NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0067-06T2
A-0191-06T2
A-0192-06T2
A-0195-06T2
A-0196-06T2
A-0197-06T2
A-0198-06T2
A-0654-06T2

CITY OF LONG BRANCH, a
Municipal Corporation in the
State of New Jersey,

Plaintiff-Respondent,

v.

LOUIS THOMAS ANZALONE and
LILLIAN ANZALONE,

Defendants-Appellants.[1]

CITY OF LONG BRANCH, a
Municipal Corporation in the
State of New Jersey,

Plaintiff-Respondent,

v.

JOYCE and PHILIP MELLILO,

Defendants-Appellants.

CITY OF LONG BRANCH, a
Municipal Corporation in the
State of New Jersey,

Plaintiff-Respondent,

v.

CARMEN and JOSEPHINE VENDETTI,

Defendants-Appellants.

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[1] Lienors of appellants' properties were named as defendants but did not participate in the trial court.

CITY OF LONG BRANCH, a
Municipal Corporation in the
State of New Jersey,

Plaintiff-Respondent,

v.

ALAN A. COOK and LUCY HUNTER,

Defendants-Appellants.

CITY OF LONG BRANCH, a
Municipal Corporation in the
State of New Jersey,

Plaintiff-Respondent,

v.

GREGORY P. BROWER,[2] ANTONE and
ANNE DE FARIA, MARCELLO S. and
ELAINA G. GRUBERG, ALEXANDER
FREIDMAN, LEE HOAGLAND and
DENISE HOAGLAND,[3] KARIN LYNN
KANDUR, PATRICIA M. TAYLOR,
ROSE LAROSA, GEORGE WARREN MCKENNA,
OLGA NETTO, RAGENDRABAHI and MANISHA
PATEL, and LAURIE ANN VENDETTI,

Defendants-Appellants.

CITY OF LONG BRANCH, a
Municipal Corporation in the
State of New Jersey,

Plaintiff-Respondent,

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[2] The appeals of Albert A. and Mary Viviano (A-0194-06T2), Gregory P. Bower (A-0196-06T2), Richard Squirlock and Peter Squirlock (A-0199-06T2) were dismissed by order of this court, and those appellants are no longer engaged in this appeal.

[3] Misnamed below as Leigh and Denise "Hogland."

v.

ESTATE OF ELSA DE FARIA, her
heirs, beneficiaries and assigns,

Defendant-Appellant.

CITY OF LONG BRANCH, a
Municipal Corporation in the
State of New Jersey,

Plaintiff-Respondent,

v.

ELLEN EAGAN and JEAN
SADENWATER,

Defendants-Appellants.

CITY OF LONG BRANCH, a
Municipal Corporation in the
State of New Jersey,

Plaintiff-Respondent,

v.

MARY MILANO and MARINO MILANO,

Defendants-Appellants.

Argued May 14, 2008 - Decided August 7, 2008

Before Judges Lisa, Sapp-Peterson and Newman.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, L-141-06 (A-0067-06T2), L-309-06 (A-0191-06T2), L-4996-05 (A-0192-06T2), L-5551-05 (A-0195-06T2), L-4987-05 (A-0196-06T2), L-871-06 (A-0197-06T2), L-317-06 (A-0198-06T2), L-307-06 (A-0654-06T2).

William J. Ward argued the cause for appellants in A-0067-06T2 (Carlin & Ward, attorneys; Mr. Ward, of counsel and on the brief; Arthur G. Warden, III and Scott A. Heiart, on the brief).

Peter H. Wegener (Bathgate, Wegener & Wolf) and Scott G. Bullock (Institute for Justice) of the Virginia Bar, admitted pro hac vice, argued the cause for appellants in A-0191-06T2, A-0192-06T2, A-0195-06T2, A-0196-06T2, A-0197-06T2, A-0198-06T2 and A-0654-06T2 (Bathgate, Wegener & Wolf and Mr. Bullock and Jeff Rowes (Institute for Justice) of the Virginia Bar, admitted pro hac vice, attorneys; Mr. Wegener, Danielle A. Maschuci, Mr. Bullock and Mr. Rowes, on the brief).

Paul V. Fernicola argued the cause for respondent in A-0067-06T2 (Bowe & Fernicola, attorneys; Mr. Fernicola, of counsel and on the brief; Robert E. Moore, on the brief).

James G. Aaron argued the cause for respondent in A-0067-06T2, A-0191-06T2, A-0192-06T2, A-0195-06T2, A-0196-06T2, A-0197-06T2, A-0198-06T2 and A-0654-06T2 (Ansell Zaro Grimm & Aaron, attorneys; Lawrence H. Shapiro and Mr. Aaron, on the brief).

Brian Weeks, Deputy Public Advocate, argued the cause for amicus curiae in A-0067-06T2, A-0191-06T2, A-0192-06T2, A-0195-06T2, A-0196-06T2, A-0197-06T2, A-0198-06T2 and A-0654-06T2 (Ronald K. Chen, Public Advocate, attorney; Mr. Chen, of counsel; Mr. Weeks and Catherine Weiss, Deputy Public Advocate, on the briefs).

McManimon & Scotland, attorneys for amicus curiae New Jersey League of Municipalities in A-0067-06T2, A-0191-06T2, A-0192-06T2, A-0195-06T2, A-0196-06T2, A-0197-06T2, A-0198-

06T2 and A-0654-06T2 (Edward J. McManimon and William W. Northgrave, on the brief).

McKirdy & Riskin, attorneys for amicus curiae The Reason Foundation in A-0191-06T2, A-0192-06T2, A-0195-06T2, A-0196-06T2, A-0197-06T2, A-0198-06T2 and A-0654-06T2 (Edward D. McKirdy and Joseph W. Grather, of counsel; Mr. McKirdy, on the brief).

McTighe & McTighe, attorneys for amicus curiae New Jersey Farm Bureau in A-0191-06T2, A-0192-06T2, A-0195-06T2, A-0196-06T2, A-0197-06T2, A-0198-06T2 and A-0654-06T2 (Arthur A. McTighe, of counsel and on the brief).

PER CURIAM

Appellants[4] are homeowners in a neighborhood in the City of Long Branch (the City) which is part of a larger area the City declared to be in need of redevelopment and for which it adopted a redevelopment plan in 1996. In late 2005 and early 2006, the City filed condemnation actions against appellants, who filed motions to dismiss. Without granting appellants' request for discovery and a plenary hearing, the judge, after hearing oral argument, based on the documentary record, denied the motions and granted judgment in favor of the City, appointing condemnation commissioners.

[4] The appeal of Louis Thomas Anzalone and Lillian Anzalone in A-0067-06T2 was calendared back-to-back with the appeals of multiple other parties (the consolidated appellants) in a series of cases previously consolidated by order of this court under A-0191-06T2. We now consolidate the Anzalones' appeal with the others for purposes of this opinion.

The City found, pursuant to N.J.S.A. 40A:12A-5(a), (c), (d) and (e), that the area including appellants' properties was in need of redevelopment. Appellants argue that the trial court erred by (1) finding substantial evidence to support the City's findings that the area was in need of redevelopment, (2) failing to find that the taking of appellants' properties represented a change in the plan that required readoption, (3) failing to conduct a plenary hearing on disputed material facts, (4) failing to find that conflicts of interest invalidated the City's findings, (5) failing to dismiss the condemnation complaints because the City failed to pursue bona fide negotiations, and (6) failing to find that the City improperly delegated eminent domain authority to the redeveloper.

The trial court decided these cases prior to the Supreme Court's decision in Gallenthin Realty Development, Inc. v. Borough of Paulsboro, 191 N.J. 344 (2007), which reaffirmed that the New Jersey Constitution requires a finding of actual blight before private property may be taken for the purpose of redevelopment. Gallenthin involved only a finding under N.J.S.A. 40A:12A-5(e), but in our view its analysis of the constitutional and legislative history applies equally to subsections (a), (c) and (d). We conclude that, under Gallenthin's heightened standard, the record does not contain

substantial evidence to support the City's findings under any of the subsections upon which it relied. Accordingly, we reverse the judgments appointing commissioners.

However, as we will discuss in this opinion, substantial activity has occurred in implementing the redevelopment plan. Although we attribute to these cases pipeline retroactivity of the Gallenthin holding, fairness dictates that the matter be remanded to afford the City an opportunity to amplify the record in an effort to meet the Gallenthin standard. Harrison Redevelopment Agency v. DeRose, 398 N.J. Super. 361, 420 (App. Div. 2008).

We agree with appellants that material facts are in dispute regarding not only whether substantial evidence supports a finding of a need for redevelopment, but also as to the subsidiary issues (if the plan is otherwise valid) of (1) construction of the terms of the redevelopment plan as it applied to appellants' particular neighborhood, and thus whether the taking of appellants' properties represented a change in the plan that required readoption, and (2) whether appellants' neighborhood was integral to the overall redevelopment area and whether its inclusion was necessary to the redevelopment plan.

We find no reversible error in the trial court's findings regarding conflicts of interest, bona fide negotiations, or delegation of eminent domain authority.

The issues remanded can only be decided after a plenary hearing. See Lyons v. City of Camden, 48 N.J. 524, 533-35 (1967) (discussing scope and nature of evidence permitted at such a hearing). We leave to the trial court's sound discretion the management of discovery issues.

I

Appellants' neighborhood is known as MTOTSA, an acronym derived from the three streets it contains, Marine Terrace, Ocean Terrace and Seaview Avenue. MTOTSA consists of mainly single-family homes, occupied by long-term owners. On average, homes in MTOTSA have been owned by the same family for forty-six years. Fifty-six of the fifty-eight units in MTOTSA are occupied by year-round residents. About one-third are retirees. This is a well-established, stable neighborhood.

MTOTSA is located at the extreme northerly end of the redevelopment area. It is bounded on the north by Seven Presidents Park, on the east by the beach and ocean, and on the west by Ocean Boulevard, a major thoroughfare that marks the western boundary of the redevelopment area of which MTOTSA is a part. This area is about one mile long and several blocks wide,

stretching from North Bath Avenue on the south to Seven Presidents Park on the north, bounded on the east and west by the ocean and Ocean Boulevard. The redevelopment plan divided it into four sectors. Going from south to north, these are: (1) Beachfront South (about 17.5 acres); (2) Pier/Village Center (about 25.5 acres); (3) Hotel Campus (about 16.75 acres); and (4) Beachfront North (about 27.5 acres). MTOTSA lies in the northern tip of the Beachfront North sector.

The redevelopment plan also includes an area of about 48.5 acres to the west of the area we have described, across Ocean Boulevard, designated as Broadway-Gateway. It has about three-quarters of a mile of frontage on Ocean Boulevard, and contained industrial and commercial areas and some residential properties in the northern and southern edges.

A. Initial consideration of redevelopment

In July 1994, the Planning Board and then the City adopted a review of the City's master plan, which had last been reviewed in 1988. The 1994 review identified several concerns about deterioration and hindrances to development, most of which applied to the City as a whole, including "inadequate attention being paid to the City's physical appearance and aesthetic qualities." The concerns about residential land use included the "excessive number of through streets in neighborhoods," the

"overcrowding of houses upon the land in some areas," and the "additional need for varied housing types not being served." The report also noted "a significant degree of residential and commercial deterioration in the City[,] neighborhoods plagued with numerous blighting influences resulting in a less-than-attractive living environment," and "difficulty on the part of the City in achieving a balanced urban renewal program to produce remedial treatment where it is needed most" in order to "effectively deal[] with the problems of blight in the City." And, the report noted the "functional obsolescence of housing in some areas especially the oceanfront."

Howard Woolley, the City's business administrator since 1994, certified that the City selected Greenbaum, Rowe, Smith, Davis & Himmel (Greenbaum Rowe) in or about June 1995 as redevelopment counsel based on its experience and reputation in redevelopment and land use.

B. The Oceanfront Master Plan

In July 1995, the planning firm Thompson and Wood and urban development consultants The Atlantic Group issued an Oceanfront Master Plan (the OMP). The OMP was commissioned by the civic group Long Branch Tomorrow, and it reflected consultation with the mayor and City Council, the Planning Board, and other municipal agencies. The OMP covered the areas we have

described, as well as a stretch of beachfront to the south of North Bath Avenue that extended about one mile to Takanassee Lake and had begun to see multi-family condominium development. The OMP referred to the two beachfront sections divided by North Bath Avenue as Waterfront South and Waterfront North.

The OMP's premises were the need for an integrated mix of uses and for greater density, which the City could promote "by converting unbuilt lands . . . to constructive year-round uses" and "providing the supporting infrastructure." Encouraging such development would benefit the City as a whole:

> Today's public sector strategy needs more entrepreneurial insight and aggressive goals than in the past: it needs to create more value in land within city borders, to increase density by converting unbuilt lands (including parking areas) to constructive year-round uses, and to provide the supporting infrastructure. . . .
>
> The enhancement of value in the waterfront zone, through well-balanced mixed use development, is based on this one central goal—achieving appropriate built density. Appropriate density is a positive force. It increases the number and intensity of uses and sometimes of height or land coverage. Density lowers the cost of infrastructure for each unit or user, and helps finance new development. . . .
>
> . . . It is critical to consider more than familiar patterns and past traditions of waterfront use—to consider the scale and type of development that can rebuild the entire oceanfront zone, not as a series of disjointed neighborhoods but as a mixed-use

> environment of urban character made unique by its connections to the existing fabric and proximity to the sea. . . . Imaginative use of these lands can launch the renaissance of Long Branch as a viable, balanced, and appealing city as it approaches the millennium.

The OMP declared that "[t]he planning intent is to achieve a critical mass of year-round residents in areas of moderate urban density," in order to "serve a market segment of individuals, couples, and small families by offering convenience, recreational amenities, and easy access to the ocean." Waterfront North's density was 5.5 residential units per acre, with the potential for eight units per acre if every vacant lot had a single-family house; that neighborhood could retain "its low scale and neighborhood character" at a density of up to fifteen dwelling units per acre, although the OMP did not indicate the extent to which such density could accommodate single-family houses.

The OMP stated that the increase in density should occur gradually: "Not by sweeping reform but by an incremental process, new buildings and blocks will fit in among the old."

> To avoid the clean-sweep practices of contemporary urban renewal yielding antiseptic uniform "projects," we recommend an incremental approach that is rather like repairing a valuable patchwork quilt, piece by piece. Change can be layered upon existing conditions, knit together by

> reciprocative scale and siting, to produce a harmonious, yet variegated fabric.

In that manner, Long Branch's "considerable housing stock of various types, both owner and renter occupied, predominantly suitable for single family occupancy," would "expand options to attract a market not currently served, citizens who will broaden the pool of labor and purchasing power within the city."

The OMP envisioned for Waterfront North "[s]afe, coherent, quiet beachside neighborhoods," and proposed "[s]mall-parcel infill with the option of upgrading and densifying existing dwellings to multi-family units," with "[l]ow-rise medium-density planned unit development as a further "possibility." It noted that "infill" could be placed "amid existing structures" by "the redevelopment of vacant sites" and the "conversion" of the occupied lots' "independent driveways and under-utilized setbacks" into sites for "multi-family units." Neither the OMP nor any other document in the record defined the term "infill." This explanatory narrative is somewhat elucidating. It suggests retention of at least some existing structures, but it cannot be said to associate the infill concept exclusively with any one purpose, such as the preservation of existing structures.

The OMP did not cite the quality of the existing houses in Waterfront North as a reason to replace them. It simply made the blanket observations that "[g]reat variation exists in the

quality and maintenance of buildings in this area," and that "[w]hile some are well maintained, virtually all of the homes need to be upgraded or rebuilt."

On August 8, 1995, the City responded to the OMP by passing Resolution 271-95, which authorized the Planning Board to conduct a "preliminary investigation" of whether all or part of the area that the OMP addressed satisfied the statutory criteria for a redevelopment area "and should be designated as same."

On August 29, 1995, in response to a request by the City's Assistant Director of Planning, Carl Turner, Fire Official Edward Williams provided the notes from the fire department's "cursory inspection" of building conditions in Waterfront North. Williams's notes covered 209 properties, most of which were houses, rooming houses, and small apartment buildings, of which a few were vacant, plus twenty-five vacant lots. They described exterior conditions that ranged from "well maintained" to "very poor." Williams observed that no interiors had been inspected, and that Turner's instruction not to disclose the purpose of the inspection had been respected.

C. The redevelopment study

In January 1996, the Long Branch City Planning Department and The Atlantic Group issued a redevelopment study of substantially the same area that the OMP addressed. The

redevelopment study concluded that Waterfront South (which it called Oceanfront South) did not meet the statutory criteria for an area in need of redevelopment, but that Waterfront North (which it called Oceanfront North) did, along with what it called the Broadway Corridor, west of Ocean Boulevard. It described Oceanfront North as being much further from fulfilling its development potential than Oceanfront South, with the sole exception of a successful hotel:

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

The redevelopment study used the term "blight" only in connection with the Broadway Corridor commercial area, which suffered the "blighting effects" of the shift of street traffic and shopping to other areas, an abandoned railroad right of way,

"and decades of public and private neglect and inadequate reinvestment." It noted that "the nearby industrial area, with obsolete buildings oriented to the abandoned rail right-of-way deters residential development and discourages maintenance in nearby blocks."

In addition, the redevelopment study analyzed the condition of 403 properties in Oceanfront North, on the basis of undated "on site inspections conducted by the City's Fire Marshal and Planning Department" that were performed no later than August 31, 1995, and that were corroborated by a photographic survey performed from October 26 to November 2, 1995. This survey, like the earlier one, was a "windshield survey," involving only exterior observation. The planning department used the city and state building codes to devise six assessment criteria: broken windows; "deteriorating" paint; exterior columns that were falling or rotten; masonry veneer that was cracked or chipped; structural parts like walls, roofs, stairs, porches, balconies, and siding that showed "evidence of deterioration"; and "evidence of apparent defects" in gutters, leaders, drains, window frames and doors. A building in "good" condition would have no such deficiencies, while a "fair" building would have one or two, and a "poor" building would have three or more.

The inspected properties in Oceanfront North, as in the Broadway Corridor but unlike in Oceanfront South, consisted mostly of vacant lots and properties in fair or poor condition:

	Broadway Corridor	Oceanfront North	Oceanfront South
Vacant	47 (20%)	148 (37%)	5 (9%)
Good	48 (20%)	70 (17%)	36 (67%)
Fair	74 (31%)	110 (27%)	11 (20%)
Poor	68 (29%)	75 (19%)	2 (4%)
Total	237	403	54

On that basis, the study concluded that Oceanfront North satisfied the N.J.S.A. 40A:12A-5(a) redevelopment criterion that "[t]he generality of buildings" were in sufficiently poor condition "as to be conducive to unwholesome living or working conditions."

The study further noted that fifteen acres, comprising sixteen percent of Oceanfront North's land area, had been vacant for ten years. It declared that circumstance to represent a large amount of long-term vacant land for a "moderate size city" and "a very clear and significant indicator" that private capital alone was unlikely to develop that land. An additional nine percent of Oceanfront North, or 9.3 acres, had been vacant for less than ten years, and the study regarded the increase in vacant land as evidence of growing "non-investment and dis-

investment phenomena." The study found that the extensiveness of vacant land was consistent with the criterion in N.J.S.A. 40A:12A-5(c) that land be unamenable to private development, although it did not address the coordinate statutory criterion that the hindrance to private development arise from the property's remoteness, topography, or soil conditions.

For the N.J.S.A. 40A:12A-5(d) criterion of conditions that are "detrimental to the safety, health, morals or welfare of the community," the study noted the dilapidation and obsolescence of the Broadway Corridor and the downtown commercial areas. It did not suggest that those conditions extended into the nearby residential areas or were in any way caused by them.

The final statutory criterion was in N.J.S.A. 40A:12A-5(e), a growing or total lack of proper land utilization, such that land "potentially useful and valuable for contributing to and serving the public health, safety and welfare" is instead left "in a stagnant and unproductive condition."[5] The study declared Oceanfront North to be increasingly if not fully unproductive, due to property values that were less than one-fourth those in Oceanfront South as measured by average property tax per square foot, which it called "a strong indication that the proposed

[5] The statute identifies "diverse ownership" as a possible cause of improper land utilization, but the study cited no instance of a parcel with problematic multiple ownership.

redevelopment area is very significantly under-productive and should be capable of improvement."

Another measure of unproductive land use was the lack of private investment, as no construction permits had been issued for Oceanfront North from 1990 through November 1995, and only two were issued in the Broadway commercial area, compared to 4745 permits issued for the rest of the City. The study concluded that the increased residential density Oceanfront North could support served as a reasonable measure of proper land utilization "for the greatest good to the community":

> There are an estimated 200 dwelling units in this area. Applying design standards consistent with the markets seeking high amenity locations such as the oceanfront, the team developed a model which will enable construction of an estimated 476 additional dwelling units in this area. This plan represents a reasonable standard for productive use of the land. The currently stagnant and not fully productive condition of this land area discourages development which could create more tax paying residential units near the ocean.

On January 23, 1996, the City Council adopted Resolution 38-96, by which it accepted the Planning Board's recommendation to find Oceanfront North and the Broadway Corridor to be areas in need of redevelopment.

D. The redevelopment plan

In April 1996 the planning department, along with Thompson and Wood for "planning and design," The Atlantic Group as redevelopment consultants, and Greenbaum Rowe, issued the "Oceanfront-Broadway Redevelopment Plan" (the plan). The plan's "overall goal is to bring about a compact and integrated ensemble of public and private places that support year-round uses related to living, working, and recreation and visitation."

As we have stated, the plan divided Oceanfront North into four sub-parts or sectors (also described as "Zones of Character"). The northernmost sector was designated as Beachfront North. It consisted of 27.5 acres and MTOTSA was at its northern tip. Beachfront North would become a "single cohesive neighborhood" of low-rise, medium-density residential use, with greater "street life" due to redesigned circulation and parking:

> Beachfront North is a sector composed of a Waterfront Recreation Zone . . . and a Beachside Residential Village. Building types that are "street based" and "street dependent" shall be required in the entire sector. A neighborhood character is to be established, emphasized by controlled street traffic, bike and walking paths, on-street resident parking and through-block alleys for garages and secondary parking.

The plan's general redevelopment objectives included the encouragement of greater density, "in order to create a walkable

environment and an enlarged base population to sustain a lively, year-round retail and residential core on Long Branch's Oceanfront." The vehicle for doing so, and for increasing the value of "land and enterprise for public and private interests," would be "high-yield projects that exploit ocean views from residential and commercial development and public spaces." Other goals included "[i]mprov[ing] the City's image by replacing vacant lots and poorly maintained buildings with new, carefully designed buildings, both commercial and residential," "increasing year-round population by creating housing types that will attract a diversified market, primarily small households," and "[c]onserv[ing] sound, well-maintained single-family housing to the extent possible, and encourag[ing] residential development through infill."

The plan declared itself "consistent with the general plan for the municipality" because it would "carry out major proposals of the Master Plan for the City and will comply with local objectives of the City as to appropriate land uses, improved street systems, and overall improvement of the area." More generally, it was consistent because it "will improve the total living and working conditions of the City through improvement of a blighted area, removal of structures in poor condition and the provision of land for new commercial and

residential development." The plan stated that both the Planning Board and the City Council found these objectives consistent with their prior findings that area addressed in the plan was in need of redevelopment.

The plan noted the City's intention of letting the private redevelopers acquire necessary properties through negotiation with their owners, and the expectation that the need for relocation would be "moderate at most, given the policy encouraging infill." However, the City would reserve the right to exercise eminent domain for properties that "are judged essential to achieve objectives intended by the Plan," upon the redeveloper's request and "as a last resort after other means have been exhausted." The plan did not indicate how the determination that a property was essential to the redevelopment project would be made.

E. The redevelopment ordinance

On April 16, 1996, the City Council, citing the procedural requirements of N.J.S.A. 40A:12A-6 and -7(f), adopted a resolution finding "substantial evidence in support of a determination that the areas delineated as Oceanfront North and Broadway Corridor individually qualify as redevelopment areas and collectively also qualify as a redevelopment area." The resolution adopted the plan and declared Beachfront North and

the Broadway Corridor to be "in need of redevelopment pursuant to the statutory criteria set forth in" N.J.S.A. 40A:12A-5(a), (c), (d), and (e).

On May 14, 1996, the City Council codified the plan as Ordinance 15-96. The ordinance included the plan's objectives and provided that further details would be provided as design guidelines.

F. The design guidelines

On October 4, 1996, the Thompson Design Group issued design guidelines for developers to follow in devising redevelopment projects to propose to the City. The guidelines for Beachfront North explained that the development of "an urban beach-side community, integrated with high amenity beachfront recreational activities," required "a critical concentration" of year-round residents. For that reason, "new development" had to contain from twelve to fifteen dwelling units per acre.

Design Guidelines Handbook 1 (General Design Guidelines), in its Generalized Land Use section, and Design Guidelines Handbook 4 (Beachfront North), in its Land Use section, designated MTOTSA as "Infill residential."

G. The redeveloper and the redevelopment agreement

Woolley certified that the plan and design guidelines were completed with no input from potential developers. The City

sent requests for proposals to more than 250 potential developers, while Woolley, Turner, the City's director of building and development, and the Thompson Design Group evaluated the responses for compliance with the plan and the design guidelines.

Their evaluations were transmitted to the mayor and council, which selected the proposal submitted by Applied Development Company (Applied). On June 1, 1999, the City entered into a memorandum of understanding with Beachfront North L.L.C., the subsidiary that Applied created to separate its redevelopment work in that neighborhood from its other redevelopment work in Long Branch.

Woolley explained that the memo of understanding was the stage at which the City's redevelopment counsel "first became involved in the process." Before that point, no attorney received materials and no attorney attended meetings with potential developers "when the issues of redevelopment were discussed." James Aaron, the City's outside counsel since July 1994 and a member of Ansell Zaro Grimm & Aaron (Ansell Zaro), certified that he and his firm had no role in selecting the redeveloper, or in negotiating or preparing the redevelopment agreement, and that the City adopted the plan before potential developers were identified.

On February 22, 2000, the City and Beachfront North, L.L.C., entered into a redevelopment agreement for the Beachfront North area, defined as the area of approximately 25 acres bordered by Ocean Avenue,[6] Ocean Boulevard, Seaview Avenue, and Madison Avenue (the redevelopment agreement). Exhibits listed appellants' properties among those subject to acquisition. The project would have two phases. Phase I encompassed all of Beachfront North except for MTOTSA. It involved the acquisition of forty-one private properties and the construction of approximately 190 townhouses, 130 rental residential units, and 10,000 square feet of retail space. Phase II, covering only MTOTSA, would comprise approximately 200 residential units and another 10,000 square feet of retail space. The conceptual site plan depicted the proposed development of Phase I, but showed MTOTSA as it currently was, with the existing houses including appellants'.

The redevelopment agreement provided that the City would monitor the redeveloper's attempt to acquire the privately owned properties within the redevelopment area, because every thirty days the redeveloper had to inform the City of the "[r]esults of discussions with" the properties' owners, "[o]pportunities to

[6] Ocean Avenue is the street closest to the beach and runs parallel to the beach.

secure options whenever possible to establish private control over" the properties, and any investigations related to the costs of acquiring the properties, including relocations and site remediation.

The redevelopment agreement also used confirmation of the State's funding commitment for the project as the trigger for the City's obligation to take the steps necessary for eminent domain jurisdiction over the privately owned properties in the redevelopment area, which would include amending the plan by identifying the properties to be acquired. The redeveloper retained the option to begin negotiating with the property owners before or after those events occurred, in which case the City would "use its best efforts . . . to assist in arranging for and facilitating discussions."

The total cost of acquiring the private properties for Phase I was not to exceed $10,300,000.[7] However, the City agreed to fund the first $500,000 of any additional consideration to be paid to the property owners. If further consideration were necessary, it would come from the State's commitment or the redeveloper.

[7] That figure was supposedly set forth in a schedule that does not appear in the record. Nothing in the record indicates whether that figure or that schedule indicated a maximum dollar amount that could be offered for each property.

For any property that the redeveloper was unable to acquire through negotiation, it would "instruct the City to acquire said parcel." The price that the City would offer was to be based on an environmental audit and on an appraisal that considered the estimated cost of remediation to residential environmental safety standards. The City would need the redeveloper's written consent to offer more than that price, and if the redeveloper withheld consent, the City would acquire the property through condemnation.

On April 11, 2000, the City amended Ordinance 15-96 by adopting Ordinance 9-00, which incorporated the redevelopment agreement's list of properties to be acquired. In January 2001, the City adopted Ordinance 2-01 to authorize the acquisition of properties in the redevelopment area by negotiation or condemnation pursuant to the redevelopment agreement. In February 2001 it entered into an amended redevelopment agreement with Beachfront North, L.L.C., which stated that the City had met its obligation to take the necessary steps for eminent domain jurisdiction and again listed appellants' properties among those that could be subject to condemnation.

<u>H. The redeveloper's partner, and the City's law firms</u>

In January 2002, Applied reached agreement with the Matzel & Mumford Organization (M&M), a subsidiary of K. Hovnanian since

1999, to be a joint venturer with it in the Beachfront North redevelopment project. M&M would bring experience in marketing non-rental housing plus $5 million in equity.

Greg Russo, a vice president at Applied, certified that it wanted a partner so it could focus its attention on a different redevelopment project in Long Branch that was more challenging due to the mix of desired uses. Applied approached M&M because of its high regard for the company from previous developments on which both had worked. Applied and M&M negotiated their joint venture agreement without informing the City or its counsel.

On June 25, 2002, the City adopted Resolution 226-02, which authorized a second amended redevelopment agreement for the Beachfront North project, to reflect Beachfront North L.L.C.'s assignment of its rights to the joint venture entity "MM-Beachfront North I, L.L.C." The cost of Phase I would remain the same, even though the number of residential units decreased to approximately 290, comprising 104 townhome units and 186 condominium units, and the commercial space was reduced to 6400 square feet. Woolley certified that no outside counsel was involved with that resolution or that agreement.

Aaron certified that he and his firm played no role in arranging the joint venture or in obtaining the City's acquiescence. While K. Hovnanian was a client of his firm,

until June 2002 he did not even know that M&M was a subsidiary, a lack of awareness that was reinforced by both entities' having submitted separate proposals for another Long Branch redevelopment project in response to the City's solicitation. From that point his only work in relation to the Beachfront North redevelopment "was to review already-existing commitments of the City and continue actual on-going litigation matters," and that work was concluded by December 2002.

Ansell Zaro never worked for M&M, and its work for K. Hovnanian on a zoning-violation case was unrelated to the Long Branch redevelopment projects. Woolley believed that the end of Ansell Zaro's work for K. Hovnanian eliminated even the appearance of a conflict that could prevent it from serving as the City's redevelopment counsel.

James Greenbaum, a member of K. Hovnanian's board of directors since 1992, certified that the Long Branch redevelopment projects were never discussed at board meetings, and that he had no communications about them with any K. Hovnanian or M&M employee or with any city official. Nonetheless, on October 9, 2002, Greenbaum resigned as the City's redevelopment counsel to spare the City from the prospect of unfounded complaints that his firm's "general representation" of M&M's parent company created the appearance of a conflict of

interest. The only exception was "certain condemnation proceedings" that new counsel took over by March 2003, and which his firm had maintained until that time in order to avoid harming the City's litigation position.

In autumn 2003, after abrogation of the Rule of Professional Conduct that required lawyers to avoid theoretical appearances of impropriety, the City retained Greenbaum Rowe anew as redevelopment counsel. The retainer expressly excluded the firm "from any involvement in the identification, selection or ranking of developers or anything to do with Beachfront North or Beachfront South." It was thus uninvolved in any issue relating to Beachfront North and worked primarily on the redevelopment of another area.

In April 2005 the City expanded Greenbaum Rowe's work to include the condemnation actions it anticipated for Phase II of the Beachfront North redevelopment, as well as any challenges to the condemnations' constitutionality. However, on July 20, 2005, after the United States Supreme Court released its opinion in the redevelopment case of Kelo v. City of New London, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005), the firm withdrew from the condemnation cases pursuant to its practice of recusing itself "with respect to the identification,

qualification, ranking and/or selection of redevelopment candidates."

While Greenbaum Rowe did not believe that the City had engaged in "impermissible favoritism" or in "creating a private benefit," or that it had helped the City to do so, it anticipated that the presence of such language in the Kelo concurrence could inspire spurious challenges to the redevelopment project if it continued to work on the condemnations. The City consented to the firm's withdrawal, and its contractual relationship with the City ended as of December 31, 2005.

I. The MTOTSA Alliance of Beachfront North residents

On July 6, 2003, the "MTOTSA Alliance" of residents and property owners on Marine Terrace, Ocean Terrace and Seaview Avenue (the Alliance) asked the City to describe the condition of the properties that were listed as subject to eminent domain and to compare their condition to that of the properties not listed. It also stated that its members, some of whom had lived and owned homes in the neighborhood for over forty years, wanted the neighborhood "revitalized" rather than redeveloped.

On May 16, 2004, the Alliance sent the City its own plan for Beachfront North, which declared that the neighborhood's existing design and characteristics, in particular an asserted

density of 14.75 dwelling units per acre, satisfied the objectives set forth in the plan. The Alliance asked the City to repave the streets, upgrade the sidewalks and street lamps, and move the telephone cables underground. It also listed the repairs and improvements that each property owner intended to make, including reconstruction on some currently vacant lots. The Alliance used the term "well maintained" to describe some of the properties the City had categorized as being in only "fair" condition. On June 15, 2004, the City responded by listing the subjects that the Alliance would have to address if its submission were to be eligible for consideration as an alternative redevelopment plan.

J. An amendment to the redevelopment agreement

In September 2005 the City adopted Resolution 333-05, authorizing an amendment to the "Developer's Agreement for Beachfront North Phase II" to incorporate the design standards. It also revised the description of Phase II to provide for approximately 185 residential condominiums and a 10,000-square-foot pavilion for public use in lieu of retail space.

The ratified amendment stated the City's and the redeveloper's determination to proceed in Beachfront North despite challenges by some of the homeowners. It recited the City's intention to acquire the properties by good-faith

negotiations "in conjunction with the Redeveloper" and to exercise eminent domain only when the redeveloper declared its inability to reach agreement with a property owner. Whether in settlement discussions or condemnation proceedings, the City would have to notify the redeveloper of its intention to use a figure for the value of any property if the figure varied by more than ten percent from the appraisal, with no indication that the redeveloper had a right to protest.

K. The condemnation offers and appraisals

The condemnation offers, dated January 28, 2005, were sent to appellants on letterhead that identified M&M as a division of K. Hovnanian. They stated that the City had retained McGuire Associates to appraise fair market value, and that the City had asked the redeveloper to "try to come to an agreement on the purchase of your property." In addition, the redeveloper was offering a ten-percent discount on "certain Phase I condominiums" to "those owner/occupants who want to remain in the Beachfront North neighborhood." The redeveloper would pay condominium association fees for ten years, and the City would provide unspecified property tax relief. If the proceeds of the owner's house were less than the discounted price of a condominium, "the Redeveloper and the City will review their

individual situation to determine if any other accommodation can be offered."

In the alternative, the redeveloper was offering to increase "the statutory relocation allowance" by an additional $2000 per month for thirty-six months. It requested a meeting with the property owner "to discuss the purchase terms and any specific needs that you may have because of the acquisition of your property."

On May 10, 2005, McGuire Associates issued to the City its appraisal report of the Anzalone's property, located at 32 Ocean Terrace (block 301, lot 5), a one-story building with two apartments. A physical inspection showed the property to be in good condition. McGuire Associates estimated the fair market value as $304,000.

The addresses of the other properties, McGuire Associates' characterization of their condition (if not vacant land), and its appraisal of their fair market value were as follows:

> Mellilo: 46 Marine Terrace (block 301, lot 3), vacant lot, $107,000.
>
> Vendetti: 38 Ocean Terrace (block 301, lot 1), single-family house in good condition, $410,000.
>
> Viviano: 99 Marine Terrace (block 303, lot 11), single-family house in average condition, $303,000.

Cook and Hunter: 45 Ocean Terrace (block 302, lot 19), single-family house in average condition, $481,000, and 40 Seaview Avenue (block 302, lot 8), vacant lot, $192,000.

Brower: 84 Ocean Terrace (block 301, lot 21), two-family dwelling in good condition, $340,000.

Gruberg and Freidman: 90 Ocean Terrace (block 301, lot 20), two-family dwelling in good condition, $448,000.

Hoagland: 68 Ocean Terrace (block 303, lot 4), single-family house in good condition, $408,000.

Kandur and Taylor: 91 Ocean Terrace (block 302, lot 2), two-family dwelling in good condition, $350,000.

Rose LaRosa: 78 Ocean Terrace (block 301, lot 22), "well maintained" two-family dwelling, $625,000.

McKenna: 69 Marine Terrace (block 303, lot 8), single-family house in average condition, $210,000.

Netto: 65 Marine Terrace (block 303, lot 10), single-family house in good condition, $305,000.

Patel: 83 Ocean Terrace (block 302, lot 22), two-family dwelling in fair to average condition, $300,000.

Laurie Ann Vendetti: 33 Ocean Terrace (block 302, lot 17), single-family house in average condition, $374,000.

Estate of DeFaria: 42 Marine Terrace (block 301, lot 2), single-family house in good condition, $360,000.

> Eagan and Sadenwater: 30 Seaview Avenue (block 302, lot 12), three-story building with three apartments, in "fair to average" condition, $467,000.
>
> Squirlock: 34 Seaview Avenue (block 302, lot 11), single lot with two dwellings in average condition, $330,000.
>
> Milano: 65-69 Ocean Terrace (block 302, lot 20), two-family dwelling, with one good unit and the other in "fair to poor" condition, $451,000.

L. Negotiations with the property owners

Russo certified that the redeveloper subsequently sent appellants "follow-up letters attempting to negotiate," but the record does not contain any examples.

On October 11 and 12, 2005, counsel for defendants in L-4987-05 and L-4996-05 wrote to Ansell Zaro, which the City had apparently appointed as its eminent domain counsel, to protest the naming of their properties as subject to condemnation. He asserted that the entire MTOTSA neighborhood had been designated at a public hearing as "infill" that would not be subject to condemnation, that his clients might nonetheless wish to enter into good-faith negotiations, and that he needed to know "whether the City can negotiate a final settlement without the need of approval from a private third party." On February 7, 2006, he sent a similar letter on behalf of defendants in L-871-07, adding that those clients "would appreciate an answer to

these questions before discussing the merits of the appraisal upon which your offer is based."

On October 28, 2005, Aaron responded to the first letter by explaining that regardless of how sketches might have designated areas as infill, the design guidelines specified all the permitted uses and stated that they were planned uses for the area. More fundamentally, the properties were subject to eminent domain by virtue of being "included in the redevelopment zone since [the] 1996 Plan which was adopted in May" of that year by ordinance. Aaron also observed that the Alliance never responded to the City's request for the additional information that its submission required in order to be considered as an alternative redevelopment plan. In any event, negotiations would be with the City rather than any developer, and no agreement delegated the City's rights to a developer in a way that violated any statute. Aaron asked counsel to advise him within seven days "should you wish to negotiate on behalf of your clients in good faith."

M. Challenges to the alleged condition of the properties

On March 2, 2006, in L-4987-05, William Giordano, whose father owned 74 Ocean Terrace (block 1, lot 303), certified that the fire bureau inspection report was wrong to characterize the building as a two-family, wood-frame-and-brick house in fair

condition with a poor roof, because it was a three-family, all-brick building with a new roof. Olga Netto certified in L-4987-05 that her property (65 Marine Terrace, block 303, lot 10) was well-maintained when she bought it in 2001, with a new roof and new windows.

That same day, also in L-4987-05, Denise Hoagland, the owner of 68 Ocean Terrace (block 303, lot 4) along with her husband, certified that the inspection report was incorrect in declaring her roof to be in poor condition. She stated "the roof was in excellent condition because it had been replaced about five years prior to the inspection being conducted." The report's characterization of her property as being only fair was inconsistent with the appraisal, which called its condition good.

Hoagland added that she had attended a January 16, 1996, Planning Board hearing at which MTOTSA was designated as residential infill, and that she then attended a redevelopment symposium where a three-dimensional model depicted Beachfront North the same way. Therefore, she and other MTOTSA property owners were "perplexed about the notion that [their] properties would be condemned." She asserted that a few weeks after the hearing and symposium, the mayor responded to her inquiry as to whether her home was in danger of being taken in connection with

the redevelopment plan, by stating that "there were no plans for her property and that he was not sure if there would be plans in the future." The mayor "said if all of the properties looked like Ocean and Marine Terrace, there would be no need for redeveloping the City of Long Branch."

N. Involvement of Monmouth Community Bank

In connection with the redevelopment of Beachfront North, Monmouth Community Bank gave Applied a $2.5 million line of credit, under which it made the first advance in September 2001 and received full repayment in June 2002. The bank also gave Applied a $2 million line of credit for the Pier/Village Center redevelopment project, with the first advance in August 2002 and full repayment in February 2003. Applied's principals personally guaranteed both lines of credit.

Monmouth Community Bank was also one of the City's main depository banks. Aaron was a shareholder of the bank, and a member of its board of directors since its inception. A November 2002 newspaper article reported that three of the five City Council members owned shares in the bank and "approved city redevelopment projects that were later financed by" the bank, although it did not name the projects. The article related the representation by some Council members that "they do not know

who will finance a redevelopment project until after the city gives its approval."

II

The Anzalones claim that the court erred by finding that the City satisfied the "substantial evidence" standard for determining that their property was in need of redevelopment. They argue that the City did not make separate findings to that effect for individual properties, that the City improperly based its findings solely on the exterior condition of the buildings, and that the City did not make findings that the physical condition of the buildings impaired the safety, health, morals, or welfare of the community.

They contended that even if some of the properties in Beachfront North were truly in need of redevelopment, the City did not find that they could only be redeveloped if other properties like appellants' were redeveloped along with them. Finally, the Anzalones argue that the property owners themselves and other private capital would have addressed the neighborhood's alleged conditions but for the City's discouragement of such activity in several ways: by denying building permits for maintenance and improvements even before condemnation unless the owner waived compensation for such work; by purposely neglecting neighborhood services and building-code

enforcement; and by rezoning to an unrealistic minimum lot size approximately three times as large as the existing lots.

The consolidated appellants make the same claims. They argue that blighted properties and vacant lots not amenable to private redevelopment must predominate in order for an area to be in need of redevelopment, and that, by itself, the possibility of more-profitable uses is not enough. In that vein they also claim that the success of the redevelopment did not require the taking of their properties. More particularly, they argue that the statutory redevelopment criterion of "diverse ownership" means an individual property with convoluted ownership that by itself is an impediment to development, and that the court erred by applying that criterion to an entire residential neighborhood simply because each home had a different owner.

We agree with appellants that, in light of the principles laid down in Gallenthin, the City did not find actual blight under any subsection of N.J.S.A. 40A:12A-5, that the record lacked substantial evidence that could have supported the New Jersey Constitution's standard for finding blight, and that the absence of substantial evidence of blight compels reversal.

The trial court explained that redevelopment is a public purpose for which the New Jersey Constitution lets

municipalities take "blighted" private properties, and that the alternative criteria in N.J.S.A. 40A:12A-5 for an area to be in need of redevelopment served as functional definitions of blight. Municipal findings that an area within particular boundaries satisfies one of those statutory criteria, along with the municipality's adoption of a redevelopment plan for that area, enjoy a presumption of validity and must be upheld as long as there is "substantial evidence" that they were not arbitrary, capricious, or unreasonable. A redevelopment plan is not necessarily invalid for including a property that is not "substandard."

The court noted the planning department's report that thirty-seven percent of the properties in Oceanfront North were vacant, while nineteen percent had buildings with three deficiencies visible from the outside, which the planning department considered to be poor condition, and another twenty-seven percent had buildings regarded as being in fair condition for having two such deficiencies. With only seventeen percent of the properties having buildings in good condition, the court concluded there was a generality of substandard or obsolescent buildings, which was substantial evidence for the City's finding pursuant to N.J.S.A. 40A:12A-5(a) that "'[o]bsolete layout and

faulty design deter private development and are detrimental to the welfare of the community.'"

The court similarly found that the vacancy rate of twenty-five percent by area, and a ten-year vacancy rate of sixteen percent by area, were substantial evidence for the City's determination pursuant to N.J.S.A. 40A:12A-5(c) that Beachfront North was unlikely to be developed by private capital. Those vacancies were also substantial evidence for the City's determination pursuant to N.J.S.A. 40A:12A-5(e) of a "growing lack" of proper land utilization "which deters private investment."

In sum, "the City concluded that private investment would make the area more productive and contribute to the public health, safety and welfare," and it had substantial evidence for that conclusion. The court also noted that the question was whether the finding that the area in question was in need of redevelopment was valid at the time the City made it, and that subsequent improvements in the area could not be considered, especially improvements that might have resulted from other redevelopment projects that were part of the City's same comprehensive vision.

The court also addressed the City's finding of a need for redevelopment in the commercial portion of the redevelopment

area north of North Bath Avenue. It upheld the finding of low commercial viability pursuant to N.J.S.A. 40A:12A-5(d) based on the study's conclusion "that the residential area also suffered from the poor appearance of nearby commercial buildings." However, while such a finding might have justified redeveloping the commercial area, it did not logically imply that redevelopment of the commercial area would fail unless Beachfront North was also redeveloped. Appellants do not challenge the City's finding of a need for commercial redevelopment, and we agree with their apparent assessment that the finding is not dispositive of the factual and legal questions about whether their properties were in need of redevelopment.

The City relied on the following portions of N.J.S.A. 40A:12A-5:

> A delineated area may be determined to be in need of redevelopment if, after investigation, notice and hearing as provided in [N.J.S.A.] 40A:12A-6[,] 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.

. . . .

> 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, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.
>
> e. A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

A city's decision that a particular area is "blighted" is "invested with a presumption of validity." Levin v. Twp. Comm. of Bridgewater, 57 N.J. 506, 537, appeal dismissed, 404 U.S. 803, 92 S. Ct. 58, 30 L. Ed. 2d 35 (1971). Challengers have "the burden of overcoming that presumption and demonstrating

that the blight determination was not supported by substantial evidence." Levin, supra, 57 N.J. at 537. Accord Gallenthin, supra, 191 N.J. at 372; Concerned Citizens of Princeton v. Mayor of Princeton, 370 N.J. Super. 429, 452-53 (App. Div.) ("Redevelopment designations, like all municipal actions, are vested with a presumption of validity."), certif. denied, 182 N.J. 139 (2004). The Legislature codified the "substantial evidence" standard by incorporating it in the municipal procedural provisions of N.J.S.A. 40A:12A-6(b)(5). ERETC v. City of Perth Amboy, 381 N.J. Super. 268, 277-78 (App. Div. 2005).

However, our courts have cautioned that the "substantial evidence" standard requires "a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met." Gallenthin, supra, 191 N.J. at 373. That standard similarly prohibits a municipality from exercising eminent domain on findings that are "supported by only the net opinion of an expert." Ibid. Instead of simply describing the physical and financial status of the properties to be taken, the municipality or its expert must perform "an analysis of the statutory criteria as applied to each of the properties in the designated" redevelopment area, and of how each property's condition reflected or contributed to the area's blight. ERETC, supra, 381 N.J. Super. at 279-80. Accord Wilson

v. City of Long Branch, 27 N.J. 360, 389-90, 394 (record related extent to which factors including buildings that were "obviously beyond restoration" contributed to blight), cert. denied, 358 U.S. 873, 79 S. Ct. 113, 3 L. Ed. 2d 104 (1958).

Furthermore, questions of law are still reviewed de novo. Gallenthin, supra, 191 N.J. at 372; Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference."). New Jersey courts interpret a statute by presuming that the Legislature was aware of constitutional requirements and intended its enactments to abide them. Gallenthin, supra, 191 N.J. at 359; State v. Profaci, 56 N.J. 346, 349 (1970). Our courts have the duty "'to so construe the statute as to render it constitutional if it is reasonably susceptible to such interpretation.'" Gallenthin, supra, 359-60 (quoting State v. Miller, 170 N.J. 417, 433 (2002) (quotation and citations omitted)).

The New Jersey Constitution's general provision on eminent domain requires only a "public purpose" and "just compensation," N.J. Const. art. I, ¶ 20, plus adherence to due process. Gallenthin, supra, 191 N.J. at 356. The provision that specifically addresses takings for redevelopment declares them

to be a public purpose, and to be eligible for preferential tax treatment, as long as the property is "blighted":

> The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired. Municipal, public or private corporations may be authorized by law to undertake such clearance, replanning, development or redevelopment; and improvements made for these purposes and uses, or for any of them, may be exempted from taxation, in whole or in part, for a limited period of time during which the profits of and dividends payable by any private corporation enjoying such tax exemption shall be limited by law. The conditions of use, ownership, management and control of such improvements shall be regulated by law.
>
> [N.J. Const. art. VIII, § 3, ¶ 1 ("the Blighted Areas Clause").]

Pursuant to the fundamental principle of giving effect to all constitutional provisions, State v. Muhammad, 145 N.J. 23, 75-76 (1996), "the general provisions of the Constitution must give way to its particular provisions." Kervick v. Bontempo, 29 N.J. 469, 479-80 (1959); accord Behnke v. N.J. Highway Auth., 13 N.J. 14, 31 (1953). It is thus the Blighted Areas Clause that controls when redevelopment is the sole public purpose for a taking.

Gallenthin, supra, 191 N.J. at 360, explained that the ordinary meaning of "blight" did not extend to an area in which the only negative condition was suboptimal land use. Instead,

the word "blight," and thus the Blighted Areas Clause, required the area to be characterized by physical or social deterioration that threatened to become intractable. Ibid. The clause could not allow a property to be declared "blighted" simply because it is "operated in a less than optimal manner," because if that were allowed, "most property in the State would be eligible for redevelopment." Id. at 365. The Court further illustrated the meaning of "blight" with similar language that the sponsor of the Blighted Areas Clause had used, after which the delegates to the 1947 constitutional convention passed the amendment containing the clause as proposed. Id. at 360-61; Proceedings of the New Jersey Constitutional Convention of 1947, vol. I at 744-45. On that basis, it held that the Blighted Areas Clause was intended to cover only "deterioration or stagnation that negatively affects surrounding areas." Gallenthin, supra, 191 N.J. at 360.[8]

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[8] The sponsor's statement, which was delivered without challenge or criticism, included the following:

> Certain sections of [the older cities in the State] have fallen in value, and have [become] what [are] known as "blighted" or "depressed" areas. . . .
>
> These depressed areas go steadily down hill. . . . It's impossible to keep the properties in good condition, the houses deteriorate more and more, and what was once

(continued)

The Blighted Areas Clause also had the related intent of ensuring the constitutionality of statutes that allowed local governments to use tax preferences as incentives for private companies to participate in redevelopment projects. Id. at 360-62; Proceedings, supra, vol. I at 743-44. In 1949, the Legislature substantially replaced those statutes with the Blighted Areas Act, which authorized local governments to find that an area was "blighted"; amendments to the Local Housing Authorities Law, authorizing local housing authorities to redevelop such areas; and the Redevelopment Agencies Law, which allowed local governments to create redevelopment authorities. L. 1949, c. 187; L. 1949, c. 300; L. 1949, c. 306; Gallenthin, supra, 191 N.J. at 361-62.

In both the Local Housing Authorities Law and the Redevelopment Agencies Law, the Legislature set out five

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(continued)

> a good section of the town is on the way to becoming a slum.
>
> Naturally, this slump in value is not confined to the original area affected. It spreads to neighboring blocks. No one person . . . can counteract this spread, because no one can afford to sink money into a blighted area . . . because the improvement is so small that it cannot turn the tide of deterioration.
>
> [Id. at 360-61 (quoting Proceedings, supra, vol. I at 742-43).]

subsections that were nearly identical to what would later appear as the first five alternative criteria in the current redevelopment statute, N.J.S.A. 40A:12A-5. L. 1949, c. 300, § 1, and L. 1949, c. 306, § 3. In 1951, it inserted those five subsections into the Blighted Areas Act as well, and deleted the provisions that had addressed only the kinds of conditions currently treated in N.J.S.A. 40A:12A-5(a) and (d). L. 1951, c. 248, § 1; Gallenthin, supra, 191 N.J. at 369-70; Forbes v. Bd. of Trustees of S. Orange, 312 N.J. Super. 519, 527 (App. Div.), certif. denied, 156 N.J. 411 (1998).

In 1992 the Legislature replaced the Blighted Areas Act and the other enactments with the Local Redevelopment and Housing Law. N.J.S.A. 40A:12A-1 to -49 (the LRHL). L. 1992, c. 79, § 59; Gallenthin, supra, 191 N.J. at 369. The five subsections that previously defined "blight" were included in the LRHL as subsections a through e of N.J.S.A. 40A:12A-5.

In addition to the general change of replacing the word "blight" with the term "in need of redevelopment," the LRHL made two ostensible changes in the fifth subsection. The first was that improper land utilization may now be found to arise from a title problem, diverse ownership, "or" other conditions, whereas previously it had to arise from a title problem or diverse ownership "and" other conditions. L. 1951, c. 248, § 1(e);

N.J.S.A. 40A:12A-5(e). The second was that the result of such conditions only has to be "a stagnant or not fully productive condition" of the land, "rather than "a stagnant and unproductive condition." Ibid. (emphasis added). However, "the definitional standards were not changed in any material respect," which meant that those two changes, along with lesser changes in the other subsections, were "cosmetic only." Forbes, supra, 312 N.J. Super. at 526, 529.

Indeed, the Legislature expressly recognized that municipal findings under the LRHL that an area was "in need of redevelopment," just like findings under the prior statutes that an area was "blighted," would be made "pursuant to the authority of" the Blighted Areas Clause and "for the purposes of" satisfying its requirement of a "blighted area." N.J.S.A. 40A:12A-3, -6(c).

The municipality in Gallenthin, supra, 191 N.J. at 348, relied solely on N.J.S.A. 40A:12A-5(e) to find that an area including the plaintiffs' property was in need of redevelopment. The Court observed that the Legislature had intended that subsection's precursor to include more than just actual slum conditions, and then explained that the intention was constitutional because the precursor's use of the term "blight" still "retain[ed] its essential characteristic: deterioration or

stagnation that negatively affects surrounding properties." Id. at 362-63. Under the presumption that the Legislature intended N.J.S.A. 40A:12A-5(e) to remain constitutional, the Court held that the provision was "reasonably susceptible" of the only construction that would preserve its validity: that the conditions it describes do not establish blight by themselves, but rather are among the recognized paths for an area to reach the level of degradation that the Blighted Areas Clause requires. Id. 365-70.

In short, the Legislature relied on the Blighted Areas Clause as the authority for all of the statutes in the prior acts that it would later incorporate in the LRHL, including the provisions that were reenacted with only "cosmetic" changes as N.J.S.A. 40A:12A-5(a) through (e). There is nothing in Gallenthin or in the legislative history to suggest that the provenance of those five provisions was anything other than parallel. While they might not be equally evocative of decay, they nonetheless share the "essential characteristic" of describing conditions of deterioration or reasons for deterioration by which an area can reach a level of degeneration that threatens to degrade other areas and that is unlikely to be remedied by private investment. We believe the Court would have used the same analysis and applied the Blighted Areas Clause in

the same manner if the municipality had relied on N.J.S.A. 40A:12A-5(a), (b), (c), or (d) instead of (e).

This reading of Gallenthin, and thus of N.J.S.A. 40A:12A-5, requires a municipality to find that the physical condition of the properties at issue was contributing to social problems not only within the redevelopment area, but also in nearby areas. Even though redevelopment would be expected to result in higher property tax payments and more spending for local businesses, the difference between the actual level of economic activity in the redevelopment area and the level that might be achieved after its transformation does not by itself amount to blight. Eminent domain based solely on such a difference would instead amount to condemnation due to the area's perceived insufficiency of wealth, and it would exemplify the Court's fear that most property would be continuously subject to forced redevelopment if the threshold requirement were nothing more than the possibility of a more profitable use of the land. Gallenthin, supra, 191 N.J. at 365.

Focusing more specifically on the language in N.J.S.A. 40A:12A-5(e), Gallenthin, supra, 191 N.J. at 367, explained that the phrase "or not fully productive" could not justify a taking for redevelopment purposes because such a criterion by itself would not satisfy the constitutional requirement of actual

blight. And, to respect the statutory construction principles of ejusdem generis and to "avoid rendering any part of a statute meaningless," the Court deemed the specific condition of "stagnant" to be "the operative criterion." Ibid. The placement of the more general phrase "or not fully productive" after "stagnant" meant that the phrase can serve to elaborate "stagnant," but not to expand its meaning. Ibid. For similar reasons, the undesirable condition of a "growing lack or total lack of proper utilization" must be caused by one of the specific problems named in the preceding clause, which are "the condition of the title" and the "diverse ownership of the real property"; the subsequent generalized phrase "or other conditions" cannot serve as a catch-all that allows unnamed causes of improper land utilization to be an independent basis for finding that an area is in need of redevelopment. Ibid.

We agree with the consolidated appellants that the Legislature most likely intended the term "diverse ownership" in N.J.S.A. 40A:12A-5(e) to cover only individual parcels with convoluted ownership. The alternative would be that the Legislature intended that the pattern of individual lot ownership, which typifies residential neighborhoods, would make them uniquely vulnerable to unnecessary redevelopment, notwithstanding the absence of any indication that the

Legislature imagined that pattern to be either a cause of blight or a symptom of it.

We are unpersuaded by the Anzalones' argument that a municipality should be barred from finding a need for redevelopment when the need arose from the municipality's own neglect of the area or from poorly conceived exercises of the municipality's zoning and other authority. They rely on Riggs v. Long Beach Township, 109 N.J. 601, 615-17 (1988), but that case does not support such an argument. Instead, it invalidated a zoning ordinance of which the sole practical effect, and thus the sole purpose as a matter of law, was to lower the fair market value and thus the amount of compensation the municipality would have to pay. Ibid.

Under Gallenthin, the absence of substantial evidence of blight invalidates all of the City's findings under N.J.S.A. 40A:12A-5 that appellants' properties were in need of redevelopment. Therefore, we need not address those findings in further detail.

III

Because we are remanding the matter, however, we will comment briefly on the evidence. We begin with appellants' contention that the taking of their properties represented a change in the plan that required readoption.

Appellants argue that the determination to take their properties was contrary to the plan's stated purposes and the design guidelines for achieving them. They contend that the term "infill" in the plan was self-defining as development that will occur in between existing structures to achieve the general purposes of the plan and also its specific objectives for Beachfront North. Appellants note that the plan named a key purpose of "[c]onserv[ing] sound, well-maintained single-family housing to the extent possible, and encourage[ing] residential development through infill," and they have asserted that their neighborhood already satisfies the plan's density objective for Beachfront North of twelve to fifteen dwelling units per acre. Such infill of their neighborhood would thus also serve the key purpose of "increasing year-round population by creating housing types that will attract a diversified market, primarily of small households," as well as the plan's "overall goal" of encouraging "year-round uses related to living[.]"

Appellants also assert that the design specifications prepared pursuant to the plan designated MTOTSA as residential infill, as did the maps and three dimensional model displayed to residents by City representatives. They further point to the provision in the plan stating that "[t]he amount of relocation required to implement the Redevelopment Plan is expected to be

moderate at most, given the policy encouraging infill." And, appellants contend that City officials affirmatively represented that houses like theirs would not be subject to eminent domain. Appellants believe that any ambiguity about the meaning of "infill" should be resolved in favor of the construction they put forth.

Under this scenario, at least the well-maintained homes owned by individuals who did not want to sell could be preserved. Voluntary sales could create larger tracts for interspersed multifamily development. Structures found to be substantially substandard could be required to upgrade or upsize, or, perhaps, those could be taken on a case-by-case basis through eminent domain. In this way, consistent with the overall purposes of the plan, an established neighborhood and its component well-maintained single-family dwellings could be retained, with new development blending in with the old.

Appellants' final observations are that the change in the plan objectives occurred after the developers got involved, and that it served their convenience. The Phase II redevelopment of their neighborhood with expensive condominiums would be easier and more profitable than the residential infill that was originally contemplated.

To refute these arguments, the City relies upon Turner's certification that while "development by in-fill" would preserve the option of selecting multi redevelopers for a sequence of smaller projects, it did not necessarily exclude exercises of eminent domain on other properties in the redevelopment area, and Woolley's certification that "[a]ny drawings in the plan which may show infill, were and are for illustrative purposes only." The City also relies upon the plan provision that it "reserves the right to condemn property if private negotiations fail and the property or properties in question are judged essential to achieve objectives intended by the Plan."

On this issue, the trial court accepted the City's contentions at face value, concluding that either residential infill or planned development (with the purchase and demolition of all existing structures) were always options in the plan. As we have stated earlier in this opinion, however, the plan contains no standards for determining what properties are "essential" to achieve the plan's objectives.

The trial court addressed these claims only implicitly. That is to say, the court did not discuss whether the evidence supported the City's assertion that the plan had always provided two options, but rather assumed sufficient evidence of a need for redevelopment by finding that it was "constrained to defer"

to the City's determination that the takings served a public purpose. That finding did not answer the question appellants raised, namely, whether the original plan indicated a purpose of preserving their residences and eschewing their replacement by new residential development. If so, the legal question would then arise whether the City's decision to abandon preservation in favor of new residential development required a new plan. By the terms of the plan itself, only property necessary to achieve the goals and purposes of the plan and to implement the plan's provisions would be taken. See also N.J.S.A. 40A:12A-8(c) (allowing acquisition by condemnation of property "necessary" for the redevelopment project); Texas E. Transmission Corp. v. Wildlife Preserves, Inc., 48 N.J. 261, 269 (1966) (condemnation of private property "must be limited to the reasonable necessities of the case").

We are satisfied that a sufficient factual issue has been raised on this point to warrant a plenary hearing for determination. Although it can be said that the documents speak for themselves, in case of ambiguity, extrinsic evidence is properly used as an aid to construction. See Schor v. FMS Fin. Corp., 357 N.J. Super. 185, 192 (App. Div. 2002) (allowed use of extrinsic evidence to aid construction of contract). When the construction of the documents turns on the meaning of the

extrinsic evidence, that meaning must be determined as a question of fact rather than of law. See Michaels v. Brookchester, Inc., 26 N.J. 379, 387 (1958) (contract case); Great Atl. & Pac. Tea Co. v. Checchio, 335 N.J. Super. 495, 502 (App. Div. 2000) (contract case).

A related issue is whether the City acted arbitrarily in including MTOTSA in the redevelopment area. We agree completely with the trial court that courts should be loath to second-guess legislative bodies in determining the specific boundaries of a redevelopment area once it is established that an area is in need of redevelopment. However, the municipality's authority in this regard is not unfettered.

We recognize, as did the trial court, that one or more properties that themselves are not deteriorated may be included in a redevelopment area and taken by eminent domain if necessary for implementation of the plan. Levin, supra, 57 N.J. at 539-40; see also Gallenthin, supra, 191 N.J. at 372 (commenting that if the municipality had presented "a situation where the subject property [was] in any way connected to a larger redevelopment plan . . . the result may have been different"). However, the determination is subject to judicial review. See Lyons, supra, 48 N.J. at 535 (allowing homeowners opportunity to present to Law Division "pertinent evidence they may have to show that

inclusion of their section of" the redevelopment area "is not supported by substantial evidence" and thus might demonstrate that the planning board "acted arbitrarily in not excluding the 'smaller' area").

It stands to reason that the more remote a location from the core of a blighted area, the weaker the case for inclusion. Other characteristics are obviously also extremely important and may well provide a basis for inclusion. The decision remains a legislative one, subject to the substantial evidence standard. We in no way suggest what the outcome should be. We merely conclude that the record contains sufficient conflicting evidence to warrant further exploration at a plenary hearing.

This leads to the quality of the evidence underlying the City's findings pursuant to N.J.S.A. 40A:12A-5(a), (c), (d) and (e). The redevelopment study based its subsection (a) finding on the survey of 403 properties in Oceanfront North, conducted by unidentified specific individuals, based only on exterior observation. The criteria utilized, although purportedly drawn from city and state building codes, are of a nature that, at least in some instances, might well be deemed more cosmetic than substantial. There is no expert opinion setting forth standards by which blighted structures should be gauged, particularly in light of the Gallenthin analysis. See also ERETC v. City of

Perth Amboy, 381 N.J. Super. 268, 280-81 (App. Div. 2005) (commenting on criteria for determining substantial evidence for blighted structures).

In our view, the survey, standing alone, was insufficient to constitute substantial evidence that the "generality" of the buildings were in such a state of decay as to qualify under subsection (a). Indeed, by the terms of the survey itself, only 19% of the structures were classified as in poor condition. Merely comparing the quality of buildings in Oceanfront North with those in Oceanfront South does not render the area containing lower quality structures in need of redevelopment. And, the study concluded with the net opinion that criterion (a) was satisfied because "[t]he generality of the buildings are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess any of such characteristics." A bland recitation of statutory criteria, with a net opinion that fails to explain its basis was expressly disapproved in Gallenthin, supra, 191 N.J. at 373. Nowhere did the study explain how the condition of the buildings contributed to unwholesome living or working conditions.

The subsection (c) criterion was deemed satisfied based upon the vacancy of 15% of the land area in Beachfront North for at least ten years, and an additional 9% that became vacant more

recently. The study concluded that this constituted evidence of growing "non-investment and dis-investment phenomena." However, subsection (c) requires more. It must be shown that because of certain conditions the land is not likely to be developed through the instrumentality of private capital. Those conditions are "location, remoteness, lack of means of access to developed sections or portions of the municipality, or topography, or nature of the soil." N.J.S.A. 40A:12A-5(c). No basis was provided to satisfy that criterion.

The study addressed criterion (d) with an analysis of the commercial area in the Broadway Corridor and in one small portion of the Beachfront North area. As we have stated, appellants do not challenge the sufficiency of the evidence supporting the need for redevelopment in the commercial area. However, to extend that need to surrounding areas, further explanation is required.

Finally, criterion (e) cannot be based upon diversity of ownership in the manner suggested by the City. The study's analysis focused on economic factors, including lower values and tax ratables than in the more affluent Beachfront South area. In other words, the property was deemed in need of redevelopment because it was "not fully productive." N.J.S.A. 40A:12A-5(e). However, a determination that a property owner is not utilizing

his or her property in a fully productive manner, standing alone, is not sufficient to meet this criterion. Gallenthin, supra, 191 N.J. at 370-72.

From the submissions of counsel, it appears that Phase I of Beachfront North has been built. In addition, substantial infrastructure has been constructed in the area. Substantial funds, public and private, have been expended on this project. While those are factors that might bar a late challenge to the right to condemn in a redevelopment project, see DeRose, supra, 398 N.J. Super. at 415, those factors cannot trump the rights of property owners. Id. at 419. In this case, the City asserted a statute of limitations defense, but the trial court rejected it based upon the public interest (thus warranting relaxation of the forty-five day limitation or Rule 4:69-6(b)(3)), and under the provisions of N.J.S.A. 20:3-5. The trial court therefore considered and determined the issues on the merits. The City has not cross-appealed from the rejection of its statute of limitations defense. Accordingly, the validity of the plan, its interpretation as applied to MTOTSA, and the validity of including MTOTSA within the redevelopment area remain "live issues" even at this late date.

IV

The Anzalones claim that the court erred by not allowing discovery on how the various conflicts of interest of city officials and the City's law firms might have influenced the decision to include their property in the redevelopment. They argue that the specter of favoritism to private interests created doubts that require investigation, in particular Greenbaum Rowe's apparent participation in devising the plan and the design guidelines while also counseling the redeveloper's parent corporation in unrelated matters.

The Anzalones also argue that the selection of Applied as a redeveloper reflected a conflict of interest because it had received letters of credit from Monmouth Community Bank, in which Aaron and some council members were shareholders. In addition, they argue that a Greenbaum Rowe opinion letter about possible conflicts of interest was relevant and that it was "made public" when it "was disclosed in materials filed with the Court," thereby creating a rebuttable presumption of public access. The consolidated appellants make a similar claim, adding the argument that any allegation of a conflict is enough to mandate a plenary hearing. We reject these arguments.

The trial court noted that the governing standard for the probity of municipal determinations prohibited both potential

and actual conflicts of interest. It observed that the City's decision to redevelop Beachfront North was embodied in Ordinance 9-00 or 2-01, which ended the ambiguity from prior indications that the existing neighborhood might remain as infill, and which did so "well over a year before" M&M became a co-redeveloper.

The court then explained that if the City or its law firms had been involved in negotiations concerning M&M's participation at any time prior to the adoption of those ordinances, that would have been a potential conflict of interest. However, the court found no evidence of such circumstances. Even though Greenbaum was a director of K. Hovnanian as well as the City's redevelopment counsel, he and another partner in his firm certified without contradiction that their firm did not become aware of M&M's participation until July 2002. Greenbaum Rowe had not participated in any discussions with the City and Applied that involved the assignment of the redevelopment agreement to Applied and M&M as joint venturers, and as soon as the firm learned of the appointment, it withdrew as redevelopment counsel.

Similarly, no one at Ansell Zaro knew until March 2002 that M&M was involved in the redevelopment project. Without evidence that the City or its law firms participated in the joint venture negotiations "during the time the City determined to take

[appellants'] properties," there was only "a speculative potential conflict" that did not warrant an examination in derogation of the presumption that the City's actions were "intended to serve a public purpose."

As for the bank, while three City Council members were shareholders, with one also serving as chief financial officer and another employed as a messenger, none of them had served on the bank's loan committee. The court regarded as "nebulous" the notion that those council members would have voted in 2002 to approve the assignment of the redevelopment agreement to a joint venture that included M&M solely because of the bank's letters of credit to Applied. A conflict of interest, even a potential one, requires interests that can be viewed as being in opposition, and the court found no opposition between the bank's prior issuance of letters of credit to the redeveloper and the interests of appellants.

An appellate court's review of a trial court's factfinding is limited. "Trial court findings are ordinarily not disturbed unless 'they are so wholly unsupportable as to result in a denial of justice.'" Meshinsky v. Nichols Yacht Sales, 110 N.J. 464, 475 (1988) (quoting Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 483-84 (1974)). Findings that "may be regarded as mixed resolutions of law and fact" receive the same

deference on appeal, with review "limited to determining whether there is sufficient credible evidence in the record to support these findings." P.T. & L. Constr. Co. v. State, Dep't of Transp., 108 N.J. 539, 560 (1987).

The existence of a conflict of interest in relation to a redevelopment project is a factual question that must be determined on a case-by-case basis. Van Itallie v. Borough of Franklin Lakes, 28 N.J. 258, 268 (1958). "The question will always be whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty." Ibid. Not every personal interest has that capacity, because "'[t]here cannot be a conflict of interest where there do not exist, realistically, contradictory desires tugging the official in opposite directions.'" Wyzykowski v. Rizas, 132 N.J. 509, 524 (1993) (quoting LaRue v. Township of East Brunswick, 68 N.J. Super. 435, 448 (App. Div. 1961)).

In Wilson, supra, 27 N.J. at 395-96, the Supreme Court rejected allegations that conflicts of interest existed, even though the chairman of the planning board was "the president, a director, and a stockholder of a bank holding some mortgages on property in the area" that the board determined to be blighted, while another board member was also a director and stockholder

of that bank, as was the mayor, who voted for the blight designation as a member of the governing body. The Van Itallie opinion elaborated on Wilson by noting the absence of a direct personal stake like an investment of personal funds, or the prospect of a promotion for a relative employed by a company that would benefit from the determination in question. Van Itallie, supra, 278 N.J. at 269.

The Van Itallie opinion emphasized the need to disregard alleged conflicts that as a practical matter do not pose a plausible risk of "corruption or favoritism":

> Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office. Of course, courts should scrutinize the circumstances with great care and should condemn anything which indicates the likelihood of corruption or favoritism. But in doing so they must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials. The determinations of municipal officials should not be approached with a general feeling of suspicion, for as Justice Holmes has said, "Universal distrust creates universal incompetency."
>
> [Ibid. (citation omitted).]

More recently, in Township of West Orange v. 769 Associates, 172 N.J. 564, 578 (2002), the Supreme Court explicitly repudiated misplaced reliance on the dicta in the Anzalones' case of City of Atlantic City v. Cynwyd Investments, 148 N.J. 55, 73 (1997) (quoting Wilmington Parking Authority v. Land With Improvements, 521 A.2d 227, 381 (Del. 1986)), which had quoted a Delaware case for the proposition that "'heightened scrutiny'" was required whenever a redevelopment project "'results in a substantial benefit to specific and identifiable private parties.'" The Supreme Court declared instead that "we have never held that the standard is other than the manifest abuse of discretion test." West Orange, supra, 172 N.J. 578.

In this case, the letters of credit to Applied were already secured by personal guarantees and were repaid in relatively short order, so they did not create a significant financial exposure for the bank. It was therefore unlikely that the council members who were shareholders in the bank voted to select Applied as the redeveloper due to concern about that exposure. Under the cases discussed above, such a concern was too nebulous to represent a potential conflict of interest.

Turning to the alleged conflicts of interest of the City's law firms, appellants cite Township of Lafayette v. Board of Freeholders of Sussex, 208 N.J. Super. 468 (App. Div. 1986), in

which we applied a combination of the Van Itallie standards and the mandates of professional ethics to conduct that was in fact very similar to Van Itallie's explanation of what conduct poses a conflict. In Lafayette, the County Board of Freeholders selected a site for a new sanitary landfill and entered into a contract for a private company to lease the site for fifty years, construct the facility, and operate it independently. Id. at 471-72. The site was next to the one on which the company's owner was already operating the county's largest sanitary landfill, but which the DEP was seeking to close. Ibid.

The Board's consultant had ranked that site thirty-eighth of ninety-one candidates, and he had not included it among the four that merited deeper study. Id. at 471. However, the owner of the company that won the contract was also the largest single stockholder in a bank of which the board's outside legal counsel was president, chairman of the board, and another major stockholder. Ibid. He was also a member of the firm that handled nearly all of the bank's legal work. Ibid.

We agreed with the trial court that the outside counsel, "who advised the Board of Freeholders on all legal aspects of the Board's decisions to select the landfill site and to enter into the purchase-lease back agreement, had a disqualifying

interest that was sufficient to invalidate" those decisions. Id. at 473. We declared that "the need for a high ethical standard on the part of lawyers" and "the nature of the capacity in which they serve" as public appointees meant that "[w]hat might be considered too speculative or remote when dealing with a public official who is not an attorney transforms into a disqualifying interest when the public official is an attorney." Id. at 474. The public could not avoid perceiving at least a potential conflict of interest "when the advice of County Counsel leads to a significant business opportunity for an individual with whom he had a business relationship to the extent of the one that existed here." Ibid. (emphasis added).

The outside counsel in Lafayette participated in the Board of Freeholders' decisions to select a site of no particular merit and to enter into a contract that were both uniquely advantageous to an individual whose company the consultant would not have chosen. The outside counsel also depended on that person's favor as the largest stockholder of the bank that employed him as an officer and provided work for his law firm. The public could have thought that the business relationship that the outside counsel was promoting — to the preclusion of the county's interest in considering the dozens of apparently superior sites for a new landfill — was little different in

"extent" from what Wilson and Van Itallie proscribed. By contrast, in these cases there was no indication that the City's law firms were aware of M&M's desire to participate in the project when the City enacted the 2000 and 2001 ordinances that identified the properties subject to eminent domain, or when the City decided in early 2002 to let M&M join Applied as co-redeveloper.

Furthermore, while appellants suspect additional connections among the council members, the City's law firms, and the redevelopers, appellants do not indicate what they might be. The value of further discovery is therefore speculative, and we will not reverse a grant of summary judgment due to insufficient discovery when a party can only suppose that further discovery might be fruitful. Auster v. Kinoian, 153 N.J. Super. 52, 55 (App. Div. 1977).

Finally, there is no merit to the Anzalones' argument that an opinion letter from Greenbaum Rowe to the City was discoverable following its apparently inadvertent disclosure during the course of in-camera review. The attorney-client privilege belongs to the client, so only the client may waive it. Kinsella v. NYT Television, 370 N.J. Super. 311, 318 (App. Div. 2004). A valid waiver thus requires the client's "knowledge of the right and an intentional surrender" of it. W.

Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 153 (1958). The negligent disclosure of confidential matter by the client's legal counsel does not amount to a voluntary and knowing disclosure by the client, so counsel's inadvertent disclosure does not constitute a waiver. Kinsella, supra, 370 N.J. Super. at 318-19. Accord Schillaci v. First Jersey Fidelity Bank, 311 N.J. Super. 396, 407 (App. Div. 1998) (inadvertent disclosure by counsel during discovery is not a waiver). There is nothing to the contrary in the Anzalones' case of Lederman v. Prudential Life Insurance Co., 385 N.J. Super. 307, 316-17 (App. Div.), certif. denied, 188 N.J. 353 (2006), which addressed the extent to which the presumption of public access to trials prohibits a court from sealing the record on pretrial motions.

We are satisfied that the trial court correctly found the absence of a conflict of interest that would have been sufficient to invalidate a determination (if otherwise sustainable) that Beachfront North was in need of redevelopment.

V

The Anzalones claim that the court erred by failing to dismiss the condemnation complaint against them due to the lack of bona fide negotiations. They argue that the City's offer was not bona fide because it was based on a stale appraisal, and

because the City wrongly treated the redevelopment agreement as capping the amount it could offer regardless of their property's value. The consolidated appellants make a similar claim for dismissal, and argue that the City prematurely ended negotiations when it failed to respond to their counsel's requests for further information. We do not agree.

The court observed that the case law balanced two governing principles. While the condemning authority does not always discharge its statutory obligation of bona fide negotiations simply by making an offer and describing its valuation method, the obligation to do more depends on the condemnee's apparent willingness to negotiate and the quality of the condemnee's evidence that the condemnor's offer is unreasonably low.

It then found that the responses to the City's offers "made clear" that appellants had "an objection to the authority to condemn" rather than just an objection to the amount of the offer. Furthermore, when "the Condemnees make it clear that they do not intend to sell their properties, negotiations are rendered a practical impossibility," and the City could not be faulted for declining to pursue them. The court ruled that the alleged staleness of the appraisals was a matter for the condemnation commissioners to address.

Appellants' disinterest in negotiating over price kept the court from reaching the question of whether the redevelopment agreement or Ordinance 2-01 improperly prevented the City from negotiating a price higher than its initial offer. However, the court cautioned the City to avoid "contracting away its ability to continue negotiations in good faith" in the event appellants stopped resisting condemnation for reasons other than the amount of compensation.

The Eminent Domain Act of 1971, N.J.S.A. 20:3-1 to -50, specifies the steps for the condemning authority to acquire title when it cannot do so by agreement, "whether by reason of disagreement concerning the compensation to be paid or for any other cause." N.J.S.A. 20:3-6. However, a condemnation action may not be instituted "unless the condemnor is unable to acquire such title or possession through bona fide negotiations with the prospective condemnee." Ibid.

The process starts when the condemnor obtains an appraisal of "fair market value" that also gives the condemnee "an opportunity to accompany the appraiser during inspection of the property." Ibid. The offer must be an amount at least equal to the appraisal of fair market value, and the condemnor must provide it in writing along with "a reasonable disclosure of the

manner in which the amount of such offered compensation has been calculated." Ibid.

If the condemnee does not accept the offer within the time that the condemnor allows, the Act declares the absence of acceptance to be "conclusive proof" that further negotiation would be fruitless: "A rejection of said offer or failure to accept the same . . . shall be conclusive proof of the inability of the condemnor to acquire the property or possession thereof through negotiations." N.J.S.A. 20:3-6.

In County of Morris v. Weiner, 222 N.J. Super. 560, 563 (App. Div.), certif. denied, 111 N.J. 573 (1988), the condemnor made an offer for the property in question that was approximately thirty percent lower than its offer for the similar adjacent property. The condemnee's letter of rejection informed the condemnor that the condemnee had recently secured a mortgage in an amount more than fifty percent above the offer, based on the issuing bank's appraisal that the property was worth more than twice the offer. Id. at 563-64. The condemnee added that it had also entered into a contract to sell the property for a price more than twice the offer, but could not consummate the sale due to the threat of condemnation. Id. at 564. The condemnee requested a response "'on the basis of a realistic appraisal.'" Ibid.

We found that the condemnee had presented "concrete and highly credible evidence that the property was worth substantially more than the amount offered." Id. at 565. He had also invited a response, albeit by using "an adversarial stance" that was not unknown in "the language of negotiation." Ibid. The purpose of N.J.S.A. 20:3-6 was "to encourage public entities to acquire property without litigation where possible," and in those circumstances, the condemnor's "obligation to conduct good faith negotiations" could not end before it even looked at such persuasive evidence that the offer was unreasonable. Id. at 564-65. If condemnors were allowed to make "take-it-or-leave-it" offers in all cases regardless of the circumstances, that "would simply eviscerate the bona fide negotiations requirement from the statute." Id. at 566.

We recognized that upholding the purpose of the statute in that manner contradicted the statute's "conclusive proof" provision. Ibid. It indicated that the determination of whether applying the provision was "harmonious[] with the purpose of the statute" required a case-by-case assessment of whether the condemnee had truly rejected the offer or rejected it with "a counter offer" that compelled the condemnor's consideration. Id. at 566-67. Accord State by Comm'r of Transp. v. Carroll, 123 N.J. 308, 317-18 (it was the "'concrete

and highly credible evidence' of a higher value" in County of Morris that created "the State's duty to . . . go beyond furnishing its appraisal and making its offer'").

The County of Morris ruling built on the observations we had made only four months earlier. County of Monmouth v. Whispering Woods, 222 N.J. Super. 1, 9 (App. Div. 1987) (upholding dismissal of condemnation action for condemnor's failure to give condemnees the appraisal and the manner in which it had been calculated), certif. denied, 110 N.J. 175 (1988). The first observation was the unsoundness of a categorical rule "that the condemnor may dispense with its statutory duty to engage in bona fide negotiations merely because the positions of the parties are far apart or are expressed in strident tones." Ibid. The other was that in some situations the condemnee's rejection of the offer could indeed indicate that negotiations would be pointless: "We would be short on realism, however, were we not to note that it takes at least two to negotiate and the record should be reviewed with that in mind." Ibid. Accord State by Comm'r of Transp., supra, 123 N.J. at 323 (property owner "repeatedly indicated that he was not willing to continue discussions in order to avoid litigation" and "never indicated that he wanted further appraisal information or misunderstood the valuation data").

In this case, appellants' counsel modeled the language in his responses to the City's offers on some of the language that the condemnee in County of Morris used. However, the ruling for the condemnee in that case was grounded in the condemnee's actual presentation of strong evidence that the offer was substantially below fair market value. The responses here did not indicate that appellants had any such evidence.

We are satisfied that the trial court properly regarded the absence of such evidence, combined with appellants' adamant efforts to retain their properties regardless of the amount offered, as demonstrating the likely futility of further negotiation and therefore as justification for applying the statute's "conclusive presumption." The Anzalones shared the other appellants' position of rejecting eminent domain regardless of price, so the court properly regarded their argument about contractual limits on the amount the City could offer them as premature.

The court was also correct in ruling that the condemnation commissioners could address the alleged staleness of the appraisals. The Act requires the commissioners to make a new assessment of the property's fair market value, N.J.S.A. 20:3-12, and it reinforces that mandate by specifying that "[n]either

the offer nor the refusal thereof shall be evidential in the determination of compensation." N.J.S.A. 20:3-6.

We therefore uphold the ruling that the City did not fail to meet its statutory obligation of pursuing bona fide negotiations to acquire appellants' properties before bringing these condemnation actions.

VI

The Anzalones claim that the City improperly delegated eminent domain authority to the redeveloper. They argue that the redevelopment agreement committed the City to having the redeveloper initiate negotiations with any property owner and decide when to end them in favor of condemnation. The consolidated appellants also claim an improper delegation. They argue in effect that the first redevelopment agreement, of February 2000, was not preceded by a valid municipal determination to condemn their properties because it was executed while the City was still representing that they would be preserved as residential infill, and that the City did not publicly abandon that position until April 2000, when it passed the first ordinance identifying the properties as subject to condemnation. We reject these arguments.

The court found that Ordinance 2-01 authorized the City to pay each property owner "an amount based upon the fair market

value," and that appellants presented no evidence that the City's offers failed to equal its appraisals of fair market value as N.J.S.A. 20:3-6 required. It added that a condemning authority may delegate to a private party the task of negotiating, as long as the private party "is held to" the same statutory standards.

Appellants rely on an inapposite Pennsylvania case to support their arguments. In re Condemnation of 110 Washington St., 767 A.2d 1154, 1156-57 (Pa. Commw. Ct.), appeal denied, 788 A.2d 379 (Pa. 2001). In 110 Washington, a county redevelopment authority agreed to a contract that delineated a "project area" and provided that the redeveloper would tell it when to condemn particular properties within the project area. Ibid. The county authority thus began condemnation proceedings against the appellant's property upon the redeveloper's instruction. Id. at 1157. However, the opinion gives no indication of whether, much less when, the redevelopment authority or any other county agency adopted a redevelopment plan and ordinance that named those properties or even delineated the project area. Id. at 1156-61.

A subsequent Pennsylvania case confirmed that the ruling in 110 Washington depended on the absence of a decision by the county to condemn the property in question. In re Condemnation

by Coatesville, 64 Pa. D. & C.4th 231, 271 n.138 (Pa. Common Pleas Ct. 2002), aff'd in part, rev'd in part on other grounds, 822 A.2d 846 (Pa. Commw. Ct.), appeal denied, 839 A.2d 353 (Pa. 2003). The Coatesville court rejected the claim of unlawful delegation because "[t]here is neither allegation nor evidence in this case that anyone other than the members of city council acting in their official capacity made the final decision to take the official formal action to condemn the lands here at issue." Ibid. (emphasis added).

Furthermore, New Jersey law recognizes that, after the condemning authority decides what properties to condemn in connection with a redevelopment project, it may then "designate[] a private developer to negotiate an acquisition." Jersey City Redev. Agency v. Costello, 252 N.J. Super. 247, 257 (App. Div.), certif. denied, 126 N.J. 332 (1991). The private developer becomes an agent subject "to the same or similar standards as that of the condemning authority." Id. at 257-58.

This case is like Coatesville and Jersey City and unlike 110 Washington, because the condemnation proceedings here did not begin until after the City adopted the plan and codified it by ordinance. The City accordingly made the final determination of which properties would be subject to eminent domain before

any condemnation action was commenced. Appellants have failed to show that New Jersey law required anything more.

Affirmed in part. Reversed and remanded in part for further proceedings consistent with this opinion.