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THE COMMITTEE ON OPINIONS

CITY OF LONG BRANCH, a Municipal Corporation in the State of New Jersey	:	SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY
	:	LAW DIVISION
Plaintiff,	:	
	:	
vs.	:	DOCKET NUMBER: MON-L-4987-05
GREGORY P. BROWER, VALLEY NATIONAL BANK as successor to Shrewsbury State Bank, ANTONE DE FARIA and ANNE DE FARIA, his wife, MARCELLO S. GRUBERG and ELAINA G. GRUBERG, his wife, ALEXANDER FRIDMAN, as Tenant in Common, PROVIDENT SAVINGS BANK, LEIGH HOGLAND and DENISE HOGLAND, PRINCIPAL MUTUAL LIFE INSURANCE CO., KARIN LYNN KANDUR, Unmarried, PATRICIA M. TAYLOR, CONTRYWIDE FUNDING CORPORATION, WASHINGTON MUTUAL BANK, PHILIP LAMOTTA and ANNA LAMOTTA, his wife, CUMBERLAND COUNTY WELFARE AGENCY, GLOUCESTER COUNTY BOARD OF SOCIAL SERVICES, CUMBERLAND COUNTY BOARD OF SOCIAL SERVICES, ANTOINETTE ANASTASIA, ANCORA PSYCHIATRIC HOSPITAL, VERIZON BANK, LORING E. SYLVESTER, MD, OHRBACHS, INC., CAMDEN COUNTY BOARD OF SOCIAL SERVICES, ROSENBERG, DRUKER 7 COMPANY, PA, ENDELWOOD MEMORIAL HOSPITAL, INTERIM HEALTH CARE, SUFERIN, ZUCKER, WALLER & WHIXTED PA, RICHARD J. CLEAVE, DR. EDWARD L. APETZ, NWNJ FEDERAL CREDIT UNION, SELECTIVE INSURANCE COMPANY, AMERICAN TRADING COMPANY, MERCER COUNTY	:	

BOARD OF SOCIAL SERVICES, RETAILERS NATIONAL BANK TARGET VISA, MEDICAL PRACTICE MANAGEMENT ASSOCIATION, Assignee, GLOBAL HOLDING & INVESTMENT, MERCER COUNTY OFFICE OF THE PUBLIC DEFENDER, ROSE LAROSA, MONMOUTH OCEAN HOSPITAL SERVICE, LOUIS WETSTEIN, GEORGE WARREN MCKENNA, MARY LA CONTE, MARYANN TESTA, OLGA NETTO, FIRST INTERSTATE FINANCIAL CORP., RAGENDRABAHI PATEL and MANISHA PATEL, his wife, SOVEREIGN BANK, as Successor of Shadow Lawn Savings Bank, SLE, JOSEPH FRIEDMAN & SONS INTERNATIONAL, INC., MANDINI SAWHNEY and SANJEEV SAWHNEY, DISCOVER BANK, R.T. DEGUZMAN, MD, NEW CENTRY FINANCIAL SERVICES, CHENG H. LIN, MD, SET SATELLITE SINGAPORE PTE, LTD., YASJ RAJ FILMS, USA, INC., LAURIE ANN VENDETTI, FLEET BANK, JERSEY CENTRY POWER & LIGHT, STATE OF NEW JERSEY, CITY OF LONG BRANCH, LONG BRANCH SEWERAGE AUTHORITY, JOHN AND JANE DOES 1-100. Defendants.	:	
CITY OF LONG BRANCH, a Municipal Corporation in the State of New Jersey Plaintiff, vs. FRANCIS T. DELUCA; CITY OF LONG BRANCH; LONG BRANCH SEWERAGE AUTHORITY; ABRAMM KUPFER; US	:	DOCKET NUMBER: MON-L-5552-05

MORTGAGE GROUP; JOHN DOES 1-10; AND JANE DOES 1-10,

Defendants.

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

Plaintiff,

vs.

ALAN A. COOK, married, LUCY HUNTER; CITY OF LONG BRANCH, LONG BRANCH SEWERAGE AUTHORITY; RESOLUTION TRUST CORP.; MEMORIAL GENERAL HOSPITAL; STATE OF NEW JERSEY, DIVISION OF TAXATION, TRAVELERS EXPRESS COMPANY, INC.; BUTTONWOOD HOSPITAL OF BURLINGTON COUNTY; JOHN DOES 1-10; AND JANE DOES 1-10,

Defendants.

DOCKET NUMBER: MON-L-5551-05

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

Plaintiff,

vs.

LOUIS THOMAS ANZALONE and LILLIAN ANZALONE, h/w, CITY OF LONG BRANCH, LONG BRANCH SEWERAGE AUTHORITY and JOHN DOE 1-10 and JANE DOE 1-10,

Defendants.

DOCKET NUMBER: MON-L-141-06

CITY OF LONG BRANCH, a Municipal Corporation in the State of New Jersey Plaintiff, vs. ESTATE OF ELSA DEFAIRA, her heirs, beneficiaries and assigns; BERNADETTE SHERIDAN, BRIDGITTE FRANTL, ELIZABETH DAINTY, CITY OF LONG BRANCH, LONG BRANCH SEWERAGE AUTHORITY, and JOHN DOE 1-10 AND JANE DOE 1-10, Defendants.	:	DOCKET NUMBER: MON-L-871-06
CITY OF LONG BRANCH, a Municipal Corporation in the State of New Jersey Plaintiff, vs. RICHARD SQUIRLOCK and PETER SQUIRLOCK, FEDERAL NEW HOME LOAN MORTGAGE CORPORATION, GMAC MORTGAGE CORPORATION OF PA, CITY OF LONG BRANCH, LONG BRANCH SEWERAGE AUTHORITY and JOHN DOE 1-10 and JANE DOE 1-10, Defendants.	:	DOCKET NUMBER: MON-L-313-06
CITY OF LONG BRANCH, a Municipal Corporation in the State of New Jersey Plaintiff,	:	

vs.	:	
ALBERT A. VIVIANO and MARY VIVIANO, his wife, CITY OF LONG BRANCH, LONG BRANCH SEWERAGE AUTHORITY and JOHN DOE 1-10 and JANE DOE 1-10,	:	DOCKET NUMBER: MON-L-320-06
Defendants.	:	

CITY OF LONG BRANCH, a Municipal Corporation in the State of New Jersey	:	
Plaintiff,	:	
vs.	:	
ELLEN EAGAN and JEAN SADENWATER, MORTGAGE ELECTRONIC REGULATION SYSTEMS, WACHOVIA NATIONAL BANK f/k/a FIRST UNION NATIONAL BANK, CITY OF LONG BRANCH, LONG BRANCH SEWERAGE AUTHORITY and JOHN DOE 1-10 and JANE DOE 1-10,	:	DOCKET NUMBER: MON-L-317-06
Defendants.	:	

CITY OF LONG BRANCH, a Municipal Corporation in the State of New Jersey	:	
Plaintiff,	:	
vs.	:	
MARY MILANO and MARINO MILANO, Joint Tenants With Right of Survivorship, NEW YORK TIMES COMPANY, STATE OF NEW JERSEY, JERSEY CITY POWER & LIGHT COMPANY, CITY OF LONG BRANCH, LONG BRANCH SEWERAGE AUTHORITY	:	DOCKET NUMBER: MON-L-313-06

and JOHN DOE 1-10 and JANE DOE 1010, Defendants.	:	
CITY OF LONG BRANCH, a Municipal Corporation in the State of New Jersey Plaintiff, vs. CARMEN VENDETTI, JOSEPHINE VENDETTI, his wife; CITY OF LONG BRANCH; LONG BRANCH SEWERAGE AUTHORITY; and JOHN and JANE DOE 1-10, Defendants.	:	DOCKET NUMBER: MON-L-4996-05
CITY OF LONG BRANCH, a Municipal Corporation in the State of New Jersey Plaintiff, vs. JOYCE and PHILIP MELILLO, GREENWOOD TRUST CO. o/b/o DISCOVER CARD CO., CITY OF LONG BRANCH, LONG BRANCH SEWERAGE AUTHORITY and JOHN DOE 1-10 and JANE DOE 1-10, Defendants.	:	DOCKET NUMBER: MON-L-309-06 **OPINION**

Decided: June 22, 2006.

ANSELL ZARO GRIMM & AARON, attorneys for Plaintiff City of Long Branch. (James G. Aaron, Esq. argued for Plaintiff. Lawrence H. Shapiro, Esq. on the brief.)

BATHGATE, WEGENER & WOLF, attorneys for Defendants, Gregory P. Brower, Antone DeFaria and Anne De Faria, Marcello S. Gruberg and Elaina G. Gruberg, Alexander Fridman, Lee Hoagland and Denise Hoagland, Karin Lynn Kandur, Patricia M. Tayler, Rose La Rosa, George Warren McKenna, Olga Netto, Ragendrabahi Patel and Manisha Patel, and Lori Ann Vendetti under MON-L-4996-05; Richard J. Squirlock and Peter Squirlock under MON-L-313-06; Ellen Eagan and Jean Sadenwater under MON-L-317-06; Joyce Melillo and Philip Melillo under MON-L-309-06; Albert A. Viviano and Mary Viviano under MON-L-320-06; Mary Milano and Marino Milano under MON-L-307-06; and the Estate of Elsa DeFaria under MON-L-871-06. (Peter H. Wegener, Esq. argued for Defendants. Mr. Wegener and Danielle A. Maschuci, Esq. on the brief. Scott G. Bullock, Esq. of counsel.)

CARLIN & WARD, P.C. attorneys for Defendants, Frances Deluca and Louis and Lillian Anzalone. (William J. Ward, Esq. argued for Defendants. Mr. Ward and Scott A. Heiart, Esq. on the brief.)

LAWSON, A.J.S.C.

The City of Long Branch (City) has filed Orders to Show Cause for the taking of property and the appointment of commissioners in the above captioned matters. Answers have been filed for each of the Defendants (Condemnees). The Condemnees have submitted briefs in support of motions to dismiss and opposing the Orders to Show Cause. The City filed an opposing brief to which Defendants filed Reply Briefs.

This court heard the oral arguments of counsel on Friday, March 24, 2006 and reserved decision. The court has reviewed the moving papers, engaged in colloquy with

counsel, and now makes the following findings of fact and conclusions of law, pursuant to R. 1:7-4.

I. STATEMENT OF FACTS

The Defendants (Condemnees) in this action are the owners of certain properties bordered by Marine Terrace and Ocean Terrace to the south; Seaview Avenue to the north; the Atlantic Ocean to the east; and, Ocean Boulevard to the west. This area, located in the City of Long Branch (hereinafter, "City") is communally known as the MTOTSA properties. The eleven actions captioned above form the matter commonly known as "The MTOTSA cases." The court will consider these matters collectively as they involve common issues of fact and law although they have not been consolidated.

The City has determined that the condemnation of the MTOTSA properties is a necessary piece of a larger redevelopment effort in the City of Long Branch. The present matter is the City's effort to enforce its power of eminent domain upon the MTOTSA property owners to which the property owners object. The property owners do not wish to sell their homes and believe the actions by the City represent an abuse of the eminent domain power.

The court, with the consent of all counsel at oral argument, visited the premises on several occasions. See

Morris County Land Improv. Co. v. Parsippany-Troy Hills, 40 N.J. 539, 549 (1963). The Condemnees are challenging the City's right to take their properties and the manner in which the City has attempted to do so based on the following grounds: 1. The City was arbitrary and capricious in designating the MTOTSA properties as "an area in need of redevelopment" under N.J.S.A. 40A:12A-1, et seq.; 2. The change from "residential infill" to condemnation was made to benefit the private redeveloper and does not advance a public purpose; 3. There were conflicts of interest between law firms, a bank and a redeveloper; 4. The City improperly delegated its authority to engage in or failed to engage in bona fide negotiations pursuant to N.J.S.A. 20:3-6; and, 5. the City unconstitutionally delegated their power of eminent domain.

a. Area in Need of Redevelopment Designation.

The Condemnor, the City of Long Branch, is no stranger to redevelopment efforts. In the 1980's, the City's attempt to redevelop a region along the beachfront failed to revitalize the area. The redevelopment's collapse was ensured by a late 1980's fire which destroyed the Long Branch Pier.

In February of 1994, a group named Long Branch Tomorrow, Inc. was formed as a public/private partnership to study

Long Branch's beachfront in order to undertake an examination of the area's potential revitalization.

Referencing the study of Long Branch Tomorrow, Inc. the Council of the City of Long Branch (hereinafter "Council") passed Resolution 271-95 on August 8, 1995. That Resolution stated that the areas from Seven Presidents Park south to Takanassee Lake were areas which "may benefit from a comprehensive plan for revitalization and redevelopment." That Resolution also requested that Long Branch determine if the areas in the study area were in need of redevelopment.

An analysis of the Beachfront North sector properties included inspections of the particular properties, crime records in the area, a review of property ownership and buildings department records, a review of tax records, and an examination of lot and building sizes and uses.

A report was issued in January of 1996 by the Planning Department of the City of Long Branch and the Atlantic Group under the instruction of the Planning Board. That report found that the Beachfront North sector, in which the MTOTSA properties are located, was an area in need of redevelopment. In particular, the report found that "[t]he 'Oceanfront North' and 'Broadway Corridor' areas meet the statutory criteria sections [N.J.S.A. 40A:12A-5] 'a', 'c',

‘d’ and ‘e’ and therefore constitute the ‘Recommended Areas in Need of Redevelopment’.” (Turner Cert. Ex. E.)

Under criterion “a”, the report found that in Oceanfront North 17% of the buildings received a “Good” rating, whereas 67% of those in Oceanfront South received a “Good” rating. Oceanfront South was not included in the redevelopment area. The ratings were based on a number of factors or deficiencies including broken windows, deteriorating paint, falling or rotten exterior columns cracked or chipped masonry veneer, structural deterioration, and drainage defects.

Moreover, in Oceanfront North, the report found that twenty-five (25) percent of the total area consisted of vacant land--sixteen (16) percent of which had remained vacant for a period of ten years or more prior to the adoption of the resolution.

Under criterion “d” an analysis revealed “high vacancy rates and marginal enterprises predominate”. Under criterion “e” an analysis of property taxes was used to determine the productivity of the land revealing $2.14 per square foot of private land in Oceanfront South and $0.50 in Oceanfront North allegedly indicating stagnant and unproductive condition of the land in the latter.

In the entire redevelopment area, 23% percent of the properties are currently vacant and seventeen 17% have been vacant for 10 years or more. The Report found that the increase from a 17% vacancy rate over ten years to a 23% rate at the time of the study indicates a growing lack of proper utilization of areas. The Report concludes that such increasing vacancy rates deter private investment which could improve the area and benefit the public. Furthermore, from 1990 to 1995, only two (2) out of four thousand seven hundred forty five (4,745) construction permits issued by the City of Long Branch were in the redevelopment area.

On May 14, 1996, the City Council determined that the study area was an area "in need of redevelopment" and adopted the Redevelopment Plan by way of Ordinance 15-96.

At that time, Defendants maintain that they had "no reason to believe that their property would be condemned, because one of the specified main objectives of the plan was to conserve sound, well-maintained single-family housing to the extent possible, and encourage residential development through infill." (Wegener Brief at 4. Citing Redevelopment Plan at 4. (citations omitted.)) A color coded map presented at the hearings depicted the MTOTSA properties as residential infill. Moreover, according to

some of the Defendants, at a January 16, 1996 public hearing, the homeowners were told that the MTOTSA properties would not be condemned, but would rather be subject to residential infill.

The City maintains that infill housing was an available alternative which was allowable but not required pursuant to the plan. (Woolley Cert. at 6.) Mr. Woolley's certification goes on to state that "[a]ny drawings in the plan which may show infill, were and are for illustrative purposes only."

The Defendants maintain that the MTOTSA properties are a separable part of the redevelopment area. The Condemnees opine that the facts supporting the declaration of the redevelopment area are too general. They go on to say that a closer look at the MTOTSA properties reveals that only 7.8% of the properties were in poor condition at the relevant time, and the targeted dwelling units per acre has nearly been met as there are currently 14.75 units per acre in the MTOTSA area. (See Maschuci Cert. Ex. 4 at 5.) The City's target under the plan is to achieve fifteen (15) dwelling units per acre. At oral argument, Mr. Aaron stated that residential infill could not produce the targeted 15 dwelling units per acre.

a. Project Implementation

By the summer of 1997, the City began the redevelopment of sections of Long Branch's beach front. Projects, including road construction on Route 36, demolition of the burned pier, and design work on Ocean Boulevard were underway before the end of that year.

In November of 1997, a consulting firm hired by the City began dissecting the more than 275 potential developers nationwide who had been invited to participate in the Redevelopment Plan. The potential developer would be charged with creating a development plan consistent with the City's project guidelines.

After narrowing the field to eight (8) development projects in July of 1997, the City ultimately decided to designate Applied Development Company (hereinafter, "Applied") as the designated developer for the Beachfront North Redevelopment sector. Applied formed Beachfront North LLC to implement the subject redevelopment project. The Beachfront North Redevelopment Agreement (hereinafter, "Agreement") divides the redevelopment into two phases—Phase I and Phase II.

The design for Phase I was approved in 2000, while Phase II was not approved until the summer of 2005. According to the City, the design work was negotiated by the Thompson

Design Group without input from the attorneys from the Ansell Firm or Greenbaum Firm.

Importantly for the redevelopment project in the Beachfront North sector, Ordinance 15-96 was amended by adopting Ordinance 9-00 on April 11, 2000. This permitted the City to acquire parcels of land designated for acquisition in the redevelopment agreement between the City and a designated redeveloper.[1] The Condemnees allege, "This statement was referring directly to the Agreement entered into between the City and [the redeveloper], where MTOTSA properties are designed to be taken under Phase II of the Redevelopment Plan." (Wegener Brief at 4.) After proper notice and a hearing, the City passed Ordinance 2-01 on January 23, 2001. As a result thereof, the MTOTSA properties were slated for condemnation. Thereafter, the City instituted negotiations in an effort to acquire those properties.

b. Conflicts of Interest

The underpinnings for Defendants allegation of a conflict of interest stems from the addition of Matzel & Mumford ("M&M") as a co-redeveloper for the Beachfront North sector

[1] The passage of Ordinance 9-00 was procedurally proper in that notice and a public hearing preceded the passage of the Ordinance.

in addition to two (2) transactions between Monmouth Community Bank and the designated redeveloper, Applied.

Defendants submit that Arthur Greenbaum, Esq. has served as a member of the Board of Directors for K. Hovnanian since 1992. M&M is a subsidiary of K. Hovnanian. Mr. Greenbaum's firm also represented the City until the Applied Group entered into an agreement with M&M in 2001— the Redevelopment Agreement was amended to designate M&M as a co-redeveloper in June 2002.

During this time the Ansell Firm which also represented the City since 1995 was representing K. Hovnanian in unrelated matters up until April of 2002. Moreover, the Greenbaum firm resumed representation of the City in April 2005, but then withdrew due to certain language in Justice Kennedy's concurrence in Kelo v. City of New London, ___ U.S. ___, 125 S.Ct. 2655, 2669-70 (2005) in which Justice Kennedy stated, *inter alia*:

> A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose… There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.

The Greenbaum firm, according to the City, "continued to provide limited services under its agreement with the City as redevelopment counsel, relating to the Broadway Arts area" until 2005. (Shapiro brief at 72.)

The City certifies that by January 23, 2001, at the latest, every relevant determination made by the City leading up to the acquisition of Defendants' properties had been made, and M&M's joint venture with Beachfront North LLC (owned by Applied) did not arise until June of 2002. In fact, on January 23, 2001, at the latest, the decision to condemn Defendants' properties had been made via Ordinance 2-01. Though, there is strong evidence that the decision to condemn had been made via Ordinance 9-00 in 2000.

Additionally, Monmouth Community Bank ("the Bank") issued a $2 million line of credit to Pier Village, LLC that was personally guaranteed by principals of Applied. (Russo cert. at 5.) The first advance on this line of credit was made in August of 2002 and was repaid in full in February of 2003. The Bank also issued a $2.5 million line of credit to Beachfront North, LLC personally guaranteed by the principals of Applied. The first advance on this line of credit was drawn in September of 2001 and repaid in full in June of 2002.

Mr. Aaron argued in court that he had no influence on these transactions as he does not sit on the loan committee and was unaware of the details of this loan. City Councilmen Anthony Giordano III, Michael DeStefano, and David G. Brown own shares in the Bank; Mr. Brown is employed by the Bank; and Mr. Giordano serves as Senior Vice President and CFO. The same Councilmen voted to approve the amended redevelopment agreement bringing in M&M as a redeveloper and condemning the subject properties.

Additionally, Mr. Ward alleges that in November 2001, after the City adopted Ordinance 2-01, members from Greenbaum, Thompson Design Group, and K. Hovnanian attended a Seminar Program and are all participants in the Long Branch Redevelopment. Mr. Ward requests discovery to see if K. Hovnanian's involvement in Long Branch was discussed during such a seminar or at any other relevant time.

c. Bona Fide Negotiations

The homeowners allege that the city failed to engage in bona fide negotiations pursuant to N.J.S.A. 20:3-6. The City asserts that it sent letters to the homeowners which contained offers based on an appraiser's assessment of fair market value. This assertion is not questioned by any of the property owners. However, counsel for some of the

property owners challenged the City's good faith negotiations through a letter dated October 11, 2005.

Mr. Wegener endorsed that letter on behalf of Defendants Brower, and stated, in part:

> Our client does not wish to sell his home and does not understand how, when and why it came to be that the City determined that this house should be taken by Eminent Domain and turned over to a private party. . . . Notwithstanding that our client does not wish to sell his home, after a reasonable explanation concerning the above, we may wish to enter into good faith negotiations. . . . However [] it appears that the City may have contracted away its ability to negotiate in good faith. We are concerned as to whether the City can negotiate a final settlement without the need of approval from a private third party.

A review of the contracts to which Mr. Wegener refers reveals that there is some interplay between the City and the Redeveloper concerning negotiations with potential sellers. The Agreement, Amended Agreement, and Second Amended Agreement all reveal, "The City may not agree in settlement or compromise to any amount in excess of the Offer Price without the written consent of the Redeveloper." The relevant agreement also contains language indicating that the redeveloper is to notify the City if private negotiations fail so that the City may proceed with condemnation.

Based on the above facts, the property owners urge this court to deny the City's application for the taking of the

subject properties and the appointment of commissioners or, in the alternative, set the matters down for a plenary hearing pursuant to R. 4:67-5.

II. LEGAL ANALYSIS

An action in condemnation is brought pursuant to R. 4:67 in a summary manner. R. 4:73-1. Summary actions typically proceed by way of complaint and order to show cause. R. 4:67-2. The hearing is held on the return day for the order to show cause pursuant to R. 4:67-5 which states:

> The court shall try the action on the return day, or on such short day as it fixes. If [] the affidavits show palpably that there is no genuine issue as to any material fact, the court may try the action on the pleadings and affidavits, and render final judgment thereon. If any party objects to such a trial and there may be a genuine issue as to a material fact, the court shall hear the evidence as to those matters which may be genuinely in issue, and render final judgment. At the hearing or on motion at any stage of the action, the court for good cause shown may order the action to proceed as in a plenary action wherein a summons has been issued, in which case the defendant, if not already having done so, shall file an answer to the complaint within 35 days after the date of the order or within such other time as the court therein directs. In contested actions briefs shall be submitted.

> [T]he right of a litigant to be heard is not diminished in the least by the "summary" nature of the proceeding. Rather expedition is achieved by short-cutting procedural steps to the end that the merits will be tried at the earliest time consistent with fairness.
>
> [County of Bergen v. S. Goldberg & Co., 39 N.J. 377, 380 (1963).]

The City has filed the underlying Orders to Show Cause seeking a determination that it has properly exercised its authority to acquire the MTOTSA properties through eminent domain and request the appointment of three commissioners to fix the just compensation to be paid for the taking of the MTOTSA properties. The MTOTSA property owners are challenging the City's effort to take their properties on several grounds. First, the property owners contend that the taking is improper because it involves a taking for a private rather than a public purpose. Second, the property owners allege the designation of their properties as an area in need of redevelopment was arbitrary, capricious or unreasonable. Third, the property owners assert that the City did not properly engage in bona fide negotiations pursuant to N.J.S.A. 20:3-6.

Redevelopment Law

To resolve the issues raised by the condemnees the Court needs to touch upon the principles regarding a municipality's 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 the authority to condemn, the City has "an overriding obligation to deal forthrightly and fairly with property owners". This 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) (private interest "may be better served by private enterprises" 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). The Redevelopment Law describes a municipality's powers to exercise its redevelopment and rehabilitation functions. N.J.S.A. 40A:12A-4a(1),(2),(3),(4). Those powers include ordering a preliminary study, determining that an area is in need of redevelopment, adopting a redevelopment

plan, and determining that an area is in need of rehabilitation.

The Redevelopment Law addresses the responsibilities of the governing body to the planning board. N.J.S.A. 40A:12A-7a, e, f. The planning board's report must identify inconsistencies with the master plan, and include recommendations as to those inconsistencies, as well as "any other matters as the board deems appropriate." Ibid. The governing body is not bound by the planning board's recommendations. It is the governing body's obligation to "review the report of the planning board and . . . approve or disapprove or change any recommendation." 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. 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. 2002) (citing N.J. Const. Art. VIII, § 3, ¶ 1), certif. denied, 174 N.J. 189 (2002). The viability of a property does not necessarily bar it from being included within a redevelopment area. Ibid. In Wilson v. City of Long Branch, 27 N.J. 360, 379, certif. denied, 358 U.S. 873, 79 S.Ct. 113, 3 L.Ed. 2d 104 (1958), our Supreme Court held that a redevelopment plan is not invalid for including homes or buildings that are substandard. The Court went on to say, property may be condemned and transferred for redevelopment to a private entity so long as the acquisition is deemed to be for a public purpose; that the private entity stands to profit does not invalidate the acquisition. Id. at 376.

When a court reviews a municipality's designation of an area in need of redevelopment, there is a presumption of validity to the city's designation that applies. Levin v. Township Comm. of Bridgewater, 57 N.J. 506, 537, appeal dismissed, 404 U.S. 803, 92 S.Ct. 58, 30 L.Ed.2d 35 (1971); Concerned Citizens of Princeton, Inc. v. Mayor and Council of Princeton, Inc., 370 N.J. Super. 429, 452-53 (App. Div.), certif. denied, 182 N.J. 139 (2004). The presumption of validity also applies to the adoption of a

redevelopment plan, which "must be shown to be arbitrary or capricious, contrary to law or unconstitutional rather than merely 'debatable'." Downtown Residents for Sane Dev. V. City of Hoboken, 242 N.J. Super. 329, 332 (App Div. 1990).

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

A. Statute of Limitations.

As a preliminary matter, the City claims that the challenge to the redevelopment's inclusion of the MTOTSA properties is out of time because almost ten years have passed, and the redevelopment project has progressed significantly to date. Typically, a challenge to a determination of a governing body must be brought within forty-five days pursuant to R. 4:69-6(b)(3). R. 4:69-6(c) permits a relaxation of that time period where the interest

of justice so requires. See Concerned Citizens of Princeton, Inc. v. Mayor and Council of the Borough of Princeton, 370 N.J. Super. 429, 447 (App. Div.), certif. den., 182 N.J. 139 (2004).

Alternatively, the power of condemnation is tempered by N.J.S.A. 20:3-1, et seq. See N.J.S.A. 40A:12A-8. N.J.S.A. 20:3-5 provides:

> The court shall have jurisdiction of all matters in condemnation, and all matters incidental thereto and arising therefrom, including, but without limiting the generality of the foregoing, jurisdiction to determine the authority to exercise the power of eminent domain; to compel the exercise of such power; to fix and determine the compensation to be paid and the parties entitled thereto, and to determine title to all property affected by the action.

In Hirth v. City of Hoboken, 337 N.J. Super 149 (App Div. 2001), the court held, "In view of the constitutional foundation of the right to judicial review of administrative action, our courts are reluctant to foreclose such review on procedural grounds…" Although Hirth contemplated a standing issue, the analysis can be applied here. Public interest and N.J.S.A. 20:3-5 warrant the court's consideration of the challenge to the City's condemnation actions. Therefore, the Court will not dismiss this matter on the statute of limitations argument raised by the City.

B. Substantive Law.

To begin the analysis of the substantive law, a review of applicable Constitutional provisions is appropriate. The United States Constitution, Amendment V provides, in pertinent part, "…nor shall private property be taken for public use, without just compensation."

The United States Constitution Amendment XIV, § 1 applies the above to the States providing, in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law.

The New Jersey Constitution, Article I, Paragraph 20, states, in relevant part, "Private property shall not be taken for public use without just compensation." Accordingly, the City has the right to acquire properties subject to the constraints that such takings must promote a public use and the City must give the property owners just compensation. Id.

In Levin v. Township Committee of Bridgewater, supra, 57 N.J. at 540-541, the Court articulated that taking blighted properties according to statute for redevelopment satisfies the public purpose prong of the takings analysis.

The following language from Levin, supra, is informative:

> [C]ommunity redevelopment is a modern part of municipal government. Soundly planned redevelopment can make the difference between continued stagnation and decline and a resurgence of healthy growth. It provides the means of removing the decadent effect of blight on neighboring property values and of opening up new areas for residences and industry. In recent years, recognition has grown that governing bodies must either plan for the development or redevelopment of blighted areas or permit them to become more deteriorated, obsolescent, stagnant, inefficient and costly. It is no longer open to question that the elimination of a blighted area . . . is a public purpose intimately related to the public health and welfare. Nor is it questionable that the ultimate taking of such land for redevelopment for the benefit of the community as a whole is a constitutional taking for public use.
>
> [Id.]

1. City's determination that the MTOTSA properties are in need of redevelopment.

a. Redevelopment Designation

In Kelo et al., v. City of New London, Connecticut, et al., supra, the United States Supreme Court recently addressed the taking of private property for economic rejuvenation and found that it was permissible under the takings analysis although the subject properties were not themselves blighted. Id. In Kelo the area was determined to be "sufficiently distressed to justify a program of economic rejuvenation." Id. at 2665. Connecticut had a statute which specifically allowed a city to take land for

an economic development project, and that such a project is a "public use". Id. Importantly, Kelo, supra, held, in pertinent part:

> Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project. It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.
>
> [Id. at 2668.]

The Court continued, "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline." Id.

A challenger can overcome a presumption of validity only by proofs that there could have been no set of facts that would rationally support a conclusion that the enactment is in the public interest. Hutton Park Gardens v. West Orange Town Council 68 N.J. 543, 564-565 (1975).

In Hutton Park Gardens, supra, The New Jersey Supreme Court articulated:

> Legislative 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. Burton v. Sills, 53 N.J. [86, 95 (1968)]; Hudson County News Co. v. Sills, 41 N.J. [220, 228 (1963)]; Reingold v. Harper, 6 N.J. [182, 195-96 (1951)]. This presumption can be overcome only by proofs that preclude the possibility that there could have been any set of facts known to the legislative body or which could reasonably be assumed to have been known which would rationally support a conclusion that the enactment is in the public interest. Reingold v. Harper, supra, 6 N.J. at 196; cf. Jamounceau v. Harner, 16 N.J. [500, 515 (1954)]. The judiciary will not evaluate the weight of the evidence for and against the enactment nor review the wisdom of any determination of policy which the legislative body might have made.
>
> [Ibid.]

The same presumptions apply to a finding of an area in need of redevelopment. Levin, supra, 57 N.J. at 537. In Levin, the Court held, in pertinent part:

> The decision of the municipal authorities that the area in question is blighted came to the Law Division invested with a presumption of validity. To succeed, plaintiffs had the burden of overcoming that presumption and demonstrating that the blight determination was not supported by substantial evidence.
>
> [Id.]

"[T]he designation of an area in need of redevelopment under the LRHL is the equivalent of a blight designation."

Concerned Citizens of Princeton, Inc. v. Mayor & Council, 370 N.J. Super. 429, 436 (App. Div. 2004).

Under the standard of review in this matter, the property owners bear the burden of showing the City's "in need of redevelopment" determination is arbitrary, capricious or unreasonable—not simply debatable. See Downtown Residents for the Sane Dev. v. Hoboken, 242 N.J. Super. 329, 332 (App. Div. 1990). Therefore, the court must sustain any redevelopment plan and its designated area as long as it is supported by substantial credible evidence.

The City conducted a preliminary study determining that the area is in need of redevelopment pursuant to N.J.S.A. 40A:12A-1, et seq. The City referred the matter to the Planning Board for investigation and review under N.J.S.A. 40A:12A-5 and held public hearings with proper notice. The governing body determined that the area was an area in need of redevelopment under N.J.S.A. 40A:12A-6b(5) and found the boundaries of Oceanfront North to include the MTOTSA properties—"N. Bath north to Seven Presidents Park, east of Ocean Boulevard".

In Lyons v. Camden, 52 N.J. 89, 98 (1968), New Jersey's Supreme Court held:

> Decision as to whether an area is blighted and as to the boundaries of a particular redevelopment project area is committed by the Legislature to the discretion of the described local governmental agencies.

See also, Berman v. Parker, 348 U.S. 26, 35-36 (1954) finding:

> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.

The City must support its determination with substantial evidence of compliance with N.J.S.A. 40A:12A-5 which provides, in pertinent part:

> A delineated area may be determined to be in need of redevelopment if, after investigation, notice and hearing as provided in section 6 of P.L. 1992, c. 79 (C. 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.

In this instance, the City supported its findings with evidence of vacant land, lack of productivity, and other criteria addressed in the facts section above meeting the standards of N.J.S.A. 40A:12A-5(a), (c), (d) and (e).

In the Report and Findings prepared by the City Planning Department and the Atlantic Group, the City concluded:

> 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 Ocean Place Hilton is located) produce only a small fraction of the revenue that they should…

Specifically, under N.J.S.A. 40A:12A-5(a), the Planning Department's study found that in Oceanfront North, where the MTOTSA properties are located, one hundred forty eight (148) or 37% of the properties were vacant and 19% of the properties were in poor condition. To be rated "poor", the property would have to have three or more of the following deficiencies: 1. broken windows; 2. deteriorating paint; 3. falling, rotten exterior columns; 4. cracked, chipped masonry veneer; 5. siding, walls, roof, stairs, porches, balconies and other structural parts showing evidence of deterioration; and 6. gutters, leaders, drains, window frames and doors showing evidence of apparent defects.

In Oceanfront North, only 17% of the buildings were free from all of the above listed deficiencies thereby receiving a "good" rating. Based on this evidence, the amount of vacant land, and the number of defects on several of the properties, the City concluded that Oceanfront North met

criterion 5(a). This determination was supported by substantial evidence and therefore is not arbitrary, capricious or unreasonable. Having met the standards set forth by 5(a) the designation of the area in need of redevelopment is supported by substantial evidence. Nonetheless, the court will address the other criteria under which the City found that the subject redevelopment area qualified.

Under 5(c), the City found that 24.3 acres of vacant land exist in Oceanfront North comprising 25% of the total area. 16% of those properties had remained vacant for ten (10) years or more. The City determined that such a large amount of vacant land having remained vacant for over ten years is a very clear indicator that the area is not likely to be developed through private capital.

Thus, the City concluded that 5(c) had been met. This determination is also supported by substantial evidence.

Under 5(d), the City found that the area north of N. Bath Avenue received a low rating in terms of commercial viability. High vacancy rates and marginal enterprises were found to be predominant in this area. The study found that Ocean Avenue had become largely un-traveled due to the addition of Ocean Boulevard. Thus, commercial buildings lack needed visibility resulting from the faulty layout

which deters commercial investment. The study found that the residential area also suffered from the poor appearance of nearby commercial buildings. Ultimately, the City's report found that "[o]bsolete layout and faulty design deter private redevelopment and are detrimental to the welfare of the community."

These findings are evidence that criterion 5(d) has been met, and the City found that these conditions were detrimental to the safety, health, morals or welfare of the community as mandated by Spruce Manor Enterprises v. Borough of Bellmawr, 315 N.J. Super. 286, 294 (Law Div. 1998).

Under 5(e), the study found an increase in vacant land from 17% to 23% in the redevelopment area (including Oceanfront North and Broadway Corridor). This sharp increase, the study found, is indicative of a growing lack of utilization which deters private investment. Ultimately, the City concluded that private investment would make the area more productive and contribute to the public health, safety and welfare.

This finding is also supported by substantial evidence and shall not be overturned.

By meeting criteria N.J.S.A. 40A:12A-5(a), (c), (d) and (e), the Condemnor's findings represent substantial

credible evidence of a public purpose, and the Court will not second guess the City's decision. Nor will the court second guess where the City decided the appropriate boundaries of the area should be situated. See Lyons v. Camden, supra.; Berman v. Parker, supra.

Moreover, the fact that the border of the Beachfront North Sector may be debatable is not enough to overcome the presumption that it is the municipality who has the expertise and has properly designated the borders of the redevelopment area. The Redevelopment plan embodied in Ordinance 15-96, therefore, must be sustained.

N.J.S.A. 40A:12A-3 provides:

> 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.

The property owners' allegation that the MTOTSA properties are not currently in need of redevelopment is of no moment.

The court is persuaded by the logic set forth in Charleston Urban Renewal Auth. v. Courtland Co., 509 S.E.2d 569, 576 (W.V. 1998), which held:

> As the Supreme Court held in Berman, supra, the viability of an incremental, multi-year, integrated plan for the overall redevelopment of [an area in need of redevelopment] would be fatally compromised if challenges to the continued need for and legitimacy of the plan based on allegedly changed circumstances were allowed as defenses to a condemnation . . . .

Allowing the property owners to challenge the current phase of the redevelopment project based on the improvements from completed parts of the redevelopment is unpersuasive and would threaten large-scale redevelopment efforts. This is what the Berman Court and Charleston Urban Renewal sought to prevent. The fact that standing alone, the MTOTSA properties should not have been included in the redevelopment area is equally unpersuasive. See Berman v. Parker, supra.

Likewise, the designation that the MTOTSA properties were in the redevelopment area was made in 1996, and absent a showing that it was improper at that time, the court must defer to the governing body's expertise and judgment in determining where the borders to such a designation shall be situated. Therefore, the condemnees' current contention that the area is not in need of redevelopment is irrelevant

to the issue of whether the designation was appropriately made in 1996.

In conclusion, the court is constrained to defer to the experts' findings, and holds that the City properly established that the "area in need of redevelopment" was supported by facts consistent with N.J.S.A. 40A:12A-5. The court finds that it cannot overturn the City's decision to include the MTOTSA properties in that area merely because the decision was debatable. No further evidence or testimony is required as the court is satisfied that the "area in need of redevelopment" designation was supported by substantial evidence, and, therefore, was not arbitrary, capricious or unreasonable.

b. Conflicts of Interest

"The power of eminent domain must always be exercised in the public interest and without favor to private interests." City of Atl. City v. Cynwyd Invs., 148 N.J. 55, 73 (1997).

The public is entitled to have its representatives perform their duties free from any personal or pecuniary interests which could influence their decisions. Wyzykowski v. Rizas, 132 N.J. 509, 522-23 (1993). The court must find only that there is ***a potential for conflict***, not whether the conflicting interest actually

influenced the action. Id. (Emphasis supplied.) In his concurring opinion in Kelo v. City of New London, 125 S. Ct. at 2669-70, Justice Kennedy stated:

> A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose . . . .

However, a whimsical allegation of a potential conflict will not support an in depth examination of the record. In Van Itallie v. Franklin Lakes, 28 N.J. 258, 269 (1958), the Supreme Court of New Jersey held, in pertinent part:

> 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." (Citations omitted.)

Under this analysis, the court must consider if any potential conflicts have been raised by the Defendants. The question this court must ask is, “Did the potential for

a conflict arise which could have influenced the decision to condemn the MTOTSA properties?"

i. Matzel & Mumford

Importantly, the decision to condemn MTOTSA properties was made either in 2000 pursuant to Ordinance 9-00, or at the very latest in 2001 via Ordinance 2-01.[2] The addition of Matzel & Mumford, a subsidiary of K. Hovnanian was made on June 25, 2002 by way of Resolution 226-02. Any allegations that Greenbaum, Smith, Ravin & Davis ("the Greenbaum Firm") or Ansell Zaro Grimm & Aaron ("the Ansell Firm") who represent or represented the City and also represented K. Hovnanian influenced the decision to condemn the subject properties are tenuous because the decision to condemn was made well over a year before the addition of M&M.

Nonetheless, the condemnees assert that discussions and negotiations logically must have preceded the agreement which added M&M as a co-redeveloper in 2002. As a result, the condemnees believe there was a potential conflict of interest that arose prior to the addition of M&M.

[2] Although the City urges that the decision was made as early as 1996, there is evidence that the decision to condemn the MTOTSA properties may not have been made at that time. In 1996, infill was still an alternative as indicated in the guidelines and by the City's own admission. The City maintains that infill would have required the condemnation of 90% of the MTOTSA properties.

The peculiar timing of any negotiations that may have paved the way for the addition of M&M and the decision to condemn the MTOTSA properties would present the potential for a conflict if the City or either law firm was involved in those negotiations. However, no evidence of that situation has been brought before the court and none can be adduced from the relevant facts.

First, the Condemnees allege that the Greenbaum Firm handled K. Hovnanian's acquisition of M&M. Arthur Greenbaum, Esq., a Senior Partner at the Greenbaum Firm, has served on the Board of Directors for K. Hovnanian since 1992. Furthermore, the Greenbaum Firm represented the City and K. Hovnanian until M&M joined the redevelopment. Significantly, the Greenbaum Firm only became aware of this joint venture in July 2002. (Goldsmith cert. at 6.)

Mr. Goldsmith also certified that the Greenbaum Firm did not participate in any discussions between the City and Applied which resulted in the assignment of the Redeveloper's Agreement to the joint venture (MM-Beachfront North LLC). Once the Greenbaum Firm learned of the potential conflict, it withdrew from its representation of the City as Special Redevelopment Counsel.

The Ansell Firm also represented K. Hovnanian until as late as 2002. Mr. Aaron did not learn that M&M sought to join Applied until March of 2002. [Aaron cert. at 6.]

Both law firms and Applied have certified that neither law firm represented Applied or M&M when the two entered into the subject joint venture. Greg Russo, Vice President of Applied Development Company certified to the following relevant facts:

> By mid 2001 a year after the Developer's Agreements had been executed Applied was proceeding with the site plan approvals for both projects. It was then that Applied made an independent decision to seek out a development partner on the Beachfront North project. That decision was made solely by Applied without any suggestion of same from the City of Long Branch or anyone else. [] In the case of Beachfront North, Applied sought a development partner to increase the capital base, spread the development risk and add additional expertise to allow Applied to focus more attention on the more complicated mixed use Pier Village projects. Applied unilaterally approached Matzel & Mumford about a potential partnership in Beachfront North in late summer, early fall of 2001. Matzel & Mumford was an ideal development partner for Applied as Matzel & Mumford and Applied Companies had been partners in the development effort in Bayonne and there was high regard for Roger Mumford the Principal of Matzel & Mumford.
> The Applied Development Company and Matzel & Mumford negotiated their deal points independently between themselves. Only in house counsel was used by Applied and Matzel & Mumford used Pitney Hardin in addition to their in house counsel. There was no notification of these negotiations to the City of Long Branch, its redevelopment attorneys, Greenbaum, Rowe, Smith & Davis LLP, or its counsel, Ansell, Zaro, Grimm

> and Aaron. Neither the Greenbaum nor the Ansell firms participated in any form, on behalf of any party, with respect to the negotiations between Applied and Matzel & Mumford. The Greenbaum and Ansell firms had no role in any aspect of Applied's joint venture with Matzel & Mumford nor were they involved in any discussions concerning this joint venture.

Thus, neither law firm nor the City was aware of the negotiations between Applied and M&M until over a year after the determination to condemn the MTOTSA properties had been made.

There is no evidence put forth by the condemnees that Applied did not enter into negotiations with M&M on their own. Nor is there any evidence that the City or either law firm had notice of the forming partnership prior to 2002. Resultantly, there is no evidence that the potential for a conflict existed at the time the City determined to take the MTOTSA properties.

In sum, although the potential for a conflict would have existed if there was any evidence that the City or either law firm were a part of the negotiations or discussions involving the partnership between Beachfront North LLC and M&M, no such evidence is before the court. M&M joined the redevelopment in 2002 and there is nothing to suggest that the City or any attorney from either the Greenbaum or

Ansell Firm took part in the relevant partnership during the time the City determined to take the MTOTSA properties.

Importantly, the decision to condemn the MTOTSA properties was embodied in a 2000 Ordinance and perfected by a 2001 Ordinance at the very latest. Thus, by 2002, when M&M joined in the redevelopment effort and any potential conflict arose, the decision to condemn these properties had been made.

As directed by Justice Kennedy in Kelo, supra, this court should treat a potential conflict seriously and examine the record to see if it has merit with the presumption that the City's actions were reasonable and intended to serve a public purpose. However, only a speculative potential conflict exists here, and this court cannot find that same warrants such examination.

ii. Monmouth Community Bank

City Councilmen Anthony Giordano III, Michael DeStefano, and David G. Brown, own shares in Monmouth Community Bank. Councilman Brown is employed by the bank as a messenger, and Councilman Giordano serves as Senior Vice President and Chief Financial Officer. The same bank issued two (2) separate lines of credit which were personally guaranteed by Applied.

The further accusation that certain Councilmen who own stock or hold positions in the Monmouth Community Bank—notably not on the loan committee—would vote to approve M&M as a co-redeveloper in 2002 because of a 2001 loan is nebulous. Defendants assert that "Beachfront North LLC directly benefited from the $2.5 million line of credit it received from Monmouth Community Bank." (Ward Reply at 11.)

However, Defendants fail to make any connection as to how this alleged benefit was detrimental to the condemnees. This court is satisfied that the condemnees have not identified a potential conflict of interest which may have affected the rights of the condemnees.

The Condemnees urge the court to consider the appropriateness of the dual roles that existed for Mr. Aaron and Councilmen with the bank and in the redevelopment. The court is not inclined to do so as no realistic conflict appears to be influencing the Councilmen or Mr. Aaron's decisions regarding the MTOTSA properties.

As the New Jersey Supreme Court held in Paruszewski v. Twp. of Elsenboro, 154 N.J. 45, 59 (1998):

> Although there need be only the potential for conflict to justify disqualification, there cannot be a conflict of interest where there do not exist, realistically, contradictory desires tugging the official in opposite directions. (Citations omitted.)

In this matter, the councilmen and the attorney have an interest in the bank. That two lines of credit were issued to the redeveloper to the benefit of the redeveloper does not suggest any "tugging" against the interests of MTOTSA property owners.

c. Change in Plan

Another argument advanced by the Defendants is that the City failed to conform to the redevelopment plan and decided, unnecessarily, to condemn the subject properties.

N.J.S.A. 40A:12A-8 makes it clear that properties can be taken for a redevelopment project.

That statute provides, in relevant part:

> Upon the adoption of a redevelopment plan [], the municipality or redevelopment entity designated by the governing body may proceed with the clearance, replanning, development and redevelopment of the area designated in that plan. In order to carry out and effectuate the purposes of this act and the terms of the redevelopment plan, the municipality or designated redevelopment entity may:
> []
> c. Acquire, by condemnation, any land or building which is necessary for the redevelopment project…
>
> [Id.]

However, the power to condemn is tempered by relevant case law. In Texas Eastern Transmission Corp. v. Wildlife Preserves, Inc., 48 N.J. 261, 269 (1966), the New Jersey Supreme Court held:

> Ordinarily where the power to condemn exists the quantity of land to be taken as well as the location is a matter within the discretion of the condemnor. The exercise of that discretion will not be interfered with by the courts in the absence of fraud, bad faith or circumstances revealing arbitrary or capricious action. [] In this connection we hold the view that when private property is condemned the taking must be limited to the reasonable necessities of the case. . . . (Citations omitted.)

The City argues that it always maintained that eminent domain could be used for the Redevelopment project in the entire area if needed and determined that it was needed for Beachfront North. The "Acquisition Plan" which the

Planning Board and City Council approved in the spring of 1996 states:

> The City 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.

The City suggests that the property owners want to "reap the rewards of the redevelopment by living in an area which is in the process of being rehabilitated, without being subject to the redevelopment, as have prior property owners." (Shapiro brief at 63.)

To the contrary, the condemnees contend that they were told "residential infill" would occur in the area in which the MTOTSA properties are located. In fact, one of the stated objectives of the City's 1996 Plan is to conserve single family homes and encourage residential infill.

The condemnees state that the underlying reason that the MTOTSA homes became the subject of eminent domain in 2001 was because Beachfront North LLC (the redeveloper) could profit from the valuable beachfront property. The current plan, in part, calls for over one hundred (100) high rise condominiums which the condemnees estimate will sell for over $800,000 per condominium.

However, this court must defer to a governing body's determination to use its power of eminent domain to condemn

property unless there is an affirmative showing of fraud, bad faith or manifest abuse. Twp. of W. Orange v. 769 Associates, 172 N.J. 564, 571, 800 A.2d 86 (2002). "In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation'." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 241 (1984) (citing United States v. Gettysburg Electric R. Co., 160 U.S. 668, 680 (1896)).

The City maintains that either residential infill or planned residential development was always a part of the Redevelopment Plan. The City chose to use a planned residential development and condemn the MTOTSA properties pursuant to its powers. The courts are constrained to defer to the governing body and "it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause." Midkiff, supra, 467 U.S. at 244. As the United States Supreme Court pointed out, debates over the wisdom of takings are not to be carried out in the courts. Id. at 243.

"The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken." N.J. Const. art. VIII, § 3, ¶ 1. Where a public purpose is found, and an

area is determined to be in need of redevelopment, "[t]he fact that single parcels in the area are useful and could not be declared blighted if considered in isolation is basis neither for excluding such parcels nor for invalidating a declaration of blight." Levin, supra, 57 N.J. at 539.

In this matter, the condemnation of the MTOTSA properties is supported by a public purpose—the redevelopment of a blighted area. As discussed above, the City followed the relevant statutes and appropriately declared the area in which the MTOTSA properties are located to be an area in need of redevelopment. The public purpose of the City's determination can be found in N.J.S.A. 40A:12A-5a, c, d, and e as analyzed above.

Pursuant to its powers under N.J.S.A. 40A:12A-8, the City adopted a plan to implement the redevelopment which requires the condemnation of the MTOSA properties. It is not the court's province to question the wisdom of that plan as long as it is supported by a public purpose. See Midkiff, supra, 467 U.S. at 244.

Of note, no challenge was made in 1996 when Ordinance 15-96 was properly introduced and passed after proper notice; no challenge was made in 2000 when Ordinance 9-00 was introduced and adopted after proper notice; and, no

challenge was made in 2001 when Ordinance 2-01 was introduced and adopted after proper notice.

The condemnees had the burden of showing that the determination is not supported by substantial evidence. Id. at 537. They have not made such a showing in the matter sub judice. Nor have they demonstrated fraud, bad faith or manifest abuse.

Therefore, no plenary hearing is warranted on this issue as the condemnees have not raised issues of factual dispute. Rather, they contend on legal grounds that the City did not have a public purpose for the subject condemnations. I find that they did.

d. Bona Fide Negotiations

N.J.S.A. 20:3-6 provides, in relevant part,

> [N]o action to condemn shall be instituted unless the condemnor is unable to acquire such title or possession through bona fide negotiations with the prospective condemnee, which negotiations shall include an offer in writing by the condemnor to the prospective condemnee holding the title of record to the property being condemned, setting forth the property and interest therein to be acquired, the compensation offered to be paid and a reasonable disclosure of the manner in which the amount of such offered compensation has been calculated, and such other matters as may be required by the rules. Prior to such offer the taking agency shall appraise said property and the owner shall be given an opportunity to accompany the appraiser during inspection of the property.

In State by Comm'r of Transp. v. Carroll, 123 N.J. 308, 321 (1991), the Court pointed out:

> [T]he reasonableness of pre-negotiation disclosures centers on the adequacy of the appraisal information; it must permit a reasonable, average property owner to conduct informed and intelligent negotiations. [A]n appraisal should contain an explanation of the valuation approach or methodology actually used.

That appraisal should not include "either the depreciating threat of or the inflationary reaction to the proposed public project." Jersey City Redevelopment Agency v. Kugler, 458 N.J. 374 (1971). See also, Jersey City Redevelopment Agency v. Mack Properties, 280 N.J. Super. 553, 569 (App. Div. 1995).

Our Appellate Division held in County of Morris v. Weiner, 222 N.J. Super. 560, 566 (App. Div. 1988):

> [T]he "conclusive proof" rule can be applied harmoniously with the purpose of the statute only where the written offer is preceded by bona fide negotiations which the offer purports to resolve. It was not intended to apply where, as here, the written offer can serve no purpose other than to open negotiations, a process which implies an offer, an acceptance or rejection and a counter offer.

That court went on to state:

> The purpose of the statute is to encourage public entities to acquire property without litigation where possible, thereby saving both the public and the condemnee the expense and delay of court action and permitting the condemnee to receive and keep the full compensation due him.
>
> [Id. at 565.]

As indicated above, a condemning authority does not satisfy the requirements of N.J.S.A. 20:3-6 by simply providing one offer and its method of valuation. In many respects, the initial offer may be the beginning of negotiations. In Weiner, supra, the court found that bona fide negotiations did not occur when the condemnee provided a response supported by concrete evidence that the appraisal was not realistic. Id. at 564.

Conversely, the duty to negotiate in good faith is a two way street which can be tempered by the property owner's failure to cooperate. State by Comm'r of Transp. v. Carroll, 123 N.J. 308, 323 (1991). See also, County of Monmouth v. Whispering Woods at Bamm Hollow, 222 N.J. Super. 1, 9 (App. Div. 1987) (holding, "it takes at least two to negotiate and the record should be reviewed with that in mind.")

1. Adequate Negotiations

Mr. Wegener sent a letter to the City on October 11, 2005 to which The Condemnees claim there was no response. However, the City alleges that it sent a responsive letter on October 28, 2005. One thing that Mr. Wegener's letter made clear is that his client was not willing to negotiate at that time as he did not believe the properties were properly being condemned. This is not a contention that the appraisal is inadequate, but rather an objection to the authority to condemn.

Even if no response was sent, Mr. Wegener's letter makes clear that the property owner had no intention of negotiating until the issues raised about the City's delegation of authority were addressed. Negotiations in the sense of discussing price, therefore, were inhibited by the property owner's issue with the methods of negotiation.

Nowhere does either party claim that the City did not make an appraisal supported by a reasonable description of the methodology used. In fact, this court is satisfied that the City did so in accordance with N.J.S.A. 20:3-6 and relevant case law as discussed *infra*.

Negotiations are a two way street. Where, as here, the Condemnees make it clear that they do not intend to sell their properties, negotiations are rendered a practical

impossibility. Thus, the court cannot find that the City failed to engage in bona fide negotiations.

2. Delegation of Authority

The Condemnees argue that it was improper for the City to limit its ability to negotiate with property owners by creating a contract under which the City must get the consent of the Redeveloper in order to pay anything above the initial offer to the homeowner. Moreover, if consent is not reached, the City was contractually obligated to condemn.

The language in Ordinance 2-01 stated that the city is, "[a]uthorized to make payment in an amount based upon the fair market value…" This comports with N.J.S.A. 20:3-6 which requires that the offer be "no less than the taking agency's approved appraisal of the fair market value." There is no evidence offered by the condemnees that the condemnor did not make offers based on a proper appraisal of the full fair market value of the subject properties. Where there is disagreement as to the accuracy of the appraisal, this court is satisfied that the issue of valuation is properly left to the court appointed commissioners.

As discussed above, the City provided an adequate appraisal based on the fair market value determined by the

City's appraiser. The City offered the full amount of its fair market value to each condemnee. Therefore, there is no basis to find that the City's statutory obligations were imposed upon by any relevant agreements.

The court notes that had the issue been reached, the City is not empowered to give away its right to negotiate unless the private party is held to the same standards imposed upon the City by the Legislature. See Jersey City Redevelopment Agency v. Costello, supra; Berman v. Parker, supra.

In the matter sub judice, the City's ability to negotiate as directed by Weiner, supra, may have been impaired by the "Amended and Restated Agreement" between the City and the Redeveloper. In pertinent part, that Agreement states, "The City may not agree in settlement or compromise to any amount in excess of the Offer Price without the written consent of the Redeveloper. If the Redeveloper does not consent, the parcel shall be acquired through condemnation." While this issue was never reached, the Court would strongly urge the City to be cautious of contracting away its ability to continue negotiations in good faith.

The condemnees also aver that negotiations were capped by Ordinance 2-01, adopted January 23, 2001, which states that

the offer cannot exceed an amount set forth in the Redevelopment Agreement. Having failed to engage in negotiations themselves, the homeowners never challenged the alleged “ceiling”. Thus this issue is not ripe for disposition by the Court at this time.

Despite the issue never becoming ripe, this court is troubled by this restriction as well. Although the court is satisfied that the ceiling had no effect on the City’s ability to offer its determination of the full fair market value of the subject properties, had the offer for fair market value been stunted by this “ceiling” the court would have no choice but to dismiss the action for failure to engage in bona fide negotiations.

Lastly, to the extent the Condemnees allege that the City contracted away its power to condemn, the court is constrained to disagree. It is reasonable for the City to allow the redeveloper to attempt to purchase properties which are the subject of a redevelopment plan. In the event the redeveloper fails to do so, it is only logical that the redeveloper would then notify the City to initiate the statutory condemnation proceedings.

The Restated Agreement was adopted on June 25, 2002. Both Ordinance 9-00, adopted in 2000, and Ordinance 2-01, adopted in 2001, determine which properties were subject to

condemnation. Therefore, the decisions to condemn were made prior to the Restated Agreement, and the City, by following N.J.S.A. 40A:12A-1, et seq., made the relevant determinations as to which properties it would condemn.

3. Date of Value

The Condemnees also assert that some of the appraisals are approximately a year old. The City maintains that the appraisals represented the current market values during the time of the negotiations. The City provided an offer in writing setting forth the compensation to be paid and the manner in which the amount was calculated pursuant to N.J.S.A. 20:3-6.

Thus, this issue can more appropriately be categorized as a valuation issue which can be decided by the Commissioners. As the City sets forth, the property will be valued as of the date of the filing of the Complaint for purposes of the Commissioner's hearing.

In sum, the staleness argument raised by the Condemnees is more appropriate for the commissioners' hearing and does not speak to bona fide negotiations under these circumstances. This is especially so where, as here, the issue was not raised during the negotiation phase.

d. All issues raised regarding the right to exercise eminent domain must be determined before the appointment of commissioners and taking of possession.

N.J.S.A. 20:3-11 states in part, "When the authority to condemn is denied, all further steps in the action shall be stayed until that issue has been finally determined."

No stay is warranted here as this court has made a definitive ruling that the taking is authorized by law.

III. CONCLUSION

For the aforementioned reasons, the City's order for the taking of property and the appointment of commissioners in the above captioned matters is hereby granted.

Counsel for the City is hereby directed to submit the proper form of Order consistent with this Opinion for each of the enumerated cases addressed herein.