the plaintiff's motion to enjoin the city from initiating condemnation proceedings, the court held that the evidence was "clear beyond dispute that [the] condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another." Id. at 1129. It noted that the city admitted as such and failed to find that the property in question suffered from any existing blight. Id. at 1129-30. Thus, the court found that the conduct in question amounted to an unconstitutional taking for purely private reasons. Id. at 1129. See also Casino Reinvestment Dev. Auth. v. Banin, 320 N.J. Super. 342, 356-58 (Law Div. 1998) (where condemnation was undertaken at the behest of a casino hotel operator to facilitate the casino hotel's future expansion, the proposed taking was found to be private rather than public).

By contrast, in this matter the Township did make findings of blight with respect to the Shiva property in its amended plan, and there is nothing in the record to indicate that Home Depot was the driving force behind the amended redevelopment plan that Costco was in 99 Cents and the casino hotel was in Banin. See also Borough of Essex Fells v. The Kessler Inst. for

Rehab., Inc., 289 N.J. Super. 329, 339-43 (Law Div. 1995) (condemnation held not for a public purpose, and bad faith found, where the reason for the exercise of eminent domain was public opposition to the proposed development on the site in question).

The distinguishing features here are that there is nothing in the record to indicate that the Township turned to the Shiva site after unsuccessfully seeking to facilitate the construction of a Home Depot on another site in the Township or because of public opposition.

Finally, defendants argue that the Township is estopped from claiming that the taking is "necessary" based on Related Retail putting out marketing material noting "big box" opportunities available between Target and Lowe's and showing Dunkin' Donuts and Wendy's as part of a proposed leasing plan, as well as Related Retail's offer to retain Spylen as a tenant. Because of this, according to these defendants, the Township, through Related Retail, implicitly conceded that the Shiva site was not necessary to the redevelopment. As such, any condemnation of the site cannot be for a public purpose.

Under the LRHL, a municipality is empowered to condemn any land or building "which is necessary for the redevelopment project," N.J.S.A. 40A:12A-8(c), even if not in blighted

condition. N.J.S.A. 40A:12A-3. This accords with the general requirement that when private property is condemned, "the taking must be limited to the reasonable necessities of the case." Texas East. Transmission Corp. v. Wildlife Preserves, Inc., 48 N.J. 261, 269 (1966).

In Pappas, supra, 76 P.3d at 15, the court held that the public entity did not act in bad faith in deciding not to enter long-term leases with the condemnees, rather than acquiring the property through condemnation, because the only evidence in the record indicated that the public entity rejected this approach because it would severely affect the financing for the redevelopment project. Here, the record indicates that Related Retail considered two alternatives, one of which would have retained at least two of the defendants as lessees. The record does not indicate why Related Retail chose one alternative over the other, but defendants fail to point to any evidence that the decision was made on other than good faith grounds. Because Related Retail at one point considered an alternative to condemnation does not transform the proposed taking into one not for public use. Cf. Lyons, supra, 52 N.J. at 98 (if the blight determination is supported by substantial evidence, that the determination may be debatable is not grounds for overturning it).

Accordingly, the proposed taking does not violate the constitutional and statutory requirement that property can only be taken for public use.

VII.

Parshavnath argues that the condemnation complaint should have been dismissed because the entire process leading up to the condemnation was fatally flawed and in violation of the process set forth by the LRHL. Specifically, Parshavnath claims that the Township never adopted a redevelopment plan in accordance with the LRHL. In addition, it asserts that the planning board did not have the statutory authority to initiate changes to the redevelopment plan. Parshavnath focuses on the change in the definition of a regional commercial center to include a "big box" retail store as a permitted use to argue that the change was arbitrary and capricious because it was inconsistent with the redevelopment plan and because the rationale for the change was not set forth. Cingular Wireless argues that the redevelopment plan failed to satisfy the criteria set forth in N.J.S.A. 40A:12A-7(a)

The various challenges raised by Parshavnath and Cingular Wireless were not raised in the trial court. Since Parshavnath is no longer a participant in this appeal, we need not address the issues raised in any event. Insofar as Cingular is

concerned, we decline to consider an issue not presented to the trial court.

VIII.

Cingular Wireless contends that the condemnation will violate the Federal Telecommunications Act of 1996 (TCA), 47 U.S.C.A. § 332, and its implementing regulations, specifically 47 C.F.R. § 24.900, by disrupting the expansion of cellular telephone service in the North Bergen area.

The Township argues that this question should not be addressed because Cingular Wireless failed to raise it below, that there was nothing in the record indicating that the cellular tower would be eliminated and that, in any event, the TCA does not apply to condemnation actions.

An issue not raised below will not be addressed on appeal unless it goes to the jurisdiction of the trial court or concerns matters of substantial public interest. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). Even assuming that the loss of a cellular phone tower is a matter of substantial public interest, the problem in this instance is that, because the issue was not raised below, there is nothing in the record as to what role the cellular phone tower located on the Shiva property plays in the provision of cellular phone service in the Township and the surrounding communities, and no

indication as to whether the Township will retain the tower after condemnation.

Moreover, there is a question whether 47 U.S.C.A. § 332(c)(7)(b) which concerns the regulation of "the placement, construction, and modification of personal wireless service facilities" is applicable. The cases applying the preemptive effect of the statutory provision have arisen in the context of zoning and variances. See Cellular Tel. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Hokus, 197 F.3d 64 (3d Cir. 1999); Cell S. of New Jersey, Inc. v. Zoning Bd. of Adjustment of W. Windsor Township, 172 N.J. 75 (2002); New York SMSA Ltd. v. Township of Mendham Zoning Bd. of Adjustment, 366 N.J. Super. 141 (App. Div.), aff'd,181 N.J. 387 (2004);. However, that is not to say that it could not arise in the condemnation context, where there is a danger that the condemnation could potentially disrupt the delivery of wireless telecommunication service. Because a Workable Relocation Assistance Plan with funding must be implemented, it could very well be that Cingular's tower could be relocated without service disruption. Or since only a small cellular phone tower located on top of a utility building in the northwest corner of the Shiva site is involved, the cellular tower could possibly be retained at its present location. In any event, we do not view the issue to be ripe for

determination on our review, especially in light of the sparse record.

Affirmed.