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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3022-03T5
A-3239-03T5
A-3240-03T5

D&M ASBURY REALTY, LLC,
VINCENT ALVINO, JENESIS
ENTERPRISES, INC., and 911
KINGSLEY, LLC,

Plaintiffs-Appellants,

v.

CITY OF ASBURY PARK,

Defendant-Respondent,

and

ASBURY PARTNERS, LLC,

Defendant/Intervenor-Respondent.

MIRAMAR APARTMENTS, LLC,
SUNSET MANSION, LLC,
FRANKLIN ARMS AP, LLC,
PARK TERRACE APARTMENTS,
LLC, and ELLIOT KOPLITZ,

Plaintiffs,

v.

THE MAYOR AND COUNCIL OF
THE CITY OF ASBURY PARK,

Defendants-Respondents,

and

THE PLANNING BOARD OF THE
CITY OF ASBURY PARK,

Defendant,

and

ASBURY PARTNERS, LLC,

Defendant/Intervenor-Respondent.

CRAIG LUCAS, SIGMA REALTY,
LLC, SPRINGWOOD LAKE, LLC,
BRITWOOD COURT, LLC, JEAN
JASLOVSKY, VINCENT GIFFORD,
KINGLSEY VIEW APARTMENT,
LLC, A BUNDA LIFE CHURCH OF
BODY, LIFE & SPIRIT, U.S.
APPLIANCE RECYCLERS AND
KINGSLEY TERRACE, LLC,

Plaintiffs-Appellants,

v.

THE CITY OF ASBURY PARK,

Defendant-Respondent,

and

ASBURY PARTNERS, LLC,

Defendant/Intervenor-Respondent.

DAN'S GLOBAL MANAGEMENT
COMPANY, LLC, d/b/a THE
BERKELEY CARTERET OCEANFRONT
HOTEL,

Plaintiff-Appellant,

v.

CITY OF ASBURY PARK,

Defendant-Respondent,

and

ASBURY PARTNERS, LLC,

Defendant/Intervenor-Respondent.

KATHRYN MCGLYNN and
INVICTUS CORPORATION,
A New Jersey Corporation,

Plaintiffs,

v.

CITY OF ASBURY PARK, a
Municipal Corporation of
the State of New Jersey,

Defendant-Respondent,

and

ASBURY PARTNERS, LLC,

Defendant/Intervenor-Respondent.

JACOB N. COHEN,

Plaintiff,

and

GARY KLEIN,

Plaintiff-Appellant,

v.

CITY OF ASBURY PARK,

Defendant-Respondent,

and

ASBURY PARK PLANNING BOARD,

Defendant,

and

ASBURY PARTNERS, LLC.

Defendant/Intervenor-Respondent.

THE KINGSLEY ARMS APARTMENTS, INC.,

Plaintiff-Appellant,

v.

CITY OF ASBURY PARK, a Municipal Corporation of the State of New Jersey,

Defendant-Respondent

and

ASBURY PARTNERS, LLC.

Defendant/Intervenor-Respondent.

Argued December 14, 2005 - Decided January 24, 2006

Before Judges Conley, Weissbard and Winkelstein.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, MON-L-3516-02.

Lawrence H. Wertheim argued the cause for appellant Kingsley Arms Apartments (Himelman, Wertheim & Geller,

attorneys; Mr. Wertheim, of counsel; Mr. Wertheim and Susan C. Gieser, on the brief).

Paul V. Fernicola argued the cause for appellants D&M Asbury Realty, LLC, Vincent Alvino, Jenesis Enterprises, Inc., 911 Kingsley, Craig Lucas, Sigma Realty, Springwood Lake, Britwood Court, Jean Jaslovsky, Vincent Gifford, Kingsley View Apartment, A Bunda Life Church of Body, Life & Spirit, U.S. Appliance Recyclers, Kingsley Terrace, and Gary Klein (Bowe & Fernicola, attorneys; Mr. Fernicola, of counsel and on the brief).

Paul V. Fernicola argued the cause for appellant, Dan's Global Management, LLC (Bowe & Fernicola, attorneys; Mr. Fernicola, of counsel; Mr. Fernicola and Angela White Dalton, on the brief).

James G. Aaron argued the cause for respondent City of Asbury Park (Ansell Zaro Grimm & Aaron, attorneys; Mr. Aaron and Lawrence H. Shapiro, on the brief).

Daniel J. O'Hern, Jr. argued the cause for respondent Asbury Partners (Becker Meisel, attorneys; Martin L. Borosko and Mr. O'Hern, Jr., on the brief).

PER CURIAM

In these consolidated appeals, plaintiffs are property owners who challenge Asbury Park's (the City) redevelopment plan for its Waterfront Redevelopment Zone (the Zone) adopted by Ordinance 2607 in 2002 (the Plan or 2002 Plan). Defendants are the City, the City Planning Board and Asbury Partners, the City's designated developer.

While plaintiffs do not dispute the City's determination that the Zone is in need of redevelopment, they nevertheless raise a number of challenges to the general aspects of the Plan

and its affects on their specific properties. Some of the claims pertain to all plaintiffs, while others are specific to particular plaintiffs.

In the Law Division, Judge Lawrence Lawson granted defendants summary judgment on each of plaintiffs' claims. The primary issues on appeal include whether: the failure of the 2002 Plan to permit property owners to develop their own properties, except with the approval of the designated developer, constitutes a taking; the City improperly ceded its legislative authority to the designated developer, a private entity; the Plan placed an illegal thirty-year moratorium on private development within the redevelopment area; the manner in which properties were chosen for redevelopment violated certain plaintiffs' equal protection rights; the City had improper motives for including certain properties in the Plan; the City's reliance on an unlicensed planner rendered the passage of Ordinance 2607 invalid; and, whether plaintiffs were denied adequate discovery. We substantially agree with Judge Lawson's conclusions and consequently, we affirm.

I.

An extensive discussion of the facts is necessary to place the issues in context. The City was founded in 1873. James

Bradley, the original developer, designed the City according to a "beautiful street and open space plan." His plan

> set a grid of traditionally scaled blocks and streets between four natural open spaces: Wesley Lake, Sunset Lake, Deal Lake and the oceanfront. Streets, which are perpendicular to the ocean, flare open as they approach the waterfront. By widening east-west streets at their ends, Bradley increased the views of the ocean from the city, facilitated the movement of sea breezes into the city and provided space for landscape and parking improvements adjacent to the beachfront.

Special consideration was given for "highly attractive residential locations," open space and the necessary elements for an urban area in which one could "live, work, shop and play."

The City was zoned so that hotels and rooming houses, residential homes, and a commercial and residential mix predominated different areas. After it developed rapidly during the first half of the Twentieth Century, the City declined in the second half of the Century following the growth of the suburbs; and its commercial center was adversely impacted by the development of shopping malls. Completion of the Garden State Parkway in the 1950s made it easier to by-pass the City, and the City's hotels and motels were forced to keep rates low to attract tourists, which in turn affected the industry's ability to reinvest or expand.

In 1984, the City commissioned an investigation of the physical and economic characteristics of its waterfront district to determine whether the area would qualify for renewal. The area under investigation consisted of approximately twenty-eight blocks and extended generally from Wesley Lake to Deal Lake along the oceanfront. The resultant report (the Kopple Report, named for its authors) concluded that most of the area studied manifested the characteristics of a blight zone. It included a disproportionate share of low income and disadvantaged residents, a large number of vacant properties, absentee landlords, and buildings that failed to meet modern design standards. Ownership in the area was highly diversified, which could hinder development.

On August 1, 1984, the City passed a resolution that approved the Planning Board's recommendation that the waterfront area was blighted. The following November, the City adopted an ordinance approving a redevelopment plan (the 1984 Plan). This was essentially a housing-based plan, "intended to conserve and enhance existing residential areas" while creating conditions to attract new development. "Private property . . . [would] be publicly acquired only if private rehabilitation plans [did] not materialize or [were] unsuccessful[] in their execution."

In August 1986, the City signed an agreement with a developer to implement the development called for in the 1984 Plan. The plan did not, however, succeed. A sewer moratorium in the City in the late 1980s and a national recession were among factors that contributed to its failure.

The City amended its redevelopment plan in April 1991 (the 1991 Plan). Due to the decline in housing demand, this plan called for expansion of entertainment uses. Pursuant to the 1991 Plan, private owners were permitted to develop their properties themselves. The plan provided that "if a private property owner develops property consistent with the redevelopment plan, the city will not exercise eminent domain to acquire that property in order to facilitate another alternative use permitted by this redevelopment plan." But, according to the 1991 Plan, in the event the developer was unable to acquire property by negotiation, "the city [was] prepared to negotiate the purchase of the private property and, where necessary, use the power of eminent domain to acquire properties."

This plan was not successful either. The developer filed for bankruptcy in 1992; all work in the redevelopment area stopped.

By 2001, the developer owed the City almost $12 million in unpaid real estate taxes. Consequently, the City permitted new

principals to acquire the developer's redevelopment rights. To do so, the City entered into a memorandum of understanding (MOU) with Ocean Front Acquisitions, LLC (the Ocean Front parties). The MOU named the Ocean Front parties, the predecessor to Asbury Partners, as the designated developer. It acknowledged the developer's need to negotiate the purchase of private properties in the redevelopment area within an expressed period; the City also agreed to use its eminent domain powers when voluntary acquisition was unsuccessful. The MOU contemplated that the developer would assign its development rights to no fewer than three subsequent developers. According to the City's attorney, provisions of the MOU that were important to the City included: having a single, or master, developer; requiring the master developer to assign rights to no fewer than three subsequent developers; the City having the right to approve the subsequent developers; and the master developer would be responsible for the costs of the infrastructure improvements.

To design and implement an amended waterfront redevelopment plan, in September 2001 Asbury Partners hired an experienced planning and design firm, the Caton firm, which was made up of architects and planners, that had been providing "planning, architecture, landscape architecture, environmental analysis and affordable housing professional services to private and public

entities throughout New Jersey for the [previous] twenty-five years." The Caton firm joint-ventured the project with an experienced architectural firm.

The Caton firm's proposed waterfront redevelopment plan was all encompassing. It included general redevelopment objectives, design principles, and specific plans for many of the properties in the designated area. The sheer size of the development, some 230 acres, presented special considerations including one mile of oceanfront, three lakes and several parks. While many of the area buildings had historical, communal or architectural significance, the area lacked sufficient infrastructure to support a viable oceanfront community.

The Caton firm saw flaws in the prior failed redevelopment plans, which included: a misplaced emphasis on entertainment or theme-park motifs as opposed to housing; a lack of recognition for the original open space design; reliance on developers who lacked adequate financial resources; reliance on the City to oversee and coordinate the redevelopment; and reliance "upon individual property owners to redevelop their own properties." The firm knew the City "desired a diverse community with diverse income groups." It proposed plans for different dwelling unit densities and for varying sizes of commercial space. Firm

representatives met with professional planners, the Mayor and Council, and held multiple public meetings.

Asbury Partners and the City decided on a dwelling-unit density of 3164 units. Numerous models and drawings were provided for comment depicting various options. The developer agree to provide affordable housing units for low and moderate income households in an amount equal to five percent of the new housing units built in the prime renewal area.

The approximate cost of the necessary infrastructure improvements would be $30 million. But, while those improvements were needed before construction of the housing and commercial space, the City was without the means to pay for them.

In January 2002, the City referred the 2002 Plan to the Planning Board for review. Known as the Waterfront Redevelopment Plan, the overall idea of the Plan was to create "a traditional city" rather than a suburb, with buildings built to the street line; as a result, it did not include "specifications for front yard setbacks or similar suburban building controls." Criteria for building height, density and architectural design would control the physical form of the structures. One of the designers stated that the overall goal

> of the . . . Plan is to build a traditional city, which takes full advantage of its

> unique beach location through the creation of a new, year-round mixed use-community. This community will contain housing, retail, entertainment and cultural facilities. The design character . . . will be established through the creation of a beautiful network of open public spaces.

The 2002 Plan was to be effective for thirty years. It envisioned three distinct zones or areas, beginning at the ocean and moving west: a boardwalk area, a prime renewal area, and a renovation infill area. Generally, property within the renovation infill area was not subject to condemnation; property within the prime renewal area was, with certain exceptions, subject to condemnation; and property within the boardwalk area was "subject to negotiated sale to [the] developer."

"Historic" and "significant" buildings were identified, including Convention Hall, the Casino and Heating Plant, the Palace (an amusement complex), the Fifth Avenue Pavilion, the Stone Pony (a music and entertainment venue), the Charms Building (a surviving historic building from 1923), the Bergh Street Complex (surviving early Twentieth Century architecture), and the Empress Hotel (centrally located at the ocean, with a "strong modern design" and which could be the basis of "an outstanding renovation"). Certain existing streets were to be closed and a few closed streets were to be opened, all in

furtherance of the Plan's goal to recreate the original Bradley Plan to the extent feasible.

The 2002 Plan identified all the blocks where properties subject to condemnation were located, and listed the exceptions. In cases where property was only subject to condemnation on the happening of a contingency, those conditions were also set forth. For example, the plan was not to acquire the Berkeley Carteret Hotel "unless the cost of re-opening Sixth Avenue would necessitate it or the Hotel falls into a state of disrepair." The Stone Pony could be acquired if it was not used as a nightclub for more than six months, and the Bergh Street properties between First and Second Avenues would be subject to acquisition if they became vacant or fell into disrepair. A relocation assistance program was created to help owners and tenants.

Traffic circulation and parking for residents and visitors were addressed in the Plan. To achieve the required parking spaces, planning was done block by block rather than parcel by parcel. Off-street parking facilities for each block were centrally located and "designed to relate to the various entrances and exits for the block as well as the geometry of the buildings on the block." In this way, individual parcels were required to compliment "the overall design of the block" because

"[t]he existence of a single odd parcel can fatally impair the design of the entire block." The block-by-block approach also permitted "Asbury Partners to obtain the required mix of uses, dwelling densities and bedroom sizes within each block and across the entire prime renewal area."

The Plan required Asbury Partners to use subdevelopers. By the time the law suits that gave rise to these appeals had been filed, Asbury Partners had contracted with three subdevelopers to redevelop designated blocks within the prime renewal area.

The Plan prescribed building and development standards. All subdevelopers were required to submit plans for approval to a committee established by the Mayor and Council, the Technical Review Committee (TRC). The properties slated for potential acquisition under the 2002 Plan changed from the 1984 Plan, but the overall area in need of development remained the same. One key aspect of the 2002 Plan, and a facet of the project that largely spurred the lawsuits, was its failure to afford individual property owners an unqualified right to redevelop their own properties. The reason for this omission was explained by a plan designer:

> it would be impossible to coordinate the redevelopment efforts if individual property owners were left with the responsibility of redeveloping their own properties. . . .

> In some cases, you would have ten, even twenty or more individual property owners all attempting to redevelop a single block. When you consider that there are thirty blocks in the prime renewal area, you can easily see the impossible logistical nightmare . . . to coordinate development by so many developers.
>
> By not relying upon individual property owners, the Redevelopment Plan also avoids one of the fundamental flaws in the prior redevelopment plans. Individual property owners have now had nineteen years to redevelop their properties. The result of which has been a complete failure. The waterfront area is in worse condition today than it was nineteen years ago.

Because of the need for development to take place over a broad base, not property by property, the only exceptions in the Plan to potential acquisition in the prime renewal area through eminent domain were for properties either having historical, communal or aesthetic value, or those that already provided parking sufficient to satisfy applicable requirements under the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 to -33, and the Residential Site Improvement Standards, N.J.A.C. 5:21-1.1 to -8. Plaintiffs' properties did not so qualify.

The City Planning Board held public hearings on the 2002 Plan. During the course of the hearings, Andres Duany, the City's planner, made several statements in connection with the Berkeley Carteret Hotel that plaintiffs would later say demonstrated the City's improper motives for including that

property for potential condemnation. Among other witnesses who appeared before the Planning Board were John Clarke of the Caton firm; one of the project's consulting civil engineers; a project traffic engineer; a planning and real estate consultant who provided a fiscal impact analysis of the project; and a representative from Rowan University's Institute for Public Policy who discussed property acquisition, relocation and affordable housing. Members of the public also appeared.

In April 2002, the Planning Board issued its report to the City, which highlighted inconsistencies between the proposal and the City's master plan, and made numerous recommendations. On June 5, 2002, the City adopted the 2002 Plan by Ordinance 2607, accepting some but not all of the Planning Board's recommendations. For example, the City accepted Planning Board recommendations to: more clearly identify whether certain areas should be included within the redevelopment area; prohibit construction of residential units above structures between Ocean Avenue and the boardwalk; and allow commercial uses along Kingsley Avenue. Examples of recommendations the City did not accept were: the City maintain ownership of all boardwalk pavilions; the Palace be fully restored and the Arthur Pryor Pavilion be maintained for its current use; bed and breakfast

inns be permitted in the prime renewal area; and property owners be permitted to develop their own properties.

In some cases, recommendations, such as suggestions about parking, were accepted as modified, or accepted "if at all possible," like the recommendation that all boardwalk pavilions be rehabilitated rather than demolished. When recommendations were rejected, the City explained why. For instance, the Palace and Arthur Pryor Pavilion suggestions were rejected based on the redeveloper's plan for the other uses in that area, and because of economic constraints; the bed and breakfast recommendations were rejected because of possible conflicts between those uses and other proposed uses that would "significantly change the marketability of projects within said prime renewal area."

As is directly related to this litigation, one of the most controversial recommendations was the Planning Board's recommendation that private property owners have the right to develop their own properties. In rejecting that recommendation, the City explained:

> This recommendation is rejected as inconsistent with the philosophy of the MOU and the prior redevelopment agreements which authorize a single developer. However, it is understood throughout this agreement that any property owner, or groups of property owners, may negotiate with the developer as set fourth in the MOU to obtain developer status and submit plans which could include their property for an entire project which

> would be subject to review by the Planning Board and the redevelopment authority of the City of Asbury Park.

In October 2002, the City authorized the redeveloper to obtain appraisals for numerous properties within the redevelopment area. Also that month, the City and Asbury Partners negotiated an amended redeveloper agreement (the Amended Agreement), which the City adopted by ordinance. That agreement was intended "to supersede and substitute for" the prior redeveloper agreement, its modification and the MOU.

Addressing property acquisition, the Amended Agreement sets forth that "City blocks, within the Redevelopment Area, are to be acquired, pursuant to [the 2002 Plan], either by Master Developer directly or through eminent domain." Asbury Partners was required to make a good faith effort to acquire properties by negotiation before initiating condemnation. The City also agreed "not to condemn or take title by exercise of its eminent domain powers any portion of the Boardwalk area or Prime Renewal Area without Master Developer's consent."

The Amended Agreement also precluded the City from negotiating with another redeveloper unless it was a "Subsequent Developer," defined as a purchaser, assignee or transferee of Asbury Partners' rights as the master developer. To become a

subsequent developer an entity must first have entered into an agreement with Asbury Partners and then be approved by the City.

Asbury Partners, the "exclusive Master Developer," was given the right, "after acquisitions and clearance of parcels within the Project Area, [to] sell or otherwise transfer parts or phases of the Project to Subsequent Developers with the City's consent, said consent not to be unreasonably withheld. . . ." Asbury Partners would be permitted to pass on certain charges to subsequent developers:

> Master Developer . . . has and may acquire and clear land for subsequent redevelopment by other qualified developers ("Subsequent Developers"). Master Developer will, as part of its role, assess . . . Subsequent Developers a fee for overall infrastructure and utility improvements to be constructed by Master Developer in the Redevelopment Area. Master Developer shall be responsible for the construction of infrastructure improvements [with the Subsequent Developers being responsible for payment of the fees] . . . .

The Amended Agreement provided for "a fair and equal distribution" of new or improved infrastructure costs.

II.

Against this factual setting, resolution of the issues raised by plaintiffs requires consideration of legal principles touching upon a municipality's power to condemn, its power to redevelop, and its authority to delegate such power. The

Eminent Domain Act of 1971, N.J.S.A. 20:3-1 to -50, prescribes the manner and circumstances under which a public body may condemn private property and establishes procedures to compensate the owner for the taking. In exercising its authority under this act, the government has "an overriding obligation to deal forthrightly and fairly with property owners"; that principle applies whether the governmental entity itself negotiates an acquisition, or delegates that authority to a private developer. Jersey City Redev. Agency v. Costello, 252 N.J. Super. 247, 257 (App. Div. 1991) (public interest "may be better served by private enterprise" undertaking redevelopment).

For redevelopment purposes, the Eminent Domain Act must be read in conjunction with the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 to -49 (the Redevelopment Law). Areas in need of redevelopment under this law, which were previously deemed "blighted areas" under the Blighted Area Act, N.J.S.A. 40:55-21.1, repealed by L. 1992, c. 79, § 59, see ERETC, L.L.C. v. City of Perth Amboy, 381 N.J. Super. 268, 278 n.2 (App. Div. 2005), are subject to condemnation. See N.J.S.A. 40A:12A-6c; N.J. Const. art. VIII, § 3, ¶ 1.

The Redevelopment Law describes a municipality's powers to exercise its redevelopment and rehabilitation functions. N.J.S.A. 40A:12A-4a(1),(2),(3),(4). Those powers include

ordering a preliminary study, determining that an area is in need of redevelopment, adopting a redevelopment plan, and determining that an area is in need of rehabilitation. Ibid.

No area may be determined to be in need of redevelopment unless the governing body has first referred the matter to the planning board for an investigation as to whether the area meets the criteria set forth in N.J.S.A. 40A:12A-5. N.J.S.A. 40A:12A-6. The planning board must hold a public hearing with notice. At the conclusion of its investigation, it reports to the governing body whether the area under study or any part of the area should be denominated a redevelopment area. N.J.S.A. 40A:12A-6b(5). Its "determination, if supported by substantial evidence, shall be binding and conclusive upon all persons affected by the determination. . . ." Ibid.

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

. . . approve or disapprove or change any recommendation." Ibid.

After a municipality designates a redevelopment area and adopts a redevelopment plan, it has the powers provided by N.J.S.A. 40A:12A-8. N.J.S.A. 40A:12A-6c. The municipality, or its designated redevelopment entity, have numerous express powers, including the right: to acquire land and buildings by condemnation "necessary for the redevelopment project" pursuant to the Eminent Domain Act; to install or construct streets, facilities and site improvements; to arrange for professional services; contract with redevelopers; and to arrange for the relocation of residents or businesses displaced by the redevelopment plan. N.J.S.A. 40A:12A-8c,d,e,f,i. The public body or its designee may make plans, "consistent with the redevelopment plan . . . for carrying out a program of voluntary repair and rehabilitation of buildings and improvements"; as well as plans relating to the "use and occupancy of buildings and improvements, and to the compulsory repair, rehabilitation, demolition, or removal of buildings and improvements." N.J.S.A. 40A:12A-8j(1),(2). The so-called "necessary and convenient" clause of the Redevelopment Law gives the municipality or redevelopment entity authority to "[d]o all things necessary or convenient to carry out its powers." N.J.S.A. 40A:12A-8n.

The "municipal power to proceed under the redevelopment statute . . . is imbedded in our Constitution." Tri-State Ship Repair & Dry Dock Co. v. City of Perth Amboy, 349 N.J. Super. 418, 424 (App. Div.) (citing N.J. Const. art. VIII, § 3, ¶ 1), certif. denied, 174 N.J. 189 (2002). The viability of a property does not necessarily bar it from being included within a redevelopment area. Ibid. Neither is a redevelopment plan invalid for including within its reach homes or buildings that are not substandard. Wilson v. City of Long Branch, 27 N.J. 360, 379, cert. denied, 358 U.S. 873, 79 S.Ct. 113, 3 L. Ed. 2d 104 (1958). And, property may be condemned and transferred for redevelopment to a private entity so long as the acquisition is deemed to be for a public purpose; that the private entity stands to profit does not invalidate the acquisition. Id. at 376.

The standard of review of a municipal ordinance is well-settled. Like other legislative enactments, they are presumed valid and will be upheld where "any state of facts may reasonably be conceived to justify [them]." Quick Chek Food Stores v. Twp. of Springfield, 83 N.J. 438, 447 (1980). In this way, "the underlying policy and wisdom" of the ordinance is left to the governing body, not to the court. Ibid. Because municipal actions are presumed to be proper, a challenger bears

a "heavy burden" of showing that they are arbitrary, capricious or unreasonable. Bryant v. City of Atlantic City, 309 N.J. Super. 596, 610 (App. Div. 1998). While an example of arbitrariness or capriciousness would be an action based on unsupported findings, ibid., "[l]egislative bodies are presumed to act on the basis of adequate factual support and, absent a sufficient showing to the contrary, it will be assumed that their enactments rest upon some rational basis within their knowledge and experience." Hutton Park Gardens v. Town Council of W. Orange, 68 N.J. 543, 564-65 (1975). A challenger can overcome the presumption only by "proofs that preclude the possibility that there could have been any set of facts known to the legislative body . . . [that] would rationally support a conclusion that the enactment is in the public interest." Id. at 565; Bryant, supra, 309 N.J. Super. at 610.

When reviewing a municipality's designation of an area in need of redevelopment, those same presumptions of validity apply. 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); Concerned Citizens of Princeton, Inc. v. Mayor and Council of Princeton, 370 N.J. Super. 429, 452-53 (App. Div.), certif. denied, 182 N.J. 139 (2004). They also apply to the adoption of a redevelopment plan, which "must be shown to be

arbitrary or capricious, contrary to law, or unconstitutional," rather than merely "debatable." Downtown Residents for Sane Dev. v. City of Hoboken, 242 N.J. Super. 329, 332 (App. Div. 1990).

In an action challenging a municipal redevelopment ordinance, the municipality will prevail by establishing "some reasonable basis for its legislative action," including the satisfaction of some expressed non-arbitrary need. Id. at 338-39. It is not for a court to second-guess a local government's redevelopment decision; we will sustain it so long as it is supported by substantial credible evidence. ERETC, supra, 381 N.J. Super. at 277-78.

III.

Subject to this legal framework, we first address plaintiffs' claims that the 2002 Plan impermissibly deprives current property owners of the right to redevelop their properties. They make several arguments to support their position. Their first is that the Plan fails because earlier redevelopment plans permitted property owners to develop their own properties, and this one does not. We find no support for that position. That the 1984 and 1991 Plans permitted redevelopment by property owners did not require the 2002 Plan to do the same. Each plan needs to be supported on its own,

given the circumstances at that time. See Downtown Residents, supra, 242 N.J. Super. at 339-40 (declaration of blight does not necessarily continue in perpetuity). Here, the prohibition against, and regulation of, the owners ability to develop their own properties cannot be gauged without consideration of the long history of the owners' lack of development when they had the opportunity to do so under the prior plans. In fact, the owners' prior failures to develop their properties contributed to the increased need for the 2002 Plan.

Also of significance is the 2002 Plan's block-by-block approach. This approach, justified by considerations such as parking needs and density requirements, supports the decision by the local government to prohibit parcel-by-parcel development. As for the City's decision to reject its planning board's recommendation that property owners be permitted to redevelop their own properties, the power to reject a planning board's recommendations is expressly granted to the governing body, N.J.S.A. 40A:12A-7, as long as it explains itself, which it did.

Plaintiffs next assert that the City's bar to redevelopment by the property owners was ultra vires because it lacked express authority under the Redevelopment Law. The Law Division disagreed, relying on N.J.S.A. 40A:12A-8n, which grants municipalities the ability to "[d]o all things necessary or

convenient to carry out its powers." We agree. That power is very broad and is consistent with N.J.S.A. 40A:12A-8c, which authorizes condemnation of property necessary for redevelopment. A broad reading of the necessary and convenient clause is also consistent with the New Jersey Constitution, which expressly provides that "any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor." N.J. Const. art. IV, § 7, ¶ 11; cf. Fred v. Mayor and Council of Old Tappan, 10 N.J. 515, 520 (1952) ("necessary and proper" provision of N.J.S.A. 40:48-2 is "express grant of broad general police powers to municipalities").

Additional support for a liberal reading of the necessary and convenient clause of the Redevelopment Law is found by examining the scope of a municipality's police power, apart from the power of eminent domain, as it otherwise affects property rights. The police power delegated to municipalities can "be exerted whenever necessary for the general good and welfare." Mansfield & Swett, Inc. v. Town of W. Orange, 120 N.J.L. 145, 151 (Sup. Ct. 1938). "It reaches to all the great public needs; and the right of property yields to the exercise of this reserve element of sovereignty." Ibid. The Mansfield court differentiated between police power and the more limited power

of eminent domain. Id. at 151-52. It said the latter may be exercised "only on condition of providing a reasonable compensation," while, in contrast, the former permits lawmakers to "make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same." Id. at 152. A broad reading of the necessary and convenient clause under the circumstances presented here is consistent with these principles.

We turn next to what we consider to be plaintiffs' most significant argument pertaining to the inability of the property owners to develop their own properties: that even if the City had the implied power to deprive property owners of the right to redevelop their properties, it could only do so after acquiring title to the properties through condemnation, which it did not do. Plaintiffs do not assert that the City could not have condemned their properties; but, because it did not, they claim that prohibiting them from developing their properties while they still have title constitutes a taking. This argument requires a close examination of the extent to which the City has interfered with plaintiffs' property rights.

To support his decision, the trial court relied on Wilson, supra, 27 N.J. at 373, where the plaintiffs challenged the decision of the governing body to declare a section of the municipality blighted under N.J.S.A. 40:55-21.1 of the Blight Act. The plaintiffs argued that to declare a property blighted before acquiring it constituted a "taking" because the market value of the property was lessened with the threat of condemnation "hanging over it." Id. at 373-74. The Wilson Court rejected that argument, finding the municipality's action was not a taking "in the constitutional sense. It is akin to the result that flows from municipal zoning. If some diminution in market value can be said to follow from a finding of blight inspired by the valid exercise of police power, it is damnum absque injuria," a harm without injury in the legal sense. Id. at 374.

The same holds true here. The 2002 Plan has the same adverse effect upon plaintiffs' properties as would the imposition of zoning restrictions under the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -129. In other words, the passage of the Plan is akin to zoning restrictions that regulate the use of the properties. Because it does not, however, deny plaintiffs all beneficial use of their properties, it is not a taking in the constitutional sense.

A "takings analysis makes two fundamental demands of any zoning scheme: it must substantially advance legitimate state interests, and it cannot deny an owner all economically viable use of the land." Gardner v. New Jersey Pinelands Comm'n, 125 N.J. 193, 205 (1991). Promotion of public health, safety and general welfare, which are among the goals of a redevelopment plan, are recognized reasons to prohibit certain uses of land. Id. at 207. In that regard, diminution of land value or "impairment of the marketability of land" alone does not amount to a taking. Id. at 210. Neither do restrictions on use necessarily equate to a taking, even if they reduce income or profits. Ibid. Rather, to be invalid, the regulatory scheme must deny all practical use or substantially destroy the beneficial use of private property. Id. at 210-11. That has not happened here.

While a property owner is entitled to be compensated when a public body takes its property, Karam v. Dep't of Envtl. Prot., 308 N.J. Super. 225, 233 (App. Div. 1998), aff'd, 157 N.J. 187, cert. denied, 528 U.S. 814, 120 S. Ct. 51, 145 L. Ed. 2d 45 (1999); N.J.S.A. 20:3-2(h), a property owner is not entitled to be compensated just because a municipality, like here, has restricted the use a property owner may make of its property. Zoning ordinances regularly impose similar restrictions. So

long as they do not deprive a property owner of all beneficial use of its property, those ordinances do not constitute a taking. See Gardner, supra, 125 N.J. at 210-11; Wilson, supra, 27 N.J. at 374. This is particularly true where, as here, the result could jeopardize the success of the rest of the redevelopment. But for the limitation on their right to redevelop their properties without the consent of the City, plaintiffs continue to have the right to use their properties as they have in the past. They have not been denied all beneficial use of their properties.

Nonetheless, should the City condemn plaintiffs' properties at a later date, plaintiffs have a remedy – compensation. The condemnation statute allows compensation, with interest, from the date of possession or commencement of the action, the date on which "action is taken by the condemnor which substantially affects the use and enjoyment of the property," or the date the governing body declared that the area was blighted, which ever is earlier. N.J.S.A. 20:3-30; N.J.S.A. 20:3-31; Mount Laurel Twp. v. Stanley, 185 N.J. 320, 325-26 (2005) (valuation date of condemned property is defined by earliest event that condemnor takes action that "directly, unequivocally and immediately stimulates an upward or downward fluctuation in value" that is directly attributable to future condemnation); Washington Mkt.

Enters. v. Trenton, 68 N.J. 107, 115, 117-18 (1975) (while declaration of blight in itself does not constitute a taking, "appropriation or invasion," though unrelated to a condemnation proceeding, may be deemed a "taking," and land use restraints can also amount to a taking under certain circumstances).

What is more, to the extent that plaintiffs desire to redevelop their properties themselves, they may apply to Asbury Partners as a subsequent developer. While plaintiffs suggested at oral argument that they would be required to pay a fee of $100,000 per unit for the right to redevelop, the current record does not support their allegation. The 2002 Plan calls for all developers to be responsible for costs associated with a review of their development plans by the TRC, and for infrastructure costs that the Master Developer can pass on to them. The Amended Agreement contemplates "a fair and equal" distribution of the infrastructure costs. Plaintiffs do not show that making them bear a fair proportion of those costs, or pay the costs of review of their development applications, is unreasonable. The Plan does not single out property owners who seek to develop their own properties, nor does it place any oppressive conditions on them. If plaintiffs are unfairly rejected, or onerous conditions are placed on their right to develop their

properties, they can seek relief through the appropriate court proceeding at that time.

Plaintiffs also assert the Plan is unfair because Asbury Partners, as opposed to the individual property owners, stands to make a profit. This argument is unpersuasive. A municipality, when redeveloping a blighted area, may permit one private entity to make a profit at the expense of another. The government may designate a private developer to undertake the redevelopment project, and "the possibility that some profit may eventuate therefrom does not render the means unlawful." Wilson, supra, 27 N.J. at 376; see also Berman v. Parker, 348 U.S. 26, 33-34, 75 S. Ct. 98, 103, 99 L. Ed. 27, 38 (1954) (public may be better served by a private enterprise executing redevelopment project, and even if one businessperson profits at the loss of another the means to proceed are best left to the legislative body); Bryant, supra, 309 N.J. Super. at 612 (city's transfer of land to redeveloper for no consideration, which was "an incidental private benefit" to redeveloper, not improper in overall redevelopment context).

Plaintiffs assert that because N.J.S.A. 40A:12A-13 does not limit development or redevelopment to a designated redeveloper, the Legislature did not intend that a municipality could prohibit property owners from redeveloping their own properties.

We disagree. That N.J.S.A. 40A:12A-13 does not exclude property owners from being redevelopers does not mean it must permit them to be so. The City had discretion to make that determination, and plaintiffs' disagreement with the exercise of that discretion does not make its exercise wrongful.

Next, plaintiffs claim they should be considered "applicants" for "development" under N.J.S.A. 40:55D-3 of the MLUL for purposes of developing their own lands. They again rely on N.J.S.A. 40A:12A-13, which provides that

> [a]ll applications for development or redevelopment of a designated redevelopment area or portion of a redevelopment area shall be submitted to the municipal planning board for its review and approval in accordance with the requirements for review and approval of subdivisions and site plans as set forth by ordinance adopted pursuant to the [MLUL].

This statute must be read, however, in concert with N.J.S.A. 40A:12A-7c, which provides that "[t]he redevelopment plan shall supersede applicable provisions of the development regulations of the municipality or constitute an overlay zoning district within the redevelopment area." Reading the two statutes together, we conclude that N.J.S.A. 40A:12A-13, which is essentially procedural in nature, is subordinate to the substantive provisions of the 2002 Plan pursuant to N.J.S.A. 40A:12A-7c. See Jersey Urban Renewal, LLC, v. City of Asbury

Park, 377 N.J. Super. 232, 235 (App. Div.) (a redevelopment plan constitutes "an overlay zoning district within the redevelopment area") (quoting Hirth v. City of Hoboken, 337 N.J. Super. 149, 164-65 (App. Div. 2001)), certif. denied, 185 N.J. 392 (2005). N.J.S.A. 40:55D-3 does not, therefore, trump the provisions of the 2002 Plan.

Plaintiffs argue that the 2002 Plan allows the City and Asbury Partners to proceed without having to deposit an amount equal to the fair market value of plaintiffs' properties. This argument fails in light of our conclusion that the Plan has not denied plaintiffs all beneficial use of their properties.[1]

Plaintiffs claim the City gave "no reason" to deny the property owners the ability to redevelop their properties consistent with the redevelopment plan. The implication is that if the redevelopment occurs consistent with the 2002 Plan, it should not matter if properties are developed by the developer or by the current owners.

That argument is not persuasive for several reasons. If all of the individual property owners were permitted to develop according to their own time tables, they may not progress at the same speed, if at all. Owners who begin to redevelop their

[1] See also our discussion of whether the 2002 Plan constitutes an inverse condemnation, infra at point V.

properties may change their minds, or encounter financial hardships, further complicating, if not frustrating, the overall redevelopment. Also, because redevelopment is being approached comprehensively, public concerns such as off-street parking and density are addressed from the beginning as part of the whole; that procedure may, in some cases, require demolition of existing buildings that undoubtedly some owners would want to keep and rehabilitate.

Plaintiffs assert that the City failed to show that redevelopment "by the designated redeveloper is a more efficient use of the legal mechanism for the improvement of properties in a redevelopment zone." In other words, plaintiffs argue that the City has a burden to show that its redevelopment scheme is more efficient than plaintiffs' proposals. No support for placing this burden on the City exists.

N.J.S.A. 40A:12A-8n provides authority for the City to limit redevelopment to the designated redeveloper and for subsequent developers to obtain its consent. N.J.S.A. 40A:12A-7e permits the governing body to reject the Planning Board's recommendation to the contrary. The City's prohibition against property owners redeveloping their own properties without the designated redeveloper's consent was reasonable and based on the need to have redevelopment proceed in a unified and

comprehensive manner. Plaintiffs did not overcome the ordinance's presumption of validity. See Quick Chek, supra, 83 N.J. at 447.

The overall decision-making process with respect to municipal choices that address areas of blight and distress is largely one where informed people can disagree and the resulting determinations ultimately depend on the exercise of sound discretion. Lyons v. City of Camden, 52 N.J. 89, 98 (1968) (addressing the Blighted Area Act, N.J.S.A. 40:55-21.1). While the Lyons Court expressly addressed the "[d]ecision as to whether an area is blighted and . . . the boundaries of a particular redevelopment project area," its discussion has equal application to a municipality's overall discretion to deal with redevelopment issues and fashion remedies:

> [T]he extent to which the various elements that informed persons say enter into the blight decision-making process are present in any particular area is largely a matter of practical judgment, common sense and sound discretion. . . . [C]ourts realize that the Legislature has conferred on the local authorities the power to make the determination. If their decision is supported by substantial evidence, the fact that the question is debatable does not justify substitution of the judicial judgment for that of the local legislators.
>
> [Ibid.]

So too here, though reasonable minds may differ on the need to prohibit property owners from redeveloping their own properties, the record supports the City's decision. Consequently, we reject plaintiffs' contentions that the ordinance was invalid because it did not permit property owners to redevelop their properties to the same extent as the designated redeveloper.

IV.

Next, plaintiffs contend that by adoption of the 2002 Plan, the City has imposed an illegal building moratorium within the Zone in violation of the MLUL. They argue that because neither the Plan nor the Amended Agreement set forth a schedule by which plaintiffs' properties must be acquired, or for that matter establish any requirement that the City ever commence condemnation proceedings, the Plan equates to an impermissible building moratorium.

Plaintiffs ground their claim on N.J.S.A. 40:55D-90, "Moratoriums; interim zoning," which provides: "a. The prohibition of development in order to prepare a master plan and development regulations is prohibited[; and] b. No moratoria on applications for development or interim zoning ordinances shall be permitted except . . . ." Plaintiffs' reliance on this statute is misplaced, however, because, as noted previously, a redevelopment plan under the Redevelopment Law supersedes the

MLUL under these circumstances. See N.J.S.A. 40A:12A-7c, supra; Jersey Urban Renewal, supra, 377 N.J. Super. at 235; Hirth, supra, 337 N.J. Super. at 164 ("When an area is found to be blighted, the adoption of a redevelopment plan is an independent municipal action which is governed by separate provisions of the Local Redevelopment Law."). It is the 2002 Plan, therefore, not the provisions of the MLUL that control.

It is also significant to this discussion that plaintiffs' properties are located in an area that is slated for development; not in an area where development is prohibited. It is the latter that is the focus of the MLUL moratorium provision. See N.J.S.A. 40:55D-90, supra. The purpose of the 2002 Plan is to ensure that development takes place; not to prevent development. The Plan merely requires that applications for development, whether they are from property owners or other parties who seek status as subsequent developers, be made to and approved by Asbury Partners and the City. It does not, as does the moratorium provision of the MLUL, prohibit development.

Plaintiffs cite to two cases they say support their assertion that preclusion from developing their properties is a moratorium prohibited by N.J.S.A. 40:55D-90. In Toll Bros., Inc. v. W. Windsor Twp., 312 N.J. Super. 540, 550 (App. Div.), certif. denied, 157 N.J. 543 (1988), the court held that timed

growth controls in a zoning ordinance violated N.J.S.A. 40:55D-90. In New Jersey Shore Builders Ass'n v. Mayor and Twp. of Middletown, 234 N.J. Super. 619, 624, 629 (Law Div. 1989), the court struck down a municipality's six-month moratorium on major site plan and subdivision applications based on a perceived inadequacy of Middletown's water system. Neither of those cases, however, involved the Redevelopment Law. That is significant because redevelopment plans are independent municipal actions; Hirth, supra, 337 N.J. Super. at 164-65. Nor, as we noted, did the Plan did preclude the property owners from redevelopment. It subjects them to an application process, which is different from the outright bans on development in Toll Bros. and New Jersey Shore Builders.

V.

We next address plaintiffs' argument that because the City did not require Asbury Partners to agree to a schedule for acquiring properties within the Zone, it created an illegal impediment to the use and development of their properties tantamount to an inverse condemnation. They argue the 2002 Plan puts them in "limbo" for up to thirty years.

Plaintiffs base their argument primarily on the Court's opinion in Lomarch Corp. v. Mayor of Englewood, 51 N.J. 108 (1968). There, the plaintiff challenged the constitutionality

of the municipality's official map that reserved the plaintiff's land for one year for use as a park while the plaintiff's subdivision application was pending. Id. at 110. The Court found a temporary taking, concluding that the municipality created a unilateral option to purchase the plaintiff's property without paying the plaintiff compensation. Id. at 113.

In a subsequent case, however, the Court limited temporary takings to instances where the government deprived the owner of "all beneficial use of the land for a significant period of time." Littman v. Gimello, 115 N.J. 154, 164-65, cert. denied, 493 U.S. 934, 110 S. Ct. 324, 107 L. Ed. 2d 314 (1989). In Littman, the plaintiffs complained that the New Jersey Hazardous Waste Siting Commission's identification of their property as a potential site for a hazardous waste incinerator, combined with the time involved in the "siting" process whereby a determination is made as to whether a site will be so utilized, constituted an impermissible taking. Id. at 157-60. The Court found that no taking had occurred, noting how "[g]overnment plans ordinarily do not constitute invasion or taking of property," and that mere "plotting" or "planning" in anticipation of condemnation normally does not constitute a taking either. Id. at 157, 161-62. Nor did "[l]ost economic opportunities allegedly occasioned by pre-taking government

activity" constitute a "compensable 'taking' under either the United States or new Jersey Constitutions." Id. at 162-63. The Court distinguished Lomarch on the grounds that there, the government "imposed a direct restraint on the use of the property, thereby depriving the owner of all beneficial use of the land for a significant period of time." Id. at 164-65.

Here, as we noted earlier, the Plan has not put direct restraints on plaintiffs' use of their properties. And, the restraints on plaintiffs' redeveloping their own properties are, as we have explained, necessary for the redevelopment project as a whole and do not deprive plaintiffs of all beneficial use of their property. In any event, plaintiffs do not explain why they cannot proceed by seeking subsequent developer status. The fact remains that until they have applied for subsequent developer status and have been unreasonably or untimely rejected, their assertion they are "in limbo" for up to thirty years is speculation.

Other cases plaintiffs point to in support of their inverse taking argument are also distinguishable. In Morris County Land Improvement Co. v. Parsippany-Troy Hills, 40 N.J. 539, 551-52, 556-59 (1963), the Court struck a zoning ordinance as an impermissible taking where the municipality's intent was to retain a swampland area in its natural state; the ordinance

forbade the plaintiff from filling the area. The municipality wanted to use the plaintiff's property as a water detention basin in aid of flood control, but did not choose to pay him for it. Id. at 553. That is not analogous. If the City deprives plaintiffs of all beneficial use of their properties, as was the case there, plaintiffs will be entitled to compensation. See e.g. Orleans Builders & Developers v. Byrne, 186 N.J. Super. 432, 447 (App. Div.) (plaintiff-developer not victim of inverse condemnation from Pinelands Commission orders and regulations because developer not deprived of beneficial use of its remaining undeveloped property), certif. denied, 91 N.J. 528 (1982). We therefore reject plaintiffs' contention that the restraints on development of their properties was an inverse condemnation.

VI.

We turn next to the claim of the Lucas plaintiffs. They assert that the record lacks support for the change in the treatment of their properties (the Bergh Street properties) from the earlier plans. Previously, those properties were not included as potential condemnation sites; in the 2002 Plan they are. The properties include six single-family dwellings and the Britwood Court Apartments located along the eastern side of Bergh Street between First and Second Avenues. They are within

the Prime Renewal Area and represent "a cluster of intact architecture from the early 20th century." At the time of the study, the Britwood apartments were vacant. The Amended Agreement said:

> [t]he Bergh Street properties . . . shall become subject to eminent domain if the occupied properties should become substantially vacant or should fall into a state of disrepair.
>
> If the vacant . . . [Britwood apartment], is not substantially rehabilitated and occupied within six (6) months from the execution of this Agreement it shall become subject to acquisition by eminent domain.

On appeal, plaintiffs claim the Bergh Street properties were made subject to condemnation without evidence to support their inclusion. They further claim that because the earlier plans excluded these properties from acquisition, the 2002 Plan's inclusion of those properties was improper.

We disagree for a number of reasons. First, an "appropriate legislative authority may reconsider [a declaration of blight]." Downtown Residents, supra, 242 N.J. Super. at 339-40. Simply because a property or properties were excepted from condemnation under a prior plan does not mean they are barred from later plans. Each plan is subject to the conditions that exist at the time the plan is adopted. In the case of the 2002 Plan, the overall scheme for acquisition was a product of both

its comprehensive nature as well as the failures of the earlier plans. While the former plans did not earmark the Bergh Street properties for condemnation, the City's decision to include those properties in the 2002 Plan so as to address the redevelopment comprehensively was reasonable. The continuity of the redevelopment to be achieved by a block-by-block treatment was a legitimate governmental goal.

Second, as defendants point out, "virtually every property in the redevelopment area has been subjected to possible eminent domain." The Bergh Street buildings are near the center of the Prime Renewal Area. The Plan makes clear the buildings' importance by including them within its discussion of historic or significant buildings, and its description of the buildings as a cluster of intact 20th Century architecture. Nor did the Planning Board have reservations about the inclusion of these properties within the Plan.

Third, the definition of "redevelopment area" in N.J.S.A. 40A:12A-3 expressly provides that a "redevelopment area may include lands, buildings, or improvements which of themselves are not detrimental to the public health, safety or welfare, but the inclusion of which is found necessary, with or without change in their condition, for the effective redevelopment of the area of which they are a part." N.J.S.A. 40A:12A-3.

Plaintiffs concede that the properties were within the Waterfront Redevelopment Zone, and it is well established that an area properly determined to be "blighted" may nonetheless include particular properties that are not themselves decrepit but which may still be subject to redevelopment as determined by the governing body. As the New Jersey Supreme Court has stated:

> The area to be classed as blighted is the portion of a municipality which in the judgment of the planning board or governing body, as the case may be, reasonably falls within the definition laid down by the Legislature. The fact that such an area includes some sound homes or buildings, or even that incorporated therein as an integral part and necessary to the accomplishment of the redevelopment plan, is a portion of the municipality containing structures which are not substandard, is not sufficient to provoke a judicial pronouncement that the Legislature unreasonably surrendered its prerogatives and duties.
>
> [Wilson, supra, 27 N.J. at 379.]

See also Berman, supra, 348 U.S. at 34, 75 S. Ct. at 103, 99 L. Ed. at 38 (Court approves redevelopment plan addressing entire community, noting need for the "area . . . [to] be planned as a whole"). Accordingly, we reject the Lucas plaintiffs' claim that their properties were wrongly included in the 2002 Plan.

VII.

Plaintiffs seek additional discovery to determine if a legal basis exists to include their properties in the 2002 Plan. The trial court rejected plaintiffs' request. So do we.

A trial court has broad discretion to determine discovery. Axelrod v. CBS Publ'ns, 185 N.J. Super. 359, 372 (App. Div 1982). The judge here did not abuse his discretion. Plaintiffs have not provided any particulars as to how additional discovery will demonstrate why the City's decision to include their properties was arbitrary. See Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999) ("bare conclusory assertions in an answering affidavit are insufficient to defeat a meritorious application for summary judgment"); Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977) (plaintiff "has an obligation to demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action").

While plaintiffs seek to force the City to explain why their specific properties were included, all that was required of the City was to show a reasonable basis for the 2002 Plan as a whole, which it has done. Downtown Residents, supra, 242 N.J. Super. at 338; compare Hirth, supra, 337 N.J. Super. at 166-67 (city relied exclusively on presumption of validity accompanying

municipal action, and failed to counter, with evidence, the plaintiff's expert's opinion that redevelopment plan, which put the plaintiff's property in an industrial zone, created illogical patterns of land use). We therefore reject plaintiffs' claims that they were denied sufficient discovery.

VIII.

We next turn to Kingsley Arms's argument that Ordinance 2607 improperly "cedes unchecked legislative authority to a private entity." It claims that Asbury Partners has "unfettered discretion" to exercise the eminent domain power within the Zone and to determine a property's use after acquisition.

As we stated earlier, in this case the properties subject to eminent domain have been identified, the purposes of condemnation clearly expressed, and to the extent Asbury Partners can request the City to institute eminent domain proceedings, the procedures to be followed in such cases are all clearly set forth. Beyond that, the City's delegation of particular powers under the 2002 Plan to Asbury Partners was authorized by applicable laws and established legal principles in matters of redevelopment.

A city may "[a]rrange or contract with public agencies or redevelopers for the planning, replanning, construction, or undertaking of any project or redevelopment work, or any part

thereof." N.J.S.A. 40A:12A-8f. The City, or its designated developer, may acquire any land or building through condemnation necessary for the redevelopment project pursuant to the Eminent Domain Act. See N.J.S.A. 40A:12A-8c; N.J.S.A. 20:3-2 ("condemnor" includes the "entity, public or private . . . which is condemning private property being condemned for a public purpose under the power of eminent domain"). Thus, the City could condemn property for Asbury Partners' use in the redevelopment project. And, where it does designate "a private developer to negotiate an acquisition" in the redevelopment context, the developer is under the same obligation as would be the government to deal fairly with the property owners in any condemnation proceedings. Jersey City, supra, 252 N.J. Super. at 257.

Development of an unproductive area of a municipality constitutes a public purpose because it benefits the entire municipality. Bryant, supra, 309 N.J. Super. 613. Where the property taken is for public use, that a private corporation is used as the means of acquisition makes no difference. "The private corporation, by its contract to redevelop, represents the means as distinguished from the end itself. And the possibility that some profit may eventuate therefrom does not render the means unlawful." Wilson, supra, 27 N.J. at 376; see

also Twp. of W. Orange v. 769 Assocs., L.L.C., 172 N.J. 564, 572, 577-78 (2002). The State Constitution makes the redevelopment of blighted areas a public endeavor that either public or private entities may be authorized to accomplish. N.J. Const. art. VIII, § 3, ¶ 1.

Kingsley Arms claims this case is like Casino Reinvestment Dev. Auth. v. Banin, 320 N.J. Super. 342, 344, 357 (Law Div. 1998), where the Casino Redevelopment Authority (CRDA) brought an action to exercise its eminent domain powers for the benefit of a Trump Casino against private property owners so the casino would have surface parking and green space. While the court said it could validate the plan if "these properties were to continue to be used for these purposes by Trump," it did not validate the CRDA's actions because Trump was not so bound. Id. at 357. The casino owner could expand its existing casino hotel "at a future time of [its] choosing." Ibid. By condemning the property, the CRDA did what "Trump [was] unable or unwilling to do . . . itself on the open market." Ibid. Relying on this, Kingsley Arms claims "it is entirely possible" that Asbury Partners will invoke the eminent domain power to take the Kingsley Arms property at "any time" within the next thirty years and continue to operate it as a residential apartment,

which is precisely the kind of open-ended condemnation that the court in Banin disapproved.

We are not persuaded. Here, the condemnation of properties is to be exercised consistent with a broad community development project. Plaintiff's assertion that the City has no control over how "various properties in the redevelopment area will be developed" is incorrect; it neglects to take into account the specifics of the 2002 Plan. Thus, the Banin court's concern that the agreement between Trump and the CRDA contained no "appropriate restrictions" is simply not present here.

Kingsley Arms also asserts that the Banin court recognized that a "heightened scrutiny" test applies when the exercise of eminent domain powers results in a substantial benefit to a private party. Id. at 346. That is incorrect. The Law Division said: "A careful reading of [City of Atlantic City v. Cynwyd [Investments, 148 N.J. 55 (1997)] makes it clear that the Supreme Court was not establishing a new 'heightened scrutiny' standard of review . . . ." Ibid. We consequently reject Kingsley Arms' contention that the 2002 Plan improperly ceded too much power to Asbury Partners.

IX.

Next, Kingsley Arms complains that Ordinance 2607 violates its equal protection rights because it unfairly discriminates

between similarly situated property owners. It says the 2002 Plan treats similarly situated property owners within the Zone differently without a rational basis; and it is vague because it fails to explain how the Kingsley Arms property will be used to advance a public interest.

Kingsley Arms is an eight-story, ninety-seven-unit apartment building located in Block 219 at the northern end of the Zone. Under the 2002 Plan, it is to be retained to provide housing units for Block 219. That block is among those that may be purchased or taken from the property owners. An apartment building in adjacent Block 220, the Asbury Towers, also within the Zone, is not slated for acquisition.

We turn first to plaintiff's vagueness challenge. A zoning ordinance is subject to being rejected on grounds of vagueness if it is incapable of being understood by a person of average intelligence in light of common experience so as to apprise him or her whether contemplated conduct is unlawful. State v. Cameron, 100 N.J. 586, 591 (1985). A statute is "facially" vague if there is "no conduct that it proscribes with sufficient certainty," while it can be "vague as applied" if it does not sufficiently clarify the prohibited conduct. Id. at 593.

Kingsley Arms claims the 2002 Plan is void for vagueness because its building is not targeted for a particular public

use. That argument is not persuasive. It is not required that every individual aspect of a redevelopment plan have a public purpose; rather, it is the comprehensive scheme of physical community development that serves a public purpose. Mansfield, supra, 120 N.J.L. at 150; see also Levin, supra, 57 N.J. at 540 (elimination of blighted areas "is a public purpose intimately related to the public health and welfare"). The 2002 Plan is such a comprehensive scheme. The Plan is not vague for failing to attribute a public purpose to the Kingsley Arms property; the public purpose for its inclusion is subsumed in the public purpose for the redevelopment area as a whole.

Next, we turn to the equal protection argument. Equal Protection requires "all persons within a class reasonably selected" to be treated alike. Wilson, supra, 27 N.J. at 377. Under federal Equal Protection challenges, statutes regulating a suspect class or a fundamental right are strictly construed; those regulating a semi-suspect class or substantially affecting a fundamental right in an indirect manner are subject to "intermediate scrutiny; if none of those subjects are involved, like here, a "rational basis" test is applied. Barone v. Dep't of Human Servs., 107 N.J. 355, 364-65 (1987). "To withstand this level of attack, the statute must be rationally related to the achievement of a legitimate state interest." Id. at 365.

The classification may be "imperfect" so long as it has a reasonable basis. Id. at 367.

Kingsley Arms's argument rests upon the Plan's exclusion of Asbury Towers, located in the adjacent block, from acquisition while including its property, a viable apartment building. It claims that as a twenty-three story building, Asbury Towers exceeds the four-to-eight story design concept envisioned by the 2002 Plan; the Bradley Plan, which much of the 2002 Plan was designed to follow, calls for a "flaring out of the streets towards the ocean," which goal is "thwarted" by leaving the Asbury Towers intact; Asbury Partners' planner said the existence of a single "odd parcel" can ruin the design of an entire block; and Kingsley Arms spent more than $1 million in "renovation costs."

To support its position, Kingsley Arms points to the City attorney's acknowledgment to the trial court that the City "would like to be able to condemn Asbury Towers," implying, according to plaintiff, that the City made a mistake in differentiating between Kingsley Arms and Asbury Towers. But, the remainder of counsel's comments demonstrates that the City did have a reason to exclude Asbury Towers from the Plan. It did so because it is "a 23 story building that provides a tremendous amount of senior housing in the area and more

importantly, it's its own block. . . . It has its own self-contained block that is already in accordance with what we need to do with the plan." These are meaningful distinctions. They show that the exclusion of Asbury Towers was not arbitrary but rests on legitimate governmental objectives.

Under the rational basis test, the question is whether any conceivable set of facts would afford a rational basis to include Kingsley Arms and exclude Asbury Towers. Drew Assocs. of NJ, LP v. Travisano, 122 N.J. 249, 258, 259 (1991); McKenney v. Byrne, 82 N.J. 304, 319 (1980). "If there is a reasonable distinction, there is no oppressive discrimination." Wilson, supra, 27 N.J. at 377. And, to the extent that the two properties are in some ways similar, nonetheless, "some discriminatory impact and some imperfections in the groupings or categories will not invalidate the classification." McKenney, supra, 82 N.J. at 316. Here, affordable housing is a goal of the 2002 Plan, and Asbury Towers is located in its own, self-contained block. This constitutes a "conceivable set of facts" that defeats plaintiff's equal protection arguments. We therefore reject Kingsley Arms's equal protection challenge.

X.

Kingsley Arms claims the thirty-year duration of the Plan creates an unfairly long "option" to purchase the property,

which amounts to an impermissible taking without just compensation in the interim. We reject these arguments for the reasons we expressed sections IV and V of this opinion.

XI.

We turn next to Dan's Global's claims. It contends that its property, the Berkeley Carteret Hotel, had already undergone "prior rehabilitation" pursuant to the 1991 Plan. A professional planner certified that the hotel, which Dan's Global had purchased in 1998, did not "meet the criteria" for rehabilitation under the 2002 Plan given that it had undergone a $3.5 million renovation and was "substantially improved" as a result. Dan's Global claims the property's viability distinguished it from more dilapidated properties.

The Berkeley Carteret Hotel is located in Block 192, Lot 1, on Ocean Avenue across from the beach and at an angle to Convention Hall. Under the 2002 Plan, it would not be acquired unless the cost of reopening Sixth Avenue "would necessitate it," or if the hotel fell into disrepair. While the property may have recently been improved, as we noted previously, the viability of a property within an area otherwise in need of redevelopment does not require that it be excluded from the redevelopment plan. See Wilson, supra, 27 N.J. at 380 (property may be taken for redevelopment although, "standing by itself,

[it] is innocuous and unoffending"); Tri-State, supra, 349 N.J. Super. at 424 (viability of the plaintiff's business not a bar to its inclusion in redevelopment area).

Also, the Plan recognizes only two circumstances where condemnation of this property will be necessary. If the cost of reopening Sixth Avenue necessitates it or the hotel falls into disrepair. If the latter occurs, that would undercut Dan's Global's argument that it should have been excepted from the 2002 Plan because it was rehabilitated and viable. If the former occurs, condemnation to minimize the government's cost to redevelop the entire area is a legitimate government goal. It is the overall area's redevelopment needs that take priority over an individual property's status. Wilson, supra, 27 N.J. at 370; Tri-State, supra, 349 N.J. Super. at 424; see also Forbes v. Bd. of Trustees of the Twp. of S. Orange Vill., 312 N.J. Super. 519, 530-31 (App. Div.) (central business district redevelopment plan remained valid despite numerous improvements to the area), certif. denied, 156 N.J. 411 (1998).

Dan's Global may raise its renovation expenses in the context of its claim for compensation should condemnation proceed. Cf. Karam, supra, 308 N.J. Super. at 235 (factor to be considered is "whether the property owner had any distinct investment-backed expectations at the time of acquiring the

property that were destroyed by the force of the regulation"). The fact of the renovation itself pursuant to an earlier redevelopment plan does not impact on the City's redevelopment goals under the 2002 Plan.

XII.

Dan's Global asserts further that the 2002 Plan should be declared invalid as to the hotel because the City had an improper motive in seeking to condemn it; it claims the reason the hotel was included was to give Asbury Partners unfair bargaining power in future negotiations over the opening of Sixth Avenue. Its primary argument is that the City's improper motive in listing the hotel for possible acquisition can be seen through the testimony of Duany, the City's planner, who acknowledged that once the hotel's parking lot is condemned, the "hotel loses a lot of its value without the parking," and that proviso in the Plan therefore created "the possibility of a more open negotiation."

The 2002 Plan detailed the areas that would experience street openings and closings. In the case of street openings, there were two: Ocean Avenue between Third and Fourth Avenue, and Sixth Avenue between Kingsley Street and Ocean Avenue. With respect to the latter, the Plan explained:

> Under previous versions of the Waterfront Redevelopment Plan the portion of Sixth

> Avenue between Kingsley Street and Ocean Avenue was vacated to allow for development within this right-of-way. This plan amendment requires that Sixth Avenue, between Kingsley Street and Ocean Avenue, be restored as a public street and opened to traffic. The developer of Block 207 shall transfer, to the City, the section of the Sixth Avenue, which was made a part of that development block. The section of the Sixth Avenue right-of-way, which was made a part of the Berkeley-Carteret Hotel lands (Block 192), may be acquired by the City through negotiation or eminent domain.

A decision to condemn should not be enforced upon a showing of improper motives, bad faith, or conduct amounting to the abuse of the eminent domain power. See Borough of Essex Fells v. Kessler Inst. for Rehab., Inc., 289 N.J. Super. 329, 337 (Law Div. 1995). "Public bodies may condemn for an authorized purpose but may not condemn to disguise an ulterior motive." Id. at 338. Nevertheless, judges are "reluctant" to find bad faith and overturn a condemnation — to do so the "evidence should be strong and convincing." Id. at 342. When "an ordinance has both a valid and an invalid purpose, courts should not guess which purpose the governing body had in mind." Riggs v. Twp. of Long Beach, 109 N.J. 601, 613 (1988).

The question is whether the City's intention to condemn was improperly motivated by a desire to force Dan's Global to agree to a lesser amount for the parking area. The City acknowledged that without the challenged provision, Asbury Partners may have

to pay a disproportionate amount for the parking, which would put the hotel in "too strong of a position" for negotiation purposes. Although at first blush that statement seems to unfairly favor the developer, we nonetheless reject Dan's Global's challenge.

First, the Plan's intent to reopen Sixth Street as part of the redevelopment was a valid reason for the City to take the property. We will not speculate that the City had any other, invalid, purpose in mind. And, pursuant to its redevelopment powers, the City had the authority to acquire the hotel with or without the parking area and without limitations. If the City could acquire all of Dan's Global's property, it could acquire a portion of it, meaning the hotel's parking area without the hotel.

Second, even if only a portion of Dan's Global's entire property is taken, it remains entitled to fair compensation. See State v. William G. Rohrer, Inc., 80 N.J. 462, 464-65 (1979) (where a taking denominated "partial" actually drains the property of all its economic worth, the "better practice [is] for the public condemnor to undertake to condemn the whole property in the first place"); N.J.S.A. 20:3-37 ("Uneconomic remnants") ("If as a result of a partial taking of property, the property remaining consists of a parcel or parcels of land

having little or no economic value, the condemnor, in its own discretion or at the request of the condemnee, shall acquire the entire parcel."). Consequently, in the event the City acquires only the parking area through condemnation, Dan's Global will be in a position to assert an uneconomic remnant claim. The point being that even if the City takes the parking area, the hotel, or both, it cannot dodge its obligations to pay for what it takes. Karam, supra, 308 N.J. Super. at 235.

XIII.

Next, Dan's Global contends the City's decision to open Sixth Avenue was arbitrary in the absence of traffic engineering studies to support the decision. We again disagree. A goal of the 2002 Plan was to restore the area to the Bradley Plan's design to the extent possible. That design incorporated "a grid of traditionally scaled blocks and streets" and provided that those streets perpendicular to the ocean such as Sixth Avenue "flare open as they approach the waterfront. . . . By widening the east-west streets at their ends, Bradley increased the views of the ocean from the City, facilitated the movement of sea breezes into the city, and provided space for landscape and parking improvements adjacent to the beachfront."

In partially explaining the decision to reopen Sixth Avenue, Asbury Partners' planner said: "because of the prior

vacation of the portion . . . between Kingsley Street and Ocean Avenue, Sixth Avenue truncates the public thoroughfare and creates a significant gap in the street pattern" established by the Bradley Plan. He then recited portions of N.J.S.A. 40:55D-2 (purposes of the MLUL) to explain how the reopening of Sixth Avenue will promote adequate light, air and open space, (N.J.S.A. 40:55D-2c); encourage the sound location and design of traffic routes, (N.J.S.A. 40:55D-29h); and promote a desirable visible environment, (N.J.S.A. 40:55D-2i). The planner also said the reopening would "create[] pedestrian-friendly streets, bring[] the city back to the ocean and maintain[] on-street parking wherever possible."

Dan's Global does not dispute this evidence directly, though its expert's certification nonetheless asserts generally that Sixth Avenue need not be reopened in order to accomplish the 2002 Plan's goals of better access and views. Instead, Dan's Global maintains it was necessary to have a traffic engineer's opinion or a suitable traffic study on the necessity of reopening Sixth Street. That simply is not so. The City had numerous community planning reasons for reopening Sixth Avenue, and, significantly, the redevelopment plan included detailed consideration of and planning for "vehicular circulation" as a whole.

Dan's Global also asserts that because the City had previously closed Sixth Avenue, specific evidence justifying a reversal of that earlier decision was necessary. Again, we disagree. The City had no burden to prove that this particular street reopening was justified above and beyond the burden for the 2002 Plan generally. And, in any event, reopening Sixth Avenue in particular was sufficiently justified. It was not enough for Dan's Global to provide a differing opinion on the desirability of maintaining Sixth Avenue's closure. So long as the Plan was determined to be reasonably related to its objective, it is the legislative will that controls.

XIV.

Finally, Dan's Global asserts that adoption of the 2002 Plan was arbitrary and capricious because the City relied on the advice of Duany, an unlicensed planner, in creating the plan amendments. The trial court rejected plaintiff's argument, as do we. The judge noted: "[p]laintiffs concede that Duany is an architect and town planner of international renown. . . . that [without question] Duany possess[es] the knowledge and ability to assess and recommend changes to a municipal redevelopment plan."

To declare the amended redevelopment plan void because the planner violated a licensing regulation is a remedy

disproportionate to the offense. A proper sanction may be a monetary penalty imposed on the unlicensed offender; the public should not be penalized. The court found little question that Duany met the requirements to hold a planner's license, and found no bad faith or misrepresentations of his status. Plaintiffs' arguments as to this issue are without sufficient merit to require additional discussion. R. 2:11-3(e)(1)(E).

Affirmed.