SUPREME COURT OF NEW JERSEY
NO. 64,032

IRON MOUNTAIN INFORMATION MANAGEMENT, INC., a Corporation of the State of Delaware, Plaintiff vs. THE CITY OF NEWARK, THE MUNICIPAL COUNCIL OF THE CITY OF NEWARK and THE CENTRAL PLANNING BOARD OF THE CITY OF NEWARK, and the NEWARK HOUSING AUTHORITY Defendants	ON PETITION FOR CERTIFICATION OF THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET No. A-006561-06T2 SAT BELOW: Mary Catherine Cuff, J.A.D. Linda G. Baxter, J.A.D. Clarkson S. Fisher, J.A.D.

BRIEF IN SUPPORT OF PETITION FOR CERTIFICATION

CARLIN & WARD, P.C.
25A Vreeland Road
P. O. Box 751
Florham Park, New Jersey 07932
(973) 377-3350
Attorneys for Plaintiff
Iron Mountain Information
Management, Inc.

Of Counsel and on the Petition
William J. Ward, Esq.
John J. Carlin, Jr. Esq.

On the Petition
Scott A. Heiart, Esq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitution

Statutes and Regulations

Rules

Treatise

STATEMENT OF THE MATTER INVOLVED

Iron Mountain Information Management, Inc. ("Plaintiff or Iron Mountain") petitions from the Appellate Division's March 13, 2009, judgment, by requesting that the Supreme Court settle the law regarding the rights a commercial tenant, who possesses an option to purchase and right of first refusal clause in its lease, has with regard to receiving notice that the property in which its business resides is targeted for redevelopment pursuant to the Local Redevelopment and Housing Law, ("LRHL") N.J.S.A. 40A:12A-1 et seq.

Iron Mountain occupies the premises located at 110 Edison Place, Newark, New Jersey ("Subject Property"), under a long term lease agreement dated August 28, 1996, with the Berkowitz Company, which runs until August 31, 2014. (Pa175-176). Pursuant to the terms of the lease agreement, Iron Mountain had the option to purchase the premises at a fixed formula during the period from September 1, 2006, to December 31, 2008. (Pa176). Iron Mountain has the right of first refusal as to a bona fide offer from a party unrelated to the landlord. (Id.) Iron Mountain also has the option to extend the term of the lease for two successive five year periods. (Id.)

On June 28, 2004, the Planning Board recommended that the City Council designate a select area which included the Subject Property as being an area in need of redevelopment pursuant to

the LRHL. (Pa40-41). The Redevelopment Study lumped properties together by tax blocks rather than examining each individually. ERETC, LLC v. City of Perth Amboy, 381 N.J. Super. 268, 280 (App. Div. 2005). Despite evidence to the contrary, Block 159 in which the Subject Property is located, was found to be in need of redevelopment pursuant to N.J.S.A. 40A:12A-5(a),(d) and (e).(Pa195). Iron Mountain was not provided notice of the Planning Board hearings nor provided with a complete copy of the transcript as parts of the tape of the hearings were inaudible. (Pa179, Pa262).

The City Council, on July 14, 2004, approved the recommendation of the Planning Board designating the "Downtown Core Redevelopment Area," which included the Subject Property as an area in need of redevelopment. (Pa47). On August 25, 2004, the Planning Board passed a resolution recommending adoption of a Redevelopment Plan that called for the Iron Mountain building to be an "optional site." (Pa19). On October 6, 2004, the City Council passed an ordinance adopting the Redevelopment Plan.(Pa27)

On November 22, 2004, Iron Mountain filed an action in lieu of prerogative writ challenging the redevelopment designation on the basis that it lacked the requisite substantial evidence to be sustained. Gallenthin Realty Development, Inc. v. Borough of Paulsboro, 191 N.J. 344 (2007). Iron Mountain also alleged that

the City sought to condemn the Subject Property not for a public purpose but rather due to an improper land swap agreement it made with the Redeveloper, Edison Properties, which improperly shielded Edison's properties from the use of eminent domain. (Pa3298, Pa516-518, Pa342-344). Iron Mountain also challenged the Redevelopment Plan as being arbitrary and capricious.

The City, joined by the other defendants, moved to dismiss the complaint as being untimely pursuant to R. 4:69-6(a). The Trial Court agreed and dismissed the complaint with the exception of Iron Mountain's challenge to the Redevelopment Plan which it found to be timely. The parties then moved for summary judgment on the remaining portion of Iron Mountain's complaint. The Trial Court granted the City's motion, finding that Iron Mountain's challenge was not to the Redevelopment Plan, but instead stemmed from the Subject Property's inclusion in the redevelopment area.

Iron Mountain filed an appeal challenging the Trial Court's grant of summary judgment arguing in part, that in light of the lack of notice and the property interest at stake, the Trial Court erred by not expanding the forty-five day window within which Iron Mountain had to challenge the designation.

In a published opinion, the Appellate Division entered final judgment on March 13, 2009, holding "that a commercial tenancy does not trigger the enhanced notice requirements found

necessary in DeRose to save the redevelopment statute's notice provisions from constitutional infirmity, unless its unit is noted in the tax assessor's records." Iron Mountain Information Management, Inc. v. City of Newark, Docket No. A-6561-06T2 (App. Div. Mar. 13, 2009). The Appellate Division did not address the merits of Iron Mountain's challenges.

As set forth below, this decision is in conflict with other decisions by the Appellate Division, presents a question of general public importance which has not been addressed by the Supreme Court, and calls for an exercise of the Supreme Court's supervision in the interest of justice. R. 2:12-4. These factors necessitate that this Court grant certification.

QUESTIONS PRESENTED

I. Whether a commercial tenant, who has an option to purchase and right of first refusal clause in its lease agreement, is entitled in the redevelopment context to the same rights regarding notice as the owner of that property.

II. Whether having a commercial tenant wait to raise its objections to the redevelopment designation as a defense to a condemnation action that may occur years in the future, if ever, unreasonably places that tenant under a cloud of condemnation, and leaves it at risk of losing its interest in the property without having had a fair opportunity to contest the basis for the taking.

ERRORS COMPLAINED OF

I. The Appellate Division erred by failing to consider Iron Mountain's ownership status as a commercial tenant, who possesses an option to purchase and a right of first refusal in its lease, in the context of whether it should have been provided notice of the redevelopment designation.

II. The Appellate Division erred by depriving Iron Mountain of its right to due process by failing to extend the time within which Iron Mountain could challenge the blight designation. R. 4:69-6(c).

REASONS FOR CERTIFICATION OF PETITION

I. The Appellate Division's Ruling Stands In Conflict With Prior Case Law R. 2:12-4

The Appellate Division's decision in the current matter stands in conflict with the published decision in State v. Jan-Mar, Inc., 236 N.J. Super. 28 (App. Div. 1989). This case was cited by Iron Mountain in its briefs before both the Trial Court and the Appellate Division. However, it is apparent that neither Court gave it any consideration.

The Appellate Division in Jan-Mar held that a lessee's option to purchase, coupled with its lease, was an "interest in real property" and therefore the lessee was entitled to participate and receive compensation from the condemnation award. Id. at 34. In reaching its decision, the Appellate

Division affirmed substantially for the reasons expressed by the Trial Court which relied on several out of state cases and Nichols, the leading treatise on Eminent Domain. See State v. Jan-Mar, Inc., 210 N.J. Super. 236 (Law Div. 1985). Based on this support, a commercial tenant who possesses an option to purchase and right of first refusal clause in its lease, such as Iron Mountain, should be considered to have a property interest equivalent to that of the property owner for purposes of notice under the LRHL.

Pursuant to the LRHL, after the Planning Board completes its investigation, it conducts a public hearing "for the purpose of hearing persons who are interested in or would be affected by a determination that the delineated area is a redevelopment area." N.J.S.A. 40A:12A-6(b)(2)(emphasis added). Clearly, Iron Mountain is an interested party who would be affected by the designation. However, despite the broad purpose of section 6(b)(2), the LRHL mandates that a copy of the notice of the hearing be mailed only to the last owner, of each parcel of property within the area according to the assessment records and also to those names that are noted on the assessment records as claimants of an interest in any such parcel. N.J.S.A. 40A:12A-6(b)(3)(emphasis added). Therefore as drafted, the LRHL places a commercial tenant who possesses an option to purchase and right of first refusal, coupled with its lease, at risk of losing the

tenanted premises without having had a fair chance to contest the basis for the taking.

The Court erred by not considering Iron Mountain's property interest created by its option to purchase in the lease. As such, the Court's holding stands in contrast to the Appellate Court's holding in Jan-Mar thereby requiring that certification be granted. R. 2:12-4.

II. Iron Mountain's Petition Presents Questions Of General Public Importance That Should Be Settled And Which The Interest Of Justice Requires Certification R. 2:12-4

The Appellate Division's ruling will deny due process to every commercial tenant who possesses an option to purchase when the tenant's leased premises is targeted for redevelopment.

Due process mandates that a commercial tenant, who possesses a property interest, similar to that of Iron Mountain, should receive individual notice of a deprivation of that interest. Absent such notice, Iron Mountain should not have been found to have waived its right to challenge the blight designation by virtue of a prerogative writ action. Moreover, confining Iron Mountain's challenge to the forty-five day period as proscribed by R. 4:69-6(a), and not extending that period in the interest of justice as permitted by R. 4:69-6(c), deprived Iron Mountain of any meaningful opportunity to be heard.

Iron Mountain did not have an opportunity to appear before the Planning Board and the City Council to object to the blight

designation due to a lack of notice. In order for Iron Mountain to have filed a timely suit challenging the blight designation it needed actual notice and a clear understanding that the Subject Property was going to be taken. Here, the Subject Property was made an "optional site" in the Redevelopment Plan. (Pa19). Iron Mountain had no reason to challenge the blight designation and/or the Plan until it knew that the premises were being acquired as part of an improper land swap agreement. (Pa3298, Pa516-518, Pa342-344). The indecisiveness of the Redevelopment Plan not only violated the requirements of N.J.S.A. 40A:12A-7 but provided little incentive for Iron Mountain to have initiated suit within the forty-five days. Furthermore, though R. 4:69-6(a) requires that a suit be filed within forty-five days from the designation; case law, such as Concerned Citizens of Princeton, Inc. v. Mayor and Council of the Borough of Princeton, 370 N.J. Super. 429, 447 (App. Div. 2004) gives the courts freedom to extend the filing time where "the interest of justice so requires." R. 4:69-6(c).

The Appellate Division's holding that Iron Mountain's constitutional rights are preserved by permitting it to challenge the blight designation as a defense to a future condemnation action does not comport with due process and also stands in conflict with the holding in Dutch Neck Land Company,

L.L.C. v. City of Newark, 2008 WL 2026506 (App. Div. 2008).[1] There the Court addressed a similar situation and noted that if Dutch Neck's prerogative writ action had been dismissed, the parties would "simply be back in court when and if the City, or its redeveloper proceeds with the acquisitions." Id. at *10. The Court held that judicial economy dictated that the matter be heard without making the property owner wait until the condemnation action occurred. Id. at *11.

Judicial economy would be served here by permitting Iron Mountain to challenge the City's blight designation, now as opposed to having the parties contest these issues during the condemnation process. The Dutch Neck Court also considered the issue of an extension of the forty-five days in the interest of justice under Rule 4:69-6(c), following the Supreme Court's decision in Gallenthin, supra, 191 N.J. at 360-63. The Court found that the interest of justice required the property owner be permitted to raise a challenge based on the substantial evidence test set forth in Gallenthin. Dutch Neck, supra, 2008 WL 2026506 at *11. The same standard should apply in this case.

[1] By letter dated May 21, 2008, Iron Mountain provided the Appellate Division and all parties with a copy of the Dutch Neck Decision pursuant to R. 2:6-11(d). Pursuant to R. 2:12-7(a), four copies of this letter and the decision are being provided to this Court with Iron Mountain's petition, appellate briefs and appendices.

The significant magnitude of those affected by Appellate Division's ruling, and the fact that due process rights are being infringed upon, present questions of general public importance that should be settled by the Supreme Court and to which the interest of justice requires certification. R. 2:12-4.

COMMENTS ON THE APPELLATE DIVISION'S OPINION

Iron Mountain Meets the Three Prong Test Set Forth in Matthews v. Eldridge 424 U.S. 319 (1976)

In Count 4 of the Complaint, Iron Mountain alleged that the actions of the Defendants unlawfully deprive it of the right to substantive due process in violation of the 14th Amendment of the United States Constitution and Article 1, Paragraphs 1 and 20 of the New Jersey Constitution.(Pa16 at ¶33). Iron Mountain further alleged that the actions of the Defendants, including the declaration of the Subject Property as being in an area in need of redevelopment and the preparation and adoption of the Redevelopment Plan to include the Subject Property, were predetermined conclusions in which Iron Mountain had no opportunity to have input into the process. (Pa16 at ¶34).

The Trial Court granted summary judgment, dismissing the Complaint on the grounds that it was essentially an attack on the blight designation which was precluded because it was not brought within the forty-five days set forth in R. 4:69. (Pa590).

The Appellate Division in Harrison Redevelopment Agency v. DeRose, 398 N.J. Super. 361, 408 (App. Div. 2008), held that the notice provisions provided in the LRHL fall short of fundamental guarantees of due process, under both the Federal Constitution and the New Jersey Constitution. In reaching this conclusion, the Court relied on the cases of Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950) and Brody v. Vill. of Port Chester, 434 F.3d. 121 (2d Cir. 2005) to find that the 14th Amendment requires individual notice by mail; and also that there must be included in that notice, an instruction that the condemnee has a limited time in which to challenge the public use underlying the taking. DeRose, supra, 398 N.J. Super. at 406. The Court in DeRose specifically found that the LRHL:

> "Lacks, however, any individualized mechanism to assure that property owners are fairly informed that the blight designation, if approved by the governing body, operates as a conclusive finding of public purpose that will authorize the government to condemn their properties. The statute also fails to require that owners be apprised of any time limits for contesting a blight designation. Additionally, the statute omits any obligation to notify owners individually that the governing body has designated their premises as in need of redevelopment, except for those prescient owners who filed a written objection with the Planning Board."

Id. at 407.

In this matter, there is no question that Iron Mountain never received any of the notice provisions mandated by DeRose. Instead of considering the impact that this deprivation had on

the constitutional rights of Iron Mountain, the Appellate Division limited its inquiry to a "determination of whether the enhanced notice provision that DeRose requires should also apply to commercial tenants, such as plaintiff." Iron Mountain, supra, opinion at p. 19. Rather than focusing on the constitutional considerations of DeRose and Brody, the Court employed a three prong test articulated in Matthews v. Eldridge, 424 U.S. 319 (1976). Iron Mountain, supra, opinion at p. 19. Matthews involved the constitutional requirement of an evidentiary hearing prior to the termination of disability benefits, rather than the requirement of notice provisions. Matthews, supra, 424 U.S. at 321. Despite the questionable appropriateness of the Matthews' test, its application to the issues raised herein demonstrates that Iron Mountain satisfies all three prongs of the test.

In assessing whether notice provisions are constitutionally sufficient, the Appellate Division recognized that the primary question is always whether there is a "protectible [sic] liberty interest at stake." Iron Mountain, supra, opinion at p. 19. This was stated by the Court to be the first prong of the three prong test articulated in Matthews. Id.

In analyzing this point, the Court stated "that only in the rarest of instances will a commercial tenant stand on the same footing as a fee simple owner." Id. at p. 20. It then held

that a fifteen-year leaseholder like Plaintiff cannot be deemed to possess a per se protectible [sic] interest for purposes of the first Matthews factor. Id. at 21.[2]

As argued above, Iron Mountain was not just a commercial tenant; it also possessed in its lease an option to purchase the realty and the right of first refusal to a bona fide offer from a party unrelated to the landlord. (Pa176). The option to purchase and the right of first refusal gives Iron Mountain the right to participate in the redevelopment process and to object on the grounds that the blight designation was not premised on substantial evidence. Jan-Mar, supra, 236 N.J. Super. 28. As noted by the Trial Court in Jan-Mar, the notion that a lessee who possesses an option to purchase in its lease possesses an interest in the land has also been recognized by several out of state cases including: County San Diego v. Miller, 523 P.2d 139 (Ca. 1975)[3]; Sholom, Inc. v. State Roads Commission, 229 A.2d 576 (Md. 1967); Texaco, Inc. v. Commissioner of Transp., 383 A.2d 1060 (Conn. Super. 1977); Fullington v. M. Penn Phillips

[2] The Court's Citation to West Jersey Grove Camp Ass'n. v. City of Vineland, ft. note 2 Opinion, p. 32 provides little support for this conclusion as the tax exemption was limited to senior citizens of limited income "residing in a dwelling house owned by him which is a constituent part of his real property." 80 N.J. Super. 361, 365 (App. Div. 1963).

[3] See endorsement of the efficacy of this decision in State of New Jersey By the Commissioner of Transp. v. Bakers Basin Realty, 74 N.J. 103, 105 (1977).

Company, 395 P.2d 124 (Or. 1964); Spokane School District No. 81 v. Parzybok, 633 P.2d 1324 (Wash. 1981), and Nicholson v. Weaver, 194 F.2d 804 (9th Cir. 1952). Id. at 244. The Trial Court further stated that there is a growing trend in the law to this effect. Id.

This holding is also recognized in *Nichols on Eminent Domain* §5.02:

> "The Interest of the holder of an option has not been considered property, even though such person was in physical possession of the property. In a case like this it has been held that a lessee under a lease containing an option to purchase is an owner within the meaning of the statute. However, where the option is exercised subsequent to the taking, the holder of the option is entitled to the award less the purchase price due the vendor. Even where the option is not subsequently exercised, the optionees are entitled to compensation for the loss of their right to elect to purchase. Recent legal trends support the conclusion that the owner of an unexercised option to purchase land possesses a property right that is compensable in eminent domain, the measure of damages being the excess, if any, of the total award above the optioned purchase price."

2-5 Nichols on Eminent Domain § 5.02. (emphasis added).

There can be no question that Iron Mountain possessed a "protectable liberty interest" which is at stake. Iron Mountain, supra, opinion at p. 19.

As to the second Matthews' prong, the Appellate Division held that it was required to determine whether the vindication of a tenant's rights at a later stage, namely during any ensuing condemnation action, serves as an acceptable substitute for

affording the individual notice that Plaintiff demands during the earlier blight designation process. Iron Mountain, supra, opinion at p. 21. The Court proceeded to theorize that before the Subject Property could be taken by eminent domain, the condemning authority would have to engage in bona fide negotiations to acquire the Subject Property, and if the negotiations were unsuccessful, it would have to file a complaint pursuant to the Eminent Domain Act ("EDA") N.J.S.A. 20:3-1 et seq. which would have to name the commercial tenant. Id. at 22-24. The Court opined that if a condemnation complaint is filed, a commercial tenant is afforded the opportunity to challenge the action by denying the City's authority to condemn. Id. at 24-25. The Court then held that the notice procedures and substantive rights afforded a commercial tenant pursuant to the EDA make unnecessary any additional procedural safeguards at the earlier blight designation stage. Thus, according to the Appellate Division, Plaintiff had not satisfied the second Matthews' prong. Id. at 25.

In theory, Iron Mountain could raise its challenges in the condemnation context. However, in almost all cases involving condemnation pursuant to the LRHL, a party will not be afforded the opportunity to raise its defenses to the taking until many years after the blight designation has occurred, if at all. The defense would be subject to a claim that significant activities

and expenditures have been undertaken by the redeveloper and the condemnor to such an extent that the challenge must be denied. DeRose, supra, 398 N.J. Super. at 390-391. The party contesting the designation would be under a cloud of condemnation until the condemning authority files its complaint. Moreover, the threat of condemnation chills the exercise of the lessee's option.

At the time Iron Mountain filed its Complaint on November 22, 2004, very little activity had transpired. The Ordinance approving the Redevelopment Plan was not passed until October 6, 2004. (Pa27). The Complaint was filed within the forty-five day limitation of the passage of that Ordinance.

The Trial Court dismissed all elements of Plaintiff's Complaint, except for the challenge to the Redevelopment Plan itself, for failure to file the Complaint within forty-five days of the City Council's passage of the blight designation. There is no question that this ruling is erroneous. DeRose, supra; Mullane, supra, 339 U.S. at 314. There is no reason why correction of this error should await the subsequent filing of a condemnation complaint involving the subject property. Dutch Neck, supra, at *10.

Moreover, the Defendants, by their improper land swap agreement, have made it unlikely that a condemnation complaint will ever be filed. On February 2, 2005, the Housing Authority entered into a revised Redevelopment Agreement, which included

Edison Properties. (Pa343). Edison was given the right to acquire the Subject Property (Pa343). This would be done by arm's length purchase with the Berkowitz Company if possible. Id. If and/or when this occurs, Iron Mountain will be deprived of its opportunity to be heard. The Housing Authority, was fully aware that Iron Mountain had an option on the property and right of first refusal, as this was contained in the Complaint and the attached certification. Notwithstanding, the Housing Authority entered into the Revised Redeveloper's Agreement which seeks to deprive Iron Mountain of its property interest. Based on the foregoing, Iron Mountain has not been provided with the safeguards which the Appellate Division envisioned and, therefore, the second prong of Matthews has been satisfied.

The third Matthews prong requires an analysis of the fiscal and administrative burdens that individual notice to commercial tenants of the early redevelopment proceedings would entail. Iron Mountain, supra, opinion at p. 25. The Court concluded that this adds an enormous burden to the redevelopment process. Id. at 25-26. It pointed out the possibility of tenant turnovers during the period from the initial request to the Planning Board for an investigation of whether a designated area is blighted through the time of the ultimate adoption of the redevelopment plan. Id. at 26. This period in this matter ran from April 12, 2004, to October 6, 2004. (Pa27). This short period does not

provide enough time for the enormous turnovers envisioned by the Appellate Division. Iron Mountain, supra, opinion at pp. 25-26.

More importantly, the compilation and analysis of commercial tenants had already been done in the May 2004 Investigation Report. (Pa192-Pa261). The findings and recommendations of the investigation were based on field inspections of the consulting engineer and the Newark Housing Authority. (Pa192). The utilization of buildings and land and their layout was based on exterior site inspections by the engineer, the Authority, and their examination of tax records. Id. The investigation disclosed that there were only sixty three commercial buildings in the study area and thirty seven of these were partially or totally vacant. (Pa217). Providing actual notice to the remaining commercial tenants hardly seems an enormous task. Iron Mountain, supra, opinion at p. 26. Updating of the list of commercial tenants would have to be done as part of the preparation of the Workable Relocation Assistance Plan ("WRAP"). N.J.S.A. 20:4-7, N.J.A.C. 5:11-6.1 - 6.3. (Pa89-90). Therefore, the requirement of notice to commercial tenants presents no additional burden to the redevelopment process..

As to notice of the Planning Board Hearing, which was furnished to Iron Mountain, both the municipality and the Trial Court relied on the constructive notice provided by the publication placed in newspapers. From the Investigation Report,

there is no question that the preparers of the report knew that the building was being used for record storage. (Pa193). The preparers knew that the large six story industrial building on Block 159, Lot 11 was known as the Iron Mountain Storage Facility. (Pa193). The municipality knew the street address of Block 159, Lot 11. It would have taken minimal effort to have given Iron Mountain actual notice of the Planning Board hearings. It does not satisfy the requirements of due process to rely on constructive notice in newspapers when the name of the individual and its address is readily available. Schroeder v. City of New York, 371 U.S. 208 (1962).

The investigation report concluded that the study area qualifies as "an area in need of redevelopment" primarily in accordance with the "e" criterion set forth in the LRHL. (Pa217). The area analysis indicates that the study area generally exhibits a growing lack of proper utilization resulting in a stagnant and not fully productive condition of the land. Id. If Iron Mountain had been given the opportunity, it could have demonstrated that Iron Mountain has occupied the building since September, 1996 and uses all six floors, plus the basement. (Pa175). Iron Mountain employs up to fifteen people at the Subject Property. Id. The building contains a loading dock and multiple freight elevators. Id. The building is in good shape and is kept in a secure condition. Id. In the last several

years, Iron Mountain has invested large sums of money in the elevators, heating and air conditioning units in the building. Id. Iron Mountain could also have shown that the Defendants and their agents did not inspect the interior of the Subject Property, and did not accurately research the occupancy of the building. (Pa173). The building is fully occupied by only one user. Id. As a commercial tenant, Iron Mountain would require relocation pursuant to N.J.S.A. 20:4-1 et seq. and N.J.A.C. 5:11-1.1 et seq. if Block 159 were to be acquired by eminent domain. However, the Investigation Report improperly indicates Iron Mountain would not require relocation. (Pa287, Pa90).

Iron Mountain has therefore satisfied all three of the Matthews' prongs, thereby affording Iron Mountain the right to individual notice at the blight designation stage. Absent such notice, Iron Mountain should have been permitted to challenge the designation beyond the forty-five days. R. 4:69-6(c), Concerned Citizens, supra, 370 N.J. Super. at 447.

CONCLUSION

For the aforementioned reasons, Iron Mountain's petition should be granted.

Respectfully submitted
CARLIN & WARD, P.C.
Attorneys for Plaintiff
Iron Mountain Information Management

By: _____
WILLIAM J. WARD, ESQ.

Dated: April 9, 2009

CERTIFICATION OF GOOD FAITH FILING

The undersigned counsel for the petitioner Iron Mountain hereby certifies that this petition presents substantial questions for resolution by this Court, and that the petition is filed in good faith and not for purposes of delay.

By: _____
WILLIAM J. WARD, ESQ.

Dated: April 9, 2009

CARLIN & WARD, P.C.
25A Vreeland Road
P. O. Box 751
Florham Park, New Jersey 07932
973-377-3350
Attorneys for Defendant-Appellant
Iron Mountain Information Management, Inc.

IRON MOUNTAIN INFORMATION MANAGEMENT, INC., a Corporation of the State of Delaware, Plaintiff-Appellant, vs. THE CITY OF NEWARK, THE MUNICIPAL COUNCIL OF THE CITY OF NEWARK and THE CENTRAL PLANNING BOARD OF THE CITY OF NEWARK, and the NEWARK HOUSING AUTHORITY Defendants-Respondents	SUPREME COURT OF NEW JERSEY DOCKET No. APPELLATE DIVISION DOCKET No. A-006561-06T2 Civil Action **NOTICE OF PETITION FOR CERTIFICATION**

TO: Steven Townsend, Clerk
Supreme Court of New Jersey
Hughes Justice Complex
25 W. Market Street
Trenton, New Jersey 08625-0970

Joseph Orlando, Clerk
Appellate Division Clerk's Office
Hughes Justice Complex
P.O. Box 006
25 West Market Street
Trenton, NJ 08625

Bradley M. Wilson, Esq.
Nowell, Amoroso, Klein, Bierman, PC
155 Polifly Road
Hackensack, New Jersey 07601
Attorney for Defendant-Respondent, City of Newark and the Municipal Council of the City of Newark

Marc Peck, Esq.
Florio, Perrucci, Steinhardt & Fader, LLC
235 Frost Avenue
Phillipsburg, New Jersey 08865
Attorney for Defendant-Respondent, Newark Housing Authority

Daniel Becht, Esq.
1802 Carriage Hill Drive
Wall, New Jersey 07719
Attorney for Defendant-Respondent, Central Planning Board of the City of Newark

PLEASE TAKE NOTICE that Defendant/Appellant Iron Mountain Information Management, Inc. shall petition the Supreme Court of New Jersey for certification pursuant to R. 2:12-3(a) to review the decision for final judgment of the Superior Court of New Jersey, Appellate Division, entered on March 13, 2009, which affirmed the final judgment of the Superior Court of New Jersey, County of Essex, Law Division, Docket No. ESX-L-9375-04. The filing fee of $200 is enclosed herewith.

Respectfully submitted,

CARLIN AND WARD, P.C.
Attorneys for Cross-Petitioner
Appellant/Defendant
Iron Mountain Information Management, Inc.

By: _____
WILLIAM J. WARD

DATED: March 31, 2009

CERTIFICATION OF SERVICE

1. I am an attorney at law of the State of New Jersey and am a Partner with the law firm of Carlin & Ward, P.C., attorneys for the Appellant/Defendant Iron Mountain Information Management, Inc.

2. On March 31, 2009, I caused the original and two copies of the Notice of Petition for Certification to which this Certification of Service is attached to be sent via Federal Express to Stephen W. Townsend, Clerk of the Supreme Court of New Jersey.

3. On March 31, 2009 I caused two copies of the Notice of Petition for Certification to be sent via Federal Express to the Clerk of the Superior Court of New Jersey, Appellate Division.

4. On March 31, 2009, I caused two copies of the Notice of Petition for Certification to be sent via Federal Express to all other parties listed on the Petition for Certification to which this Certification of Service is attached.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

WILLIAM J. WARD

Dated: March 31, 2009

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6561-06T2

IRON MOUNTAIN INFORMATION MANAGEMENT, INC.,

Plaintiff-Appellant,

v.

CITY OF NEWARK,

Defendant-Respondent,

and

MUNICIPAL COUNCIL OF THE CITY OF NEWARK, CENTRAL PLANNING BOARD OF THE CITY OF NEWARK and CITY OF NEWARK HOUSING AUTHORITY,

Defendants.

APPROVED FOR PUBLICATION

March 13, 2009

APPELLATE DIVISION

Argued January 14, 2009 - Decided March 13, 2009

Before Judges Cuff, Fisher and Baxter.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-9375-04.

William J. Ward argued the cause for appellant (Carlin & Ward, P.C., attorneys; Mr. Ward and John J. Carlin, Jr., of counsel and on the brief; Scott A. Heiart, on the brief).

Bradley M. Wilson, argued the cause for respondent (Nowell Amoroso Klein Bierman,

P.A., attorneys; Mr. Wilson, of counsel and on the brief).

The opinion of the court was delivered by

BAXTER, J.A.D.

The central question before us is whether the Law Division erred when it dismissed as untimely a commercial tenant's challenge to the City of Newark's redevelopment plan, even though that tenant never received individual notice that the property in which its business was located was targeted for redevelopment. In particular, we are called upon to decide whether a commercial tenant is entitled in the redevelopment context to the same rights that must be afforded to an owner of the property, as held in Harrison Redevelopment Agency v. DeRose, 398 N.J. Super. 361 (App. Div. 2008). There, we held the notice provisions of the Local Redevelopment and Housing Law (LRHL), N.J.S.A. 40A:12A-1 to -49, constitutionally infirm, and required fair and adequate contemporaneous individual written notice of the impending redevelopment process to the property owner. 398 N.J. Super. 361, 367-68 (App. Div. 2008). We further held that unless such constitutionally adequate notice is provided, the owner's right to challenge the redevelopment designation is preserved beyond the forty-five day limit established by statute and court rule. Id. at 368.

Notably, when the Legislature adopted the LRHL, it chose not to impose upon a governing body any obligation to provide commercial tenants with individual notice of a proposed blight designation. In fact, the LRHL treats commercial tenants no differently from any other member of the general public whose only notice of the proposed blight designation is publication of a hearing notice in a newspaper of general circulation once a week in each of the two weeks preceding the Planning Board meeting. N.J.S.A. 40A:12A-6(b)(3). This is in sharp contrast to the individual notice, however "spotty and incomplete," DeRose, supra, 398 N.J. Super. at 400, the Legislature required for property owners.

We now hold that a commercial tenancy does not trigger the enhanced notice requirements found necessary in DeRose to save the redevelopment statute's notice provisions from constitutional infirmity, unless its unit is noted in the tax assessor's records. The trial judge correctly held that plaintiff, a commercial tenant, was obliged to challenge the blight designation within forty-five days even though not afforded individual advance notice of such proposed designation. We thus affirm the trial judge's dismissal of plaintiff's complaint.

I.

Plaintiff, Iron Mountain Information Management, Inc., operates a document storage and retrieval business in a six-story, 350,000 square foot building (the building) located at 110 Edison Place in Newark. Situated on a 2.04 acre lot, the building is bordered by McCarter Highway and Edison Place. All six floors of the building, which was constructed in the early part of the twentieth century, are dedicated to plaintiff's business of storing files, stacked floor to ceiling, for law firms and hospitals. Plaintiff, the sole tenant in the building, has occupied the property since August 28, 1996, when it entered into a long-term lease with the owner, the Berkowitz Company, to rent the property until August 31, 2014, with the option to extend the term of the lease for two successive five-year periods.

The lease also afforded plaintiff the option to purchase the property "at a fixed formula during the period from September 1, 2006 [to] December 31, 2008," and provided plaintiff a right of first refusal if another party offered to purchase it. Finally, the lease entitles plaintiff to share, according to a fixed formula, in any proceeds realized by Berkowitz if the property is taken by eminent domain, but only if the taking occurred prior to September 1, 2007.

On April 12, 2004, defendant Municipal Council of the City of Newark (City Council) adopted a resolution authorizing the Planning Board to investigate whether a number of properties within a twenty-four acre zone known as the Core Area qualified as blighted pursuant to N.J.S.A. 40A:12A-5. The Berkowitz property was within that Core Area.

To complete the investigation ordered by City Council, the Planning Board commissioned Schoor DePalma to investigate whether the Core Area was blighted. On May 20, 2004, Schoor DePalma issued its investigative report answering that question in the affirmative, describing the Core Area as:

> [e]xhibit[ing] a growing lack of proper utilization resulting in a stagnant and not fully productive condition of land, which is highlighted by the proliferation of parking lots as one of the dominant land uses, a high volume of vacant commercial space, conflicting land uses, and the low value of taxable improvements found throughout the study area.

With respect to the Berkowitz property, Schoor DePalma observed that its interior was in poor condition[1] and described it as "an obsolete building with a marginal economic use":

---

[1] Notably, this description of the property is inconsistent with the findings of a planner retained by plaintiff, who in his June 2005 report found "no evidence of any significant deterioration," and opined that the building had only "isolated cosmetic deficiencies," which "did not appear to compromise the (continued)

> This building['s] . . . vertical design is obsolete for modern warehousing needs, which is evidenced by the leasing of the building to multiple tenants over at least the past 27 years. The area around the building has been transformed from the mixed-use residential, commercial and industrial area of the early 20th Century to the modern corporate office and business district of the 21st Century, leaving an obsolete building with a marginal economic use in the heart of the CBD [central business district].
>
> In addition, the current storage use of the building generates minimal employment and creates a stagnant condition over half of Block 159, which when combined with the expanse of surface parking on the adjacent properties is a lack of proper utilization of land in the Central Business District. It is unlikely that this condition will be remedied without some further assemblage [of] properties . . . .

The report then discussed the Berkowitz building in relation to the surface parking lots on the adjacent properties, and concluded that as a whole the properties qualified as blighted under N.J.S.A. 40A:12A-5(a), (d) and (e):

> The surface parking lots consume over 4 acres (71% of the total 5.6-acre block) of downtown real estate while posting an improvement value of only 4%. These blocks are characterized by conditions that are obsolete, deleterious and unproductive, which qualify the block under criteria "a", "e" and "d" [of N.J.S.A. 40A:12A-5].

(continued)
integrity of the building" or the "high level of security associated with the building's current use."

On June 9, 2004, the Planning Board held a public hearing on whether the Core Area qualified as blighted. Notice of the hearing was published in The Star-Ledger on May 22 and 29, 2004, and notice was mailed to Berkowitz. A representative appeared on behalf of Berkowitz, and objected to the Berkowitz property being designated blighted. No one appeared at the hearing on behalf of plaintiff.

On June 28, 2004, the Planning Board passed a resolution recommending that all of the properties in the Core Area be designated blighted. On July 14, 2004, City Council passed a resolution, approving the Planning Board's recommendation to declare the study area blighted, and adopting the Board's findings. City Council directed Schoor DePalma to draft a redevelopment plan for the Core Area.

On August 16, 2004, the Planning Board held a public hearing on the redevelopment plan proposed by Schoor DePalma. Two of the plan's provisions had significant implications for the Berkowitz property. First, the plan specified that warehouse facilities, such as the Berkowitz property, be excluded and prohibited. Second, the plan authorized the acquisition of most parcels within the Core Area, including the subject property. The plan identified the Berkowitz property as "an optional site in the plan" that "could remain, be modified,

or demolished to make way for additional development." The plan provided for the construction of a sports and entertainment arena in the area where the Core Area and another redevelopment zone known as the Gateway Area overlapped.

No one objected to or commented on the plan at the August 16, 2004 Planning Board public hearing, and on August 25, 2004, the Planning Board passed a resolution recommending its adoption. On October 6, 2004, City Council passed both an ordinance adopting the plan and a resolution, pursuant to N.J.S.A. 40A:12A-4(c), designating the Housing Authority to act as the redevelopment agency for the Core Area.

On November 22, 2004, plaintiff filed a complaint in lieu of prerogative writs against the City, City Council and Planning Board seeking to invalidate the July 14, 2004 City Council resolution that designated the area blighted, and the October 6, 2004 City Council ordinance that adopted the redevelopment plan. The complaint alleged: 1) the plan failed to comply with statutory requirements governing the contents of a redevelopment plan and was unconstitutionally vague; 2) inclusion of the Berkowitz property in the redevelopment plan was baseless because the property was not blighted; and 3) the October 2004 ordinance adopting the plan was arbitrary, capricious and

unreasonable, and impermissibly authorized the condemnation of the Berkowitz property for a private purpose.

As to the latter allegation, plaintiff contended that the City had acted in bad faith by including the non-blighted Berkowitz property only to enable the City to trade it for another piece of property that Edison Properties (Edison) owned, upon which the City wanted to construct a sports and entertainment arena. An amended complaint, filed on August 19, 2005, added an allegation, pursuant to 16 U.S.C.A. § 470f of the Historic Prevention Act, that the City was prohibited from modifying or destroying the Berkowitz building because of its historical significance.

On January 5, 2006, defendants moved to dismiss plaintiff's amended complaint. Defendants argued that plaintiff's blight challenge was untimely because plaintiff's complaint, filed on November 22, 2004, was not filed within forty-five days of City Council's July 14, 2004 resolution adopting the Planning Board's findings and declaring the area blighted. Defendants relied upon Rule 4:69-6(a), which requires any challenge to municipal action to be filed within forty-five days.

On April 12, 2006, the court agreed that plaintiff's challenge to the July 14, 2004 blight designation was untimely and entered an order dismissing it; however, the court held that

plaintiff's November 22, 2004 complaint was a timely challenge to the October 6, 2004 ordinance adopting the redevelopment plan. Consequently, the court refused to dismiss plaintiff's challenge to the redevelopment plan. At the conclusion of the discovery period, both sides filed motions for summary judgment, which were heard on July 16, 2007.

As it had done during the previous motion hearing, plaintiff asserted that the plan made inclusion of the Berkowitz property optional and that the City had done so to preserve the option of trading the Berkowitz property for some of Edison's property to construct a sports and entertainment arena. The trade benefited Edison, argued plaintiff, and served no valid public purpose.

Judge Schott concluded that plaintiff's challenge was not to the October 6, 2004 redevelopment plan, but instead to the Berkowitz property's inclusion within the redevelopment area, i.e. that plaintiff was actually challenging the basis for the blight designation, which City Council had accepted when it declared the Core Area blighted on July 14, 2004. Consequently, the court held that the blight challenge was time-barred.

In so ruling, the judge incorporated by reference her earlier determination that the Rule 4:69-6(a) forty-five-day limitation period precluded plaintiff's challenge to the blight

designation because the City Council resolution designating the Core Area blighted was adopted on July 14, 2004, and plaintiff did not file its complaint until November 22, 2004. The court rejected plaintiff's argument that the Planning Board's failure to provide it individualized, or personal, notice of the June 9, 2004 hearing on the blight designation justified its late challenge, or alternatively, formed a basis to grant a time extension.

The judge reasoned that not only was notice of the hearing published in The Star-Ledger, but plaintiff provided "no foundation of competent evidence" establishing that it "was unaware that this [action by the Planning Board] was going on." The judge reasoned that plaintiff submitted no certified statement asserting it was unaware of the Planning Board's actions or that the Planning Board, or any other City entity, did anything to confuse plaintiff about the Berkowitz property's status within the Core Area or its inclusion within the redevelopment plan. Thus, the judge concluded that plaintiff was aware of the Planning Board's actions and should have filed its challenge within the forty-five-day period required by Rule 4:69-6(a). The judge also rejected plaintiff's argument that an extension of time was warranted by Rule 4:69-6(c), which

authorizes an extension when "it is manifest that the interest of justice so requires."

Last, the court found plaintiff had presented no proof to support its claim that the City had acted in bad faith by including the Berkowitz property within the development area for Edison's sole benefit. On July 20, 2007, the court entered an order granting defendants' motions for summary judgment and denying plaintiff's.

On appeal, plaintiff maintains, as it argued in the Law Division, that because it received no personal notice of the Planning Board's June 9, 2004 hearing or the Planning Board's June 28, 2004 resolution, it was unfairly deprived of the opportunity, and its right, to object to the recommended blight designation, which City Council accepted when it adopted its July 14, 2004 resolution. On February 25, 2008, after both sides submitted appellate briefs, DeRose, supra, was decided. In an April 22, 2008 supplemental submission authorized by Rule 2:6-11(d), plaintiff pointed to the decision in DeRose and argued that DeRose: 1) required the City to have provided plaintiff with personal notice of the July 14, 2004 blight designation, and 2) entitled plaintiff to reinstatement of its amended complaint that had been dismissed as untimely.

For its part, the City contends that DeRose is distinguishable because DeRose involved the rights of property owners. The City also contends that the only notice of the Planning Board hearing to which plaintiff as a tenant was entitled was that mandated by N.J.S.A. 40A:12A-6(b)(3). That statute requires notice "published in a newspaper of general circulation in the municipality once each week for two consecutive weeks," the last publication being "not less than ten days prior to the date set for the hearing." N.J.S.A. 40A:12A-6(b)(3). The City asserts that it provided Berkowitz, plaintiff's landlord, with individual notice of the hearing and it published notice of the hearing in The Star-Ledger for two consecutive weeks prior to the hearing. Thus, it argues it complied with the notice provisions of the LRHL.

II.

The process of redevelopment begins when the governing body adopts a resolution authorizing its Planning Board to conduct a "preliminary investigation" of a delineated area to determine whether the proposed area satisfies any of the LRHL criteria for an area in need of redevelopment. N.J.S.A. 40A:12A-6(a). After the Planning Board completes the investigation, it conducts a public hearing "for the purpose of hearing persons who are interested in or would be affected by a determination that the

delineated area is a redevelopment area." N.J.S.A. 40A:12A-6(b)(2).

As the City correctly contends, the Planning Board must give notice of the hearing in accordance with N.J.S.A. 40A:12A-6(b)(3), which provides:

> The hearing notice shall set forth the general boundaries of the area to be investigated and state that a map has been prepared and can be inspected at the office of the municipal clerk. A copy of the notice shall be published in a newspaper of general circulation in the municipality once each week for two consecutive weeks, and the last publication shall be not less than ten days prior to the date set for the hearing. A copy of the notice shall be mailed at least ten days prior to the date set for the hearing to the last owner, if any, of each parcel of property within the area according to the assessment records of the municipality. A notice shall also be sent to all persons at their last known address, if any, whose names are noted on the assessment records as claimants of an interest in any such parcel. The assessor of the municipality shall make a notation upon the records when requested to do so by any person claiming to have an interest in any parcel of property in the municipality. The notice shall be published and mailed by the municipal clerk, or by such clerk or official as the planning board shall otherwise designate. Failure to mail any such notice shall not invalidate the investigation or determination thereon.
>
> [N.J.S.A. 40A:12A-6(b)(3) (emphasis added).]

The foregoing statute makes clear, as the City argues, that only property owners and all persons "whose names are noted on

the assessment records as claimants of an interest" are entitled to personal notice of the planning board hearing. Ibid. Here, plaintiff was not the owner of the property, and was not named on the City's tax assessment record. Therefore, plaintiff was not entitled by statute to personal notice of the Planning Board's hearing. Ibid.

At the hearing, "the planning board [must] hear all persons who are interested in or would be affected by a determination that the delineated area is a redevelopment area." N.J.S.A. 40A:12A-6(b)(4). The objections may be made orally or in writing. Ibid. After conducting the hearing, the planning board must recommend to the governing body whether the area, or any part of it, should be designated for redevelopment. N.J.S.A. 40A:12A-6(b)(5).

The governing body is required to send notice of the blight designation to anyone who filed a written objection to the designation at the Planning Board hearing. N.J.S.A. 40A:12A-6(b)(5). If such objections were filed, the governing body must wait forty-five days before it takes any further action. N.J.S.A. 40A:12A-6(b)(6). The text of the LRHL requires no further notice of the blight designation.

Once the above process is completed, the governing body shall adopt, pursuant to N.J.S.A. 40A:12A-7, a redevelopment

plan for the area. N.J.S.A. 40A:12A-6(c). The LRHL does not require a municipality to submit a copy of the plan, or even notice of the plan's adoption, to anyone. The designation, "if supported by substantial evidence," is "binding and conclusive upon all persons affected" by it. N.J.S.A. 40A:12A-6(b)(5).

Once the redevelopment plan is adopted, the governing body may use any of the powers listed in N.J.S.A. 40A:12A-8 to implement the plan. N.J.S.A. 40A:12A-6(c). Among them is the power to condemn the property and take it by eminent domain. N.J.S.A. 40A:12A-8(c).

Moreover, the governing body's designation of the delineated area as a "redevelopment area" N.J.S.A. 40A:12-6(b)(5), serves to deem the area "blighted" for purposes of the Blighted Areas Clause of the Constitution. N.J.S.A. 40A:12A-6(c). Any ensuing governmental taking of the property by eminent domain is consequently "treated as a legitimate 'public purpose' for purposes of constitutional takings law." DeRose, supra, 398 N.J. Super. at 396-97.

Like any other challenge to municipal action, challenges to blight designations are subject to Rule 4:69-1 to -7, which establishes procedures for seeking to invalidate municipal action by the filing of an action in lieu of prerogative writs.

Rule 4:69-6(a) requires such challenges be brought within forty-five days of the municipal action.

In DeRose, the trial court dismissed the property owner's claims finding that he had waited too long to assert them, and that others had reasonably relied on implementation of the project. DeRose, supra, 398 N.J. Super. at 385. At the latest, the trial court found DeRose should have filed his blight challenge within forty-five days of learning that his property had been designated blighted. Id. at 385. Because DeRose learned of the designation in January 2004, and did not file his challenge until 2006, the trial judge deemed both his blight challenge and his challenge to the constitutionality of the LRHL's notice provisions untimely pursuant to Rule 4:69-6(a). Id. at 385-86.

On appeal, we held that the redevelopment agency never provided sufficient notice to DeRose of the blight designation, and DeRose could not be denied an adequate opportunity to challenge it. Id. at 416-17. We explained that:

> [i]ndividual notices mailed to all property owners in the designated zone are only specified for the initial planning board hearing to consider the "preliminary investigation." Thereafter, no individual notices are called for, except for notice of the governing body's adoption of a redevelopment designation, which is mailed only to the select few persons who take the time and effort to file a written objection

> with the planning board. And no one is statutorily entitled to individual notice of the town's ensuing adoption of a redevelopment plan, not even those whose properties are covered by that plan.
>
> [Id. at 400.]

We held that, as drafted, the LRHL placed a property owner at risk of losing his property without having had a fair chance to contest the basis for the taking. Id. at 407-08. We concluded that:

> [t]he statute [LRHL] lacks . . . any individualized mechanism to assure that property owners are fairly informed that the blight designation, if approved by the governing body, operates as a conclusive finding of public purpose that will authorize the government to condemn their properties. The statute also fails to require that owners be apprised of any time limits for contesting a blight designation. Additionally, the statute omits any obligation to notify owners individually that the governing body has designated their premises as in need of redevelopment, except for those prescient owners who filed a written objection with the Planning Board.
>
> [Id. at 407.]

We held that these notice provisions were violative of state and federal due process guarantees. Id. at 408.

To cure the constitutional infirmity, we held that a property owner may challenge a blight designation beyond the forty-five-day period of Rule 4:69-6(a), and as an affirmative defense in a condemnation proceeding, unless the municipality

> has provided the property owner with contemporaneous individual written notice that fairly alerts the owner that (1) his or her property has been designated by the governing body for redevelopment, (2) the designation operates as a finding of public purpose and authorizes the municipality to take the property against the owner's will, and (3) informs the owner of a presumptive time limit within which the owner may take legal action to challenge the designation.
>
> [Id. at 413.]

Because DeRose never received that type of notice, we held that his right to pursue a blight challenge was preserved, and the trial court erred in concluding otherwise. Id. at 418.

III.

We turn now to a determination of whether the enhanced notice provisions that DeRose requires should also apply to commercial tenants such as plaintiff. In approaching that task, we remain mindful that "[t]he exact contours of due process cannot be defined. What it commands depends upon the specific facts presented." In re Allegations of Sexual Abuse at E. Park High Sch., 314 N.J. Super. 149, 160 (App. Div. 1998). In assessing whether particular notice procedures are "constitutionally sufficient, the primary question is always whether there is a protectible liberty interest at stake." Ibid. That determination is the first prong of the three-prong test articulated in Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct.

893, 47 L. Ed. 2d 18 (1976). Mathews also requires us to consider:

> [S]econd, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
>
> [424 U.S. at 335, 96 S. Ct. at 902, 47 L. Ed. 2d at 33.]

Turning to the first prong, a tenancy is generally treated as a contractual right, not a property right. Only in the rarest of instances will a commercial tenant stand on the same footing as a fee simple owner. For example, even a tenant with a leasehold interest lasting as long as ninety-nine years is considered the equivalent of a fee simple owner for some purposes, but not for others. See City of Atlantic City v. Cynwyd Investors, 148 N.J. 55, 72 (1997).[2] Thus, if the holder

---

[2] In Cynwyd Investors, supra, 148 N.J. at 72, the Court identified Lake End Corp. v. Twp. of Rockaway, 185 N.J. Super 248, 256 (App. Div. 1982) (holding that "ninety-nine year leaseholds are the equivalent of a fee ownership for the purposes of real estate taxation, valuation and assessment"), and Ric-Cic Co. v. Bassinder, 252 N.J. Super. 334, 341-42 (App. Div. 1991) (permitting such lessees to apply for a zoning variance), as circumstances where courts of this State have held that ninety-nine year lessees are the equivalent of fee simple owners under the common law.

(continued)

of a ninety-nine year lease is not uniformly regarded as the equivalent of a fee simple owner, it is readily apparent that a fifteen-year leaseholder like plaintiff cannot be deemed to possess a per se protectible interest for purposes of the first Mathews factor.

We turn next to the second Mathews factor, which requires us to determine whether there is so significant a risk of erroneous deprivation of the interest at stake that additional or substitute procedural safeguards would eradicate that erroneous risk. Specifically, we must determine whether the vindication of a tenant's rights at a later stage, namely during any ensuing condemnation proceedings, serves as an acceptable substitute for affording the individual notice that plaintiff demands during the earlier blight designation process. We turn to an analysis of the Eminent Domain Act (EDA), N.J.S.A. 20:3-1 to -50.

The EDA's provisions are significant because "the government's taking of property for purposes of redevelopment

---

(continued)

The Court also identified West Jersey Grove Camp Ass'n v. City of Vineland, 80 N.J. Super. 361, 365 (App. Div. 1963) (holding that senior citizens' tax exemptions are not available to tenants with ninety-nine year leases), as an example of a situation where ninety-nine year lessees that lacked options to renew were not afforded the same rights as a fee simple owner. Cynwyd Investors, supra, 148 N.J. at 72.

implicates not one, but two, statutes: the LRHL and the Eminent Domain Act." DeRose, supra, 398 N.J. Super. at 409. The LRHL specifies that, in carrying out a redevelopment plan, a municipality or redevelopment entity has the power to "[a]cquire, by condemnation, any land or building which is necessary for the redevelopment project, pursuant to the provisions of the 'Eminent Domain Act of 1971[.]'" N.J.S.A. 40A:12A-8(c).

The EDA requires a municipality to compensate a "condemnee" for the fair market value of any property taken through the exercise of eminent domain. N.J.S.A. 20:3-6 and -12. However, before filing the verified complaint that begins the process of condemnation, the municipality or other condemnor must engage in bona fide negotiations to acquire title or possession of the subject property from the prospective condemnee. N.J.S.A. 20:3-6.[3]

The EDA broadly defines a condemnee as "the owner of an interest in the private property being condemned for a public purpose under the power of eminent domain," N.J.S.A. 20:3-2(c).

---

[3] The purpose of this statutory provision is "to encourage settlements and the voluntary acquisition of property needed for public purposes, allowing both the public entity and land owner to avoid the expense and delay of litigation and a trial, while permitting the land owner to receive just compensation." Cynwyd Investors, supra, 148 N.J. at 71.

In Cynwyd Investors, supra, the Court faced the question of whether, in light of the broad statutory definition of a condemnee contained in N.J.S.A. 20:3-2(c), a municipality must negotiate with "not only the record owners, but [also] tenants and other parties having an interest in the condemned party." 148 N.J. at 70. Turning to an analysis of the precise language of N.J.S.A. 20:3-6 (Section 6), the Court observed that Section 6 requires that "the negotiations are to be undertaken [only] with the condemnee who holds title of record of the property." Id. at 70 (quoting N.J.S.A. 20:3-6). Consequently, the Court held, Section 6 spares the municipality "the difficult requirement of negotiating with each condemnee having an interest in the property," such as anchor tenants, each of the other tenants, and mortgagees. Ibid.

The Court reasoned that the "rights of all other condemnees with a compensable interest," such as commercial tenants, "are better protected by allowing them to participate later during the Commissioner's hearing, where value is determined, N.J.S.A. 20:3-12, and during the still subsequent proceeding [N.J.S.A. 20:3-34,] when compensation is allocated." Id. at 70-71. "In the absence of a contractual waiver, a tenant is entitled to an allocation of the value of its leasehold from the award of the

value of the fee" simple interest. Jersey City Redevelopment Agency v. Exxon Corp., 208 N.J. Super. 53, 57 (App. Div. 1986).

In the event a condemnor files a complaint condemning the property, Rule 4:73-2 requires the condemnor to name both the record owner and any occupant of the property as parties to the action.[4] A tenant-occupant, in its answer to the condemnation complaint, may contest the condemnation by denying the condemnor's authority to condemn. N.J.S.A. 20:3-11. "[O]nce the condemnee files an answer denying the authority to condemn, 'all further steps in the action shall be stayed until that issue has been finally determined.'" Twp. of Piscataway v. S. Washington Ave., LLC, 400 N.J. Super. 358, 368 (App. Div. 2008) (quoting N.J.S.A. 20:3-11). Any issues to be decided "other than that of value and damages [including] a challenge to the plaintiff's right to exercise the power of eminent domain . . . must be presented to and decided by the court before it enters judgment appointing condemnation commissioners." State, Comm'r of Transp. v. Orenstein, 124 N.J. Super. 295, 298 (App. Div. 1973). Thus, if a condemnation complaint is filed, a commercial

[4] Rule 4:73-2 provides that the following individuals or entities "shall be made parties" to a condemnation action: "The record owner, the occupant, if any, such other persons appearing of record to have any interest in the property and such persons claiming an interest therein as are known to the plaintiff[.]"

tenant is afforded the opportunity to challenge the action by denying the City's authority to condemn the property.

Unquestionably, the EDA provides clear and adequate procedural safeguards that protect a commercial tenant's leasehold interest in condemned property by affording the tenant the right to challenge the authority to condemn, and by affording him compensation for any losses that result from lease termination. As we have observed, the LRHL and the Eminent Domain Act must be read in tandem, not in isolation. DeRose, supra, 398 N.J. Super. at 409. The provisions of these related statutes must be "construed together as a unitary and harmonious whole." Am. Fire and Cas. Co. v. N.J. Div. of Taxation, 189 N.J. 65, 80 (2006) (citation omitted). So viewed, when the two statutes are read as a whole, it is evident that the notice procedures and substantive rights afforded a commercial tenant pursuant to the EDA make unnecessary any additional procedural safeguards at the earlier blight designation stage. Thus, plaintiff has not satisfied the second Mathews prong.

The third Mathews prong requires us to analyze the fiscal and administrative burdens that individual notice to commercial tenants would entail. Unquestionably, requiring a municipality to ascertain the identity of each tenant and provide individual notice to that tenant adds an enormous burden to the

redevelopment process. Moreover, it is likely that from the time the municipality first requests its Planning Board to undertake an investigation of whether a designated area is blighted through the time of the ultimate adoption of the redevelopment plan, one commercial tenant may vacate the premises and a new one may take its place. Such turnover creates the possibility of an almost endless cycle of challenges to the redevelopment process if each new commercial tenant were to be afforded the right to file a complaint challenging the blight designation. That possibility has the capacity to create unreasonable burdens on the redevelopment process.

Thus, our review of the three Mathews factors leads inexorably to the conclusion that neither the federal nor state Constitution affords plaintiff the right to individual notice at the blight designation stage. A tenancy is not a per se protectible interest, the condemnation stage affords the tenant a comprehensive and complete forum for the vindication of its rights, and the administrative burdens of requiring individual notice at the earlier blight designation stage are enormous. We thus decline to find a constitutional right to individual notice for commercial tenants during the LRHL proceedings.

Moreover, we are reluctant to interfere with the policy judgment that the Legislature has made. It is evident that the

Legislature was well aware that a commercial tenant has a direct stake in the governmental taking of property. For that reason, the Legislature provided a tenant the right to seek compensation when its lease is prematurely terminated by the condemnation of the property. It is clear, however, that by choosing not to afford tenants individual notice of the LRHL blight designation process, the Legislature has made a policy determination that the tenant's right to individual notice should not be recognized unless, and until, the condemnor proceeds to the condemnation stage. We must assume that when the Legislature limited the right of notice and an opportunity to be heard in the LRHL context to owners of record and those whose are listed on the tax assessor's records, see N.J.S.A. 40A:12A-6(b)(3), the Legislature did so intentionally. State v. Vonderfecht, 284 N.J. Super. 555, 559 (App. Div. 1995).

We conclude that the EDA affords commercial tenants such as plaintiff a full and fair opportunity to obtain redress for any financial losses sustained as a result of the governmental taking. We see no reason, statutory, constitutional, or otherwise, to engraft onto the LRHL an individual notice requirement the Legislature itself chose not to require for commercial tenants. See Bosland v. Warnock Dodge, Inc., ____ N.J. ____, ____ (2009) (slip. op. at 23).

Consequently, we hold that the Legislature has not, and did not, intend to afford commercial tenants the right to individual notice with regard to the blight designation process of the LRHL. Moreover, because commercial tenants do not have an interest entitled to individualized recognition and protection at the earlier blight designation stage, there is no basis to extend to them the notice that we held in DeRose must be afforded to the owners of record. Consequently, the Law Division correctly held that plaintiff was obliged to comply with the forty-five day filing requirement of Rule 4:69-6(a) even though it had been afforded no individual notice of the July 14, 2004 City Council meeting at which Council declared the Core Area blighted.[5] Plaintiff's remaining contentions lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.

[5] In light of our disposition, there is no need to evaluate the judge's alternative holding that plaintiff was aware of the redevelopment proceedings early enough to have complied with the requirements of Rule 4:69-6(a) had it chosen to do so.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
ESSEX COUNTY
DOCKET NO. ESX-L-9375-04
APP. DIV. NO. _____

IRON MOUNTAIN INFORMATION MANAGEMENT, INC.

Plaintiff,

vs.

CITY OF NEWARK, et al.,

Defendants.

TRANSCRIPT
Of
HEARING

Place: Essex County Courthouse
50 West Market Street
Newark, New Jersey 07102

Date: July 16, 2007

BEFORE:

HONORABLE FRANCINE A. SCHOTT, J.S.C.

TRANSCRIPT ORDERED BY:

SCOTT A. HEIART, ESQ. (Carlin & Ward)

APPEARANCES:

SCOTT A. HEIART, ESQ. and
WILLIAM A. WARD, ESQ. (Carlin & Ward)
Attorney for the Plaintiff

BRADLEY M. WILSON, ESQ. (Nowell, Amoroso, Klein, Bierman, PC)
Attorney for the Defendant, City of Newark

MARK PECK, ESQ. (Florio, Perrucci, Steinhardt & Fader, LLC)
Attorney for the Defendant, Newark Housing Authority

DEBRA L. STOREY
KLJ Transcription
246 Wilson Street
Saddle Brook, New Jersey 07663
(201) 703-1670
(201) 703-5623 (Fax)

Audio Recorded
Audio Operator, L. Fisher

I N D E X

THE COURT: ....may I have your appearances for the record?

MR. HEIART: Good morning, Your Honor. Scott Heiart, H-E-I-A-R-T, from the law firm of Carlin and Ward, on behalf of plaintiff, Iron Mountain.

MR. WARD: William J. Ward, Carlin and Ward, on behalf of Iron Mountain. Mr. Heiart will handle the oral argument, Your Honor.

THE COURT: Okay.

MR. PECK: Good morning, Your Honor. Mark Peck, Florio, Perrucci, Steinhardt & Fader for the Newark Housing Authority.

MR. WILSON: Bradley M. Wilson, Nowell, Amoroso, Klein & Bierman, on behalf of the City of Newark, Judge.

THE COURT: Okay. Agree or disagree that warehousing is not allowed in the district, as it's been re -- rezoned?

UNIDENTIFIED SPEAKER: I'm sorry, can you repeat that, Your Honor?

THE COURT: Agree or disagree, warehousing is not allowed in the rezoned area?

MR. HEIART: Your Honor, I have two quick (indiscernible), and that is a valid question, and I'll be glad to answer it. As a practical matter, just very

-- just housekeeping, Mr. Peck hasn't submitted anything -- any briefs, or pleadings in this case, and I ask that he shouldn't be entitled to argue. Just a practical --

THE COURT: I'm not going to hear argument from him. I'm just going to hear from the city. From --

MR. HEIART: That's fine. In addition, and this is all to get to your answer, Your Honor, if you just give me a little leeway, I'd ask that you revisit your earlier ruling, because this directly affects your questions. And my answer to your question, the earlier ruling, which said we were time barred to challenge the blight declaration. The reason I ask that you revisit it is based on some recent cases. The Glenton (phonetic) case, as you know, just came back from the Supreme Court, and a recent Appellate Division case, which I have copies for counsel, and Your Honor, concerning the Borough of Bellmawr. Both cases deal with challenging blight declaration, and that both -- both their -- both the Appellate Division, and the Superior Court has made it clear that one, the 45 days should run from the action of the municipal body, not from the action of the planning board. So, when the municipal body acts here --

THE COURT: Can I ask you something?

MR. HEIART: Sure.

THE COURT: Did you give me a brief on this before you got here today?

MR. HEIART: No, we didn't, Your Honor.

THE COURT: Why not?

MR. HEIART: The case law is just very recent, Your Honor.

THE COURT: No, it -- well, it wasn't last night, right? It wasn't Friday?

MR. HEIART: It was -- the Bellmawr decision did come down, literally, July 11th, so only four or five days ago, Your Honor.

THE COURT: Is that published?

MR. HEIART: It is an Appellate Division case, and it is published. I'd be glad to -- I have copies for everyone here, Your Honor, and I'd be glad -- I would be glad --

THE COURT: Let me see it. The Supreme Court case you reference, though, that was, my recollection, the week before last, yes?

MR. HEIART: The Glenton was two weeks ago, Your Honor.

THE COURT: Okay. So, if -- if it stands for the proposition that you've indicated --

MR. HEIART: It stands for multiple propositions.
THE COURT: Well, but the proposition you're arguing here today, which was with this new law it's clear that my prior ruling was in error, because the 45 days was not calculated from the proper benchmark. It seems to me that would have been a real quick three paragraph, Dear Judge Schott, law is changed. Here you go. Give your adversary notice, and -- why didn't you do that? Why did you wait until this morning?
MR. HEIART: Your Honor, that would be my fault. I apologize for that.
THE COURT: Well, I didn't think it was anybody else's fault. I'm asking you what the reason is.
MR. HEIART: I'd be glad to brief it for Your Honor, and give Mr. Wilson time to respond to the brief.
THE COURT: Let me rephrase it. Is there a reason that you waited?
MR. HEIART: Just because of the recent revelations in the case law, Your Honor, and we knew that we were going to be --
THE COURT: Two weeks ago. Two weeks ago, right? Two weeks ago, according to you, the Supreme

Court came down, and handed you a clear declaration that I was wrong.
MR. HEIART: Not that you were wrong, but that you -- it was -- the record below was inaccurate.
THE COURT: I don't mind being wrong. Everybody is wrong sometimes. My ego is very strong. If I was wrong, I was wrong, and I'll fix whatever I did that was wrong, okay? So, two weeks ago, if the -- I'm just really just -- my concern here is that -- I think by now you've probably figured out I -- I don't think the government should get away with any slight of hand, and I don't think the plaintiff should be allowed to get away with delay. You know, one way or the other it -- if the Supreme Court handed a decision down that says, you trial judges should -- you've been wrong, you've got to go -- why not put it in a brief. Let your adversary know. Let him respond. Do you agree that's what the Court said, or no?
MR. WILSON: I have no -- I'm aware of the Glenton opinion. I'm not aware of this opinion.
THE COURT: Well, in the Supreme Court opinion do they -- do they --
MR. HEIART: The Supreme Court doesn't focus surely on the 45 days, but focuses on -- Glenton focuses, more importantly, Your Honor, on -- that there

has to be substantial credible evidence supported by expert testimony when declaring blight. Here we would argue that you never got to that issue, because you -- you ruled it's time barred. We'd ask that you revisit that issue. If you'd like us to brief it --

THE COURT: Well, wait. I'm sorry. The Supreme Court held there had to be expert testimony.

MR. HEIART: A -- showing substantial credible evidence under the local redevelopment housing law.

THE COURT: What does that have to do with the ruling about time?

MR. HEIART: Well, I'm -- I'm saying you should revisit it, Your Honor, because those arguments are still very valid before this Court. We believe that their expert testimony lacks any credible evidence that the Iron Mountain Building, which is a warehouse use --

THE COURT: Wait a minute. Wait a minute. That's -- you're mixing apples and oranges. What does that have to do with the issue of time? In other words, you always had that right. You didn't need that opinion to say they have to support what they're doing with some foundation, and factual information. You just --

MR. HEIART: I think both the Bellmawr decision --

THE COURT: -- the issue was you had to do it in 45 days.

MR. HEIART: I think both the Bellmawr decision, and the Glenton did clarify, you know, that the 45 days, and also clarified that --

THE COURT: Read me the part of the Supreme Court case that clarifies it had to be 45 days from the --

MR. HEIART: It, actually, would be the Bellmawr decision, Your Honor, and Concerned Citizens of Princeton is quoted both in Glenton, and --

THE COURT: Well, call up to me the part that says the 45 days, you know -- that the court below -- did the court below in Bellmawr make the same mistake I made?

MR. HEIART: The court below, in the Bellmawr case did -- was overturned by the Appellate Division. They, however, did actually get to the merits of the case.

THE COURT: The court below in the Bellmawr case calculated the 45 days not from when the town acted, but from when the planning board acted?

MR. HEIART: No. They didn't -- they didn't

go into that analysis. They still heard argument regarding the merits of the case.

THE COURT: I'm sorry, counsel. Is there anywhere in this -- in this opinion where the Court, specifically, states where the 45 days is supposed to be calculated from? Are you just saying that in this case nobody talked about --

MR. HEIART: I'm saying that specifically --

THE COURT: -- stop. Nobody talked about it. It just happened that it was 45 days from when the municipality acted?

MR. HEIART: It would be 45 days from when the municipality acted. The case doesn't --

THE COURT: No, that wasn't my question. My question --

MR. HEIART: The case doesn't --

THE COURT: Counsel, please.

MR. HEIART: Go ahead, Your Honor.

THE COURT: My question -- you have two choices. Did the Court make such a ruling?

MR. HEIART: No.

THE COURT: Or are you, simply, saying that because in this case it had been 45 days from when the municipality acted, as opposed to the planning board, and nobody raised the issue, therefore --

MR. HEIART: Correct. It would be the latter, Your Honor.

THE COURT: Well, how do you get from that to they held that the 45 days has to run from --

MR. HEIART: As a practical matter, Your Honor, a planning board's resolution has no teeth to it, unless the municipality adopts such a resolution. The planning board action just recommending that this --

THE COURT: Can I ask you something?

MR. HEIART: Sure.

THE COURT: If you're asking me to reconsider the decision about the 45 days --

MR. HEIART: Correct, Your Honor.

THE COURT: -- where's the transcript from the ruling? Where's the briefs from the prior ruling. I mean, you just show up, and say, Judge, change your mind?

MR. HEIART: I think it's just essential to make it a part of this record, Your Honor.

THE COURT: No, but you can't just incorporate -- you're not effectively making it a part of this record, counsel. For the record, this isn't raised. These decision that you talk about, you gave no notice to your adversaries. You were going to refer

to them, rely on them. You stand here today, you say -- you have to acknowledge they don't even discuss the issue of timeliness. They just happen to be cases where the 45 days wasn't raised, correct? There's no mention of the --

MR. HEIART: Right, Judge.

THE COURT: Okay.

MR. HEIART: Correct.

THE COURT: So, essentially, you've come today arguing reconsideration with no new law to add to it. Not record of the prior ruling. No nothing. So, you're not making a record. I want that very clear for the Appellate Division that there's nothing before me, today, that would -- let me say the following: There's a phrase in your moving brief that says I was wrong. There's no argument for reconsideration, as the rule would require any reconsideration motion to be brought, specifically designated, transcript of prior ruling, explanation of what the law the Court missed, what facts the Court missed, or how the Court was palpably wrong. So, how do I let you argue reconsideration when you've never brought that motion?

MR. HEIART: That's understandable, Your Honor. I just wanted to get that out into the record. I'll be glad --

THE COURT: Get what into the record?

MR. HEIART: I'll be glad -- that if we do go up to the Appellate Division the Glenton decision, and this Bellmawr decision, we believe you erred, barring us on the 45 days, and we believe that you should revisit it based on the Supreme Court's decision in Glenton, which says --

THE COURT: What in the Superior Court decision in Glenton -- quote to me the part about the 45 days in Glenton that you're referring to?

MR. HEIART: Again, Your Honor is correct, it doesn't directly deal with the 45 day issue. It just -- there are cases, which I'd be glad to cite in a brief, which do allow for the expansion of the 45 days, or which show that the 45 days should run from the --

THE COURT: But that doesn't have anything to do -- for the record, two weeks ago, when the Supreme Court decided that case, you certain had, within your power, the ability, if you thought that there was anything in there that justified a motion for reconsideration to make such a motion. No such motion has been made. I want it clear in the Appellate Division. I've never gotten such a motion from the plaintiff.

MR. HEIART: Correct, Your Honor.

THE COURT: The plaintiff has never moved for this Court to reconsider its order concerning the 45 days, and so, you can't just, quote, add to the record, things that have never been argued -- things that -- motions that have never been made. Because if you've never made them, I've got nothing to rule on.

So, let's go back to my first question. Are -- is warehousing a permitted use in the rezoned district?

MR. HEIART: No. However, the Iron Mountain building would be qualified as a non-conforming use, Your Honor. It -- it exists -- it's been up for decades now. We're not seeking (indiscernible), or anything. We're seeking to have the building be left alone, and the way it is. And the reason we do that, Your Honor is because we believe -- we have proof, and the record shows, this is part of a large land swap that the former administration, Mayor Sharpe James, specifically, has come about, and said, we don't have the money to build the arena now, but we're going to take some land from rich private developers, that being Jerry Gottesman, Don Pepe Lopez, and in exchange we're going to just give you over any land that you would like. We're not going to give you any criteria that you have to develop it. We're not going to say, you

know, that it needs to be -- that the plan needs to be specific with what you're going to do with the building, that -- we're just going to give it to you. And it's a non-conforming use. It should be left alone, Your Honor.

THE COURT: I gave you the chance to conduct discovery.

MR. HEIART: Yes.

THE COURT: What discovery did you do of anyone from Edison Properties, or from the City of Newark concerning this land swap?

MR. HEIART: We did interrogatories, and document production.

THE COURT: Did you depose one human being on the topic of how this came about? What the considerations were? What the back, and forth was? In other words, you stand before me today -- your basic position is, if I can paraphrase, bring it down, for lack of a better word, to street language. The city is making a deal that really puts it to the little guy, right? And just -- there's no proper purpose here, really, and they're just benefitting the rich people that own property in Newark, right?

MR. HEIART: Right. There's no public purpose here, Your Honor.

THE COURT: Okay. I gave you the opportunity to do discovery. Have you deposed one human being involved in this project, who can support your proposition that this wasn't for the purpose of facilitating the building of the arena?

MR. HEIART: I don't think we needed depositions to prove that, Your Honor. I think the record shows -- the arena is up, Your Honor, and this building still -- still standing. This is separate from the arena. This is not needed to take the arena.

THE COURT: But that goes into your argument, then, about isn't that -- and, really, your argument is nothing more than that. It should not have been included in the redevelopment area.

MR. HEIART: Right. It shouldn't be included in redevelopment --

THE COURT: But that's time barred.

MR. HEIART: But the redevelopment plan -- we'll go to that argument, Your Honor. The redevelopment plan, and the local redevelopment housing law 7A says, that when you adopt a redevelopment plan you have to have specific objectives, and uses for the properties contained therein. Their own expert called this building an optional site. He said, it could stay or go. Their own expert says, he loves the building.

That's Randy Martin, the -- the city's own --

THE COURT: Well, it can still or go, but it can't be used as a warehouse.

MR. HEIART: No, they -- they don't say that. They say, it could stay or go. They don't say it couldn't be used --

THE COURT: I thought the prohibited use is including warehousing?

MR. HEIART: That's of the plan, this was a non-conforming use, Your Honor.

THE COURT: Isn't that a sort of circular argument? I mean, you're saying that they didn't -- they didn't set out --

MR. HEIART: This is a prior --

THE COURT: -- what the plan was for the property of the building, but yet, part of the plan is clear, it can't be used as a warehouse?

MR. HEIART: Part of the plan -- the plan doesn't call for anything to do with this building. The plan just says it's optional. It doesn't say --

THE COURT: But the plan says as to the building it's optional whether you knock it down, or don't knock it down, but where does it say its uses are optional?

MR. HEIART: It just uses the broad term of

it being optional, Your Honor.
THE COURT: Okay. So, let me ask this question.
MR. HEIART: But, again, those uses aren't public purchases.
THE COURT: Did you depose anybody from the planning board, or the city who would tell you what they meant by that term?
MR. HEIART: No, Your Honor. I -- I don't --
THE COURT: Okay. So, the city comes forward, and says, look, Judge, by optional all we meant was you can either knock it down, or you can leave it standing.
MR. HEIART: But they drafted the redevelopment plan. If that's what they meant, they're the drafters. They should have included it. The Court should read it --
THE COURT: No, they just did. They said that in this court. That -- that's what they said, they said optional means you have a lot of flexibility in -- in exactly how you might do this. You might leave it standing, you might knock it down, but the one thing you can't do is use it as a warehouse. Where you go from there, whether you want to make it mixed residential, commercial, whatever you want to do, you

do, but the only thing optional meant was you could, or you couldn't knock it down, and still be consistent with the plan.
MR. HEIART: They say that in their papers. They, certainly, don't say that in the redevelopment plan, Your Honor, and that's what the redevelopment plan has to say. It has to be --
THE COURT: Quote to me the redevelopment plan portion that you're relying on.
MR. HEIART: This is Section -- Exhibit B to my certification, Your Honor, where it highlights the parcel C.312 Parcel I. Parcel I is a developable --
THE COURT: Hold on. Hold on.
MR. HEIART: I'm sorry.
THE COURT: Hold on. I'm not -- stop, I'm not there yet. What exhibit are you on, C?
MR. HEIART: This would be Exhibit B, Your Honor, the second page where it highlights the map of the building in my certification. The second line of that says, this is an optional site in the plan. Option site in the plan, meaning it may not be a part of the plan, Your Honor. That -- that wording is key, and the wording should go against the drafter, not against the property owner, and the Court shouldn't read into it --

THE COURT: It follows, the building could remain, be modified, or demolished to make way for additional development.

MR. HEIART: It's an optional site in the plan. I think that's a key phrase, optional site in the plan. It doesn't say it's an optional use. It doesn't -- it says it's an optional site of -- of whether it should be included in the plan, or not. And -- and under the local redevelopment housing law it's clear. You have to be specific, and set certain objectives for the parcels that you designate. They failed to do that, Your Honor, and therefore --

THE COURT: Where are similar designations for the other parcels? Do you have them with you?

MR. HEIART: I don't have the -- the full plan, and the certification, Your Honor. I'd be glad to --

THE COURT: Let me see what you have.

(Pause)

MR. HEIART: There's a -- Your Honor already would have this. This would be Mr. Wilson's certification. He does put in the plan --

THE COURT: Which exhibit?

MR. HEIART: I believe it would be Exhibit A.

THE COURT: Take me to the pages that are

similar to what you just showed me as to Parcel I.

MR. HEIART: You're looking for other warehouse -- just so I can clarify --

THE COURT: No, I want to know -- I want to see how the other parcels are described? What's the apples, to apples comparison between Building I, and all of the other buildings that might be in the plan?

MR. HEIART: If you look -- I'm trying to find page numbers, because I am there. Unfortunately, there are no page numbers in here. If you would look, approximately halfway through it, Your Honor, you'll see diagrams of how they describe other parcels. There's parcel -- starts with, obviously, Parcel A.

THE COURT: Hold on. Starts -- okay, C4.1?

MR. HEIART: C.4 would be Parcel A --

THE COURT: All right.

MR. HEIART: -- and you can see how it describes Parcel A, and then it goes on from there.

THE COURT: Now, is Parcel A the arena?

MR. HEIART: I believe it is, Your Honor, yes.

THE COURT: All right. Take me to the buildings that are adjoining what come to be called as the Iron Mountain building.

MR. HEIART: Parcels B, and C would be

similar, and then -- I would say Parcel I is the --
THE COURT: B, and C are adjoining I?
MR. HEIART: Oh, adjoining the Iron Mountain building.
THE COURT: I'm talking about the ones in the same area. I'm not talking about the ones dead center into the arena, or in the same block. I'm talking about the ones that adjoin the Iron Mountain building.
MR. HEIART: The only ones that are adjacent would be G, Your Honor, and then K, and L. If you look at C.412, that map on C.412 shows that the Iron Mountain building being I. You can look at G, K, and L. That sets forth the adjacent buildings on the following subsequent page. And you'll not find any other language that says this is an optional site in the plan.
THE COURT: Is there any place else in this plan, counsel, that defines a building as optional?
MR. WILSON: I'm sorry, you're talking to me, Judge?
THE COURT: I'm asking the city if there's any other place in the plan?
MR. WILSON: No. And I'll tell you why, Judge, because this building is a unique building. It's obvious from the testimony of the expert, this is

a unique building. Some people like it. Some people don't. The blue ribbon committee said it should be torn down. The expert who testified said he likes it. He thinks it could stay. The building, itself, that's the only option in this -- and we've been through this a number of times. The only reason that this is an option is that some people like the exterior of the building, some people don't. But there's no question that under C2 this is a mixed retail, residential building. That's the use that this building has to be put to.
So, contrary to what the plaintiffs say, this -- there's a definite explanation of what's to become of this building.
Now, on the backside of this building is to be a pedestrian walkway that will go right down to the train station, and on the other side, there's all retail, and entertainment. There's no question but that a warehouse does not fit within this new plan.
THE COURT: Hold on. Do you agree that those are the planned uses surrounding the building?
MR. HEIART: Surrounding the building? That may be the case, Your Honor.
THE COURT: Well, do you agree or disagree?
MR. HEIART: I would agree that surrounding

it, those are some of the uses. However --
THE COURT: Well, let me rephrase it, do you agree that in the back is the pedestrian walkway that leads from —
MR. HEIART: It --
THE COURT: -- leads foot traffic from -- where does it go, from the arena down to the train?
MR. WILSON: To the -- across where that bridge is now is to be a pedestrian walkway to take you down to Penn Station.
MR. HEIART: I wouldn't agree, because nothing has been done yet, Your Honor.
THE COURT: I know it's not built yet, but I assume you've looked at the plans, yes?
MR. HEIART: I have looked at the plans.
THE COURT: Does that show on the plans?
MR. HEIART: There are spots where it says that intended uses for -- you know, for the area behind the building to include a walkway, yes, or that hasn't been achieved yet, and that doesn't mean that's what is going to happen down the road. There's nothing concrete about this plan, except for the arena, Your Honor.
THE COURT: Of course nobody can guarantee -- I understand that. But is there any factual dispute

that when you open up the plan -- the master plan that the city has that directly behind that existing building is shown a planned pedestrian walkway from the arena down to the train station. Are you sufficiently fluent with the plan to know what it is that's planned for around the building?
MR. HEIART: Yes. Yes, Your Honor. I mean --
THE COURT: Okay.
MR. HEIART: -- we're not putting that issue in debate. We're putting the fact that --
THE COURT: All right. Now --
MR. HEIART: Go ahead.
THE COURT: Why didn't the city just condemn Edison's property?
MR. WILSON: As even the Star Ledger pointed out on Thursday, there -- this whole --
THE COURT: You don't want to go to what's been in the paper recently about Newark, and the development of property, do you? You don't want me to go there?
MR. WILSON: No.
THE COURT: All right. Then let's stop with the citation to the newspaper, okay?
MR. WILSON: Very well. This -- there are a

number of parcels that make up this downtown core redevelopment plan area.

THE COURT: I understand that included Edison's property, which -- why didn't -- instead of swapping land with Edison, giving them, basically, where the Iron Mountain site is, they gave you there land where the arena was, and you gave them Iron Mountain's land. Why not just condemn Edison's property?

MR. WILSON: It could have been done. The city chose not to do it that way.

THE COURT: Okay. How does the city have the power to simply choose when -- when it's Edison's property that you needed? How do you choose not to condemn it, and rather, give Edison somebody else's property?

MR. WILSON: Well, Judge, I think you're looking in -- in areas that really belong in the legislative area, not in the judicial area, and that's really --

THE COURT: How so?

MR. WILSON: Because the determination was made that they would adjust the properties that are owned by various --

THE COURT: Adjust is a sophisticated word

for taking away. Adjust -- adjust is just intended to take the emotion, and the constitutional ramifications out of the scheme. You took their property. Edison gave you Edison's property, and you're about to give Iron Mountain's property to Edison in return.

MR. WILSON: Correct.

THE COURT: That's not an adjustment, that's a taking.

MR. WILSON: That's a taking.

THE COURT: Why didn't you take Edison's property if that's what the city wanted?

MR. WILSON: It will be taken.

THE COURT: What do you mean?

MR. WILSON: It is going to be taken. It will be taken by the redeveloper. By -- by Edison.

THE COURT: No, no, no. I'm sorry. They gave you something, right? They gave you those parcels of land, yes?

MR. WILSON: They gave us the right to --

THE COURT: Well, they gave you the land.

MR. WILSON: Right.

THE COURT: Here you go, have this land, right?

MR. WILSON: Right.

THE COURT: And in return for which you gave

them somebody else's land. Okay. So, instead of giving them somebody else's land, why didn't you just take their's if that what you needed, and that's what you wanted?

MR. WILSON: Because the property that we needed was -- was Edison's property.

THE COURT: I know, so just condemn their property, and take it, the same way you want to do to Iron Mountain.

MR. WILSON: At the time the city did not have the funds -- well, there are number of reasons that -- that go into that, all of which, I think, were resolved in, and by the city council when they -- when they approved this plan. The redeveloper's agreement, and, you know, the city has the authority to exchange property, to -- to --

THE COURT: Show me where that is, counsel, the quote that you have -- they have the right to exchange their own property. They don't have the right to exchange somebody else's property. That quote that you had from the statute doesn't go to your -- you don't have the right to exchange someone else's property. You, certainly, under the statute, have a right to exchange your own property for somebody else's property. But to read this statute that you quoted to

say you have the right to exchange one private person's property so that the city can have, as a gift, someone else's property, that -- that -- you're going to have to go a lot further than the statute you quoted in your brief to convince me of that. Do you have any authority for it other than that one singular quote about the ability of the city to exchange property?

MR. WILSON: Well, this -- this whole area is being condemned in one manner, or another, Judge to comply with the redevelopment plan So, the redeveloper is -- is only acting as a means to the end that the city has determined.

THE COURT: No, that wasn't -- you -- wait. But we've gone -- we started out on apples, and you wound up on oranges. You said that the city has the authority to exchange property. Is it your position that the city has the authority not to exchange its own property for someone else's, but to force a private landowner into a condemnation in order that the city can exchange one piece of property with a developer for that private person's property?

MR. WILSON: The city has made a determination that this plan is -- that they've adopted needs certain development. They've retained a redeveloper, Edison in this case, to -- to redevelop.

THE COURT: You're repeating yourself. My question was very specific, you said the city has the authority to exchange property. I am asking you directly, devoid of any of the sophisticated terms whether or not you are standing before me saying the city has the authority -- when you talk about exchanging property, not to exchange city owned property with a landowner for their own property, but rather to allow one private property owner to give over to the city something, and then, basically, force an exchange by taking somebody else's property.

MR. WILSON: Well, Judge, we're -- maybe I'm misunderstanding, or maybe you're misunderstanding me, but --

THE COURT: Maybe.

MR. WILSON: -- this whole plan is -- is -- deals with the area in its entirety, and the city is determined that these things have to be redeveloped. We've retained a redeveloper to do what the city could do. The -- the redeveloper is acting only as a conduit to get to that point that the city could get to. So, I'm not -- maybe I'm not understanding what you're asking.

THE COURT: I'm -- I'm not understanding why you didn't -- why -- why the deal with Edison that

says, you give us your property, and we'll give you somebody else's property, right? That's, basically, what -- what happened here. Edison -- Edison said, we'll give you this property that we own by the arena, and then City of Newark, through your authority, in your redevelopment plan, you give me Iron Mountain's property.

MR. WILSON: No. You -- you permit us to redevelop -- well, yeah. Okay. But --

THE COURT: Edison -- this company that Edison is related to is going to own this Iron Mountain property, right?

MR. WILSON: Right. Right.

THE COURT: Right? Yes?

MR. WILSON: Yes. Yes.

THE COURT: So, basically, the city said to Edison, you give us the property we want by the arena, and we'll give you Iron Mountain's property.

MR. WILSON: Okay. The city, at this point, has not condemned Edison's property. Edison has given us the right to -- for site development, and then construction. That arena is long since gone up on Edison's property, and we have yet to condemn that property.

THE COURT: Well, because you made a deal

with them, right, that says you're gong to give them Iron Mountain's property?
MR. WILSON: Of course. Of course. But that property is going to be condemned.
THE COURT: When you say that, what do you mean?
MR. WILSON: The -- the arena property. It's defacto taking, and the arena is on it.
THE COURT: Well, when you say it's going to be condemned, why haven't you condemned it, and why are you giving them Iron Mountain's property if you're going to pay them for their property anyway?
MR. WILSON: If -- I'm sorry. If what, Judge?
THE COURT: I understood this to work as follows: Edison had some property where the city wanted to put the arena, right?
MR. WILSON: Correct.
THE COURT: And the arena is not a non-profit, am I right?
MR. WILSON: No, it's not a non-profit.
THE COURT: It's for profit, right?
MR. WILSON: Yes.
THE COURT: The Devils aren't doing any charitable work in the City of Newark, am I right?

MR. WILSON: Not yet.
THE COURT: Yes. Okay. And the $10,000 boxes, that's not charity either, right? It's a for profit establishment, sports arena in the middle of the city.
MR. WILSON: To bring people into the city.
THE COURT: To bring people into the city.
MR. WILSON: Right.
THE COURT: Edison owns the land on which the actual arena was proposed to be built, right?
MR. WILSON: Among others, yes.
THE COURT: Okay. Instead of condemning Edison's land, an agreement was reached where Edison would give you all the development rights, and give you the land, as long as you gave them Iron Mountain's land, right?
MR. WILSON: Yes.
THE COURT: Okay. That agreement was reached before, or after the redevelopment area was drawn?
MR. WILSON: After.
THE COURT: Was the plan originally then to condemn Edison's property?
MR. WILSON: Sure. The plan was to condemn all property.
THE COURT: I'm sorry?

MR. WILSON: The plan was to condemn all the property in --

THE COURT: Well, if you were going to condemn their property, why did you have to make a land swap deal with them?

MR. WILSON: It's a decision the city made, Judge.

THE COURT: I know they made it. If they hadn't made it, you all wouldn't be here. I asked the why question.

MR. WILSON: At -- at the time the city believed it to be the most expedient method to -- initially to start construction. Former Mayor Sharpe James was adamant that this -- this thing get started. We -- the city had a contract with the Devils, where certain levels of construction had to be reached at certain periods. There's a real tight time constraint on the agreement to put up the arena. So, in order to streamline that process, Edison gave us the right to get on there, and to start site development before the -- the condemnation proceedings could go through. In -- in exchange, the city agreed to give them the right to redevelop the -- the property that Iron Mountain leases. So, it was -- it was --

THE COURT: I guess -- I guess the problem I

have -- you say it in a tone of voice that makes it sound so innocent, and yet when I read it, it sounds so nefarious, and that's what I struggle with. When I read it, it sounds like the antithesis of how the power of eminent domain should be used.

MR. WILSON: There is absolutely no question, Judge, that this warehouse cannot stay. The use cannot stay. There's no question about that. And that's --

THE COURT: Well, you know --

MR. WILSON: -- and that's what the leasee -- the lessee is -- is here arguing, that they should be permitted to stay.

THE COURT: Well, okay. Okay. But -- but here's the problem. I'm not -- I'm not indicating -- that's -- that's -- again, we start out with apples, and go to oranges. Again, what I'm disturbed by is when you say it, it sounds so innocent, and it seems to make so much sense, and when I put my, what I call a common person on the street hat on, it makes the hair on the back of my neck stand up.

Now, that's not to say that I'm so naive that I understand, basically, what's going on here. Iron Mountain is not carrying this banner in the name of, you know, advancing the little man's cause of eminent domain. They want to operate their warehouse in the

middle of a redevelopment district that, quite frankly, doesn't contemplate warehousing. And, I guess, in the end what this really comes down to is the very first issue we addressed. Your argument doesn't make any sense unless the only reason you are included in that plan was to benefit Edison, right?

MR. WILSON: Correct, Your Honor.

THE COURT: You agree with that?

MR. WILSON: I agree 100 percent, and that's the only reason --

THE COURT: Okay. So, that --

MR. WILSON: -- it's been included in the plan was to benefit Edison.

THE COURT: So, that, basically, your argument if -- all right. Tell me if I got this right, and as an intellectual manner in terms of how this is to be analyzed, your sole argument here is they only stuck it in here in the first place, so that they could effectuate the land swap with Edison.

MR. HEIART: Correct.

THE COURT: And if they had just -- okay. And if they had just condemned Edison's property for the arena, if that's what they wanted to do, condemn it, pay for it, leave us out of it, they never would have gone so far as to include your property within

that plan.

MR. HEIART: Right. And that's why it's an optional site in the plan, because -- that's what they had originally called it, because -- then this land swap comes along, and say, the only reason we're putting you in here is so we can -- Edison can benefit, because we decided to shield Edison from eminent domain.

THE COURT: Okay. So, now my question is this. Isn't that argument the, really, an argument that says, the entirety of your claim here goes to your inclusion within the plan, in the first place?

MR. HEIART: Correct.

THE COURT: And that's what was time barred, right?

MR. HEIART: No, Your Honor. That is not what was time barred. What was time barred is our challenge that the designation as being blighted under the LRHL, you clearly let us challenge the -- our inclusion in the plan has been arbitrary, and capricious, and counsel has admitted so in its papers. That is clear. You've allowed this challenge to go forward as it pertains to our inclusion in the plan.

THE COURT: Okay. So, here's my question. I gave you the right to do discovery. You didn't depose

one human being. You realize -- you're, basically, accusing them of abusing the power of eminent domain?
MR. HEIART: Correct, Your Honor.
THE COURT: Total abuse, right?
MR. HEIART: It's an obvious abuse, though, and I apologize --
THE COURT: How do you believe it's obvious abuse? They got a plan --
MR. HEIART: They shielded an entity -- Edison -- a private developer from eminent domain. If they wanted those properties they could have taken them. The reason they didn't --
THE COURT: But wait -- stop. All you're doing is repeating your proposition. You're here after discovery, summary judgment motions on both sides. I have a plan before me that shows this building that you're claiming they only stuck in there in the first place so they could effectuate a land swap. Actually, you don't disagree, and the plans, themselves, it shows it being a part of this new neighborhood of having walkways, and pedestrian walkways, and access being a part of -- of taking that arena, and connecting it down to the train station, okay? So, when you say, oh, it's obvious, no what's obvious is this property is -- is been incorporated

into a redevelopment of an entire area.
MR. HEIART: But the redevelopment agreement -- we have that in here -- clearly says what -- why this development -- why our property is included in the redevelopment plan.
THE COURT: No, it doesn't say why, it says what's going to happen, but it doesn't say why. And -- and if you've chosen not to, you know, take any deposition. You didn't depose anybody from Edison. You didn't get -- did you get Edison's file, and -- and do a time line of, you know, when the swap was proposed, when the first -- you know, when the city first figured out here's the land we're going to need, and here's how we're going to have to do it, et cetera, et cetera. I don't have any of that before me. I have before me, today, the same exact thing that you walked in here the first day with.
MR. HEIART: You have the testimony before the planning board from Edison's own agent, where he says, we're willing to give you all this property. We're just -- we just want to develop that property over there.
THE COURT: What are you talking about? In your brief that you filed in this case, please tell me where you reference that?

MR. HEIART: If you would just give me a moment, Your Honor?

(Pause)

MR. HEIART: If you look at Page 3 of our original brief, Your Honor?

THE COURT: I'm talking -- the only briefs I have, counselor, which you filed in connection with this motion, is that --

MR. HEIART: That's what I'm -- I'm saying, our original -- our brief in support of plaintiff's motion for summary judgment.

THE COURT: Right.

MR. HEIART: Page 3.

THE COURT: Page 3.

MR. HEIART: At the bottom, you will see at the June 9th, 2004 planning board meeting, Douglas Serini (phonetic) of Edison Properties, gave testimony as follows: "Edison will agree to exchange property it owns within the area, which are already cleared, and clean for development by others, providing Edison receives equal area within the project to pursue Edison's own development plan."

THE COURT: But it says within the project area. It was -- within the project. In other words, he's saying in the project already -- this implies to

me there's already a project. We've already got this plan out there. There's an arena here. There's a train station down here. We've got to get the people from one to the next. We're going to have a couple of retail places here. In other words -- so, he's saying, okay, look I own these over here, and I'll give you those if I can have some over here.

MR. HEIART: Right. And, so, he's saying include the Edison -- the Iron Mountain building in the property -- in the project, or in the property, because this is before the plan had adopted, Your Honor, and we'll be able to develop that. This occurred prior --

THE COURT: Where do you get from -- how do I get, on this record, from this quote that you just read, "Edison will agree to exchange properties it owns within the area, which are already cleared, and clean for development by others, provided Edison receives equal area within the project" -- I've added the emphasis within the project -- "to pursue Edison's own development plans." How do you get from -- how do I get, as a Judge, were you standing here telling me no facts in dispute that that comment is made, that at the time it's made there's a plan? It does not include the Iron Mountain property. After this statement is made, then the Iron Mountain property is stuck into the

project.
MR. HEIART: Because in the same hearing if you go to Page 5 of -- of our -- of that same brief, Your Honor, Brandon Morton then goes into his testimony that this is a great old warehouse that I believe should stay. It's an optional site.
THE COURT: So, that means it was already there before Edison said, but I need other property in the -- in the project area.
MR. HEIART: No. This testimony was heard first, saying, this is an optional site, and then you have -- all of a sudden have --
THE COURT: What testimony -- you're saying was --
MR. HEIART: Page 5, Mr. Morton's testimony at the bottom of the page, and then there's a --
THE COURT: Okay. Counsel, hold on. That was on August 16th, 2004, right?
MR. HEIART: Correct.
THE COURT: That -- that -- that's after.
MR. HEIART: That was after the June 9th hearing, correct.
THE COURT: Right. So -- but here's my question. The theory that you have come to this court with is what catches me as a judge. Someone goes,

whoa, whoa, wait a minute. What's going on here. But where's the main event? Where are the facts? That's what concerns me. The only fact you come -- is, yes, there was a land swap, okay? But the land swap, in and of itself, just standing by itself, how -- that's all you have. That's what you had the first day you came in, that's what you have now. It's just a land swap.
MR. HEIART: But in proper land swap you --
THE COURT: Why?
MR. HEIART: -- serve a private --
THE COURT: Where's the -- where is --
MR. HEIART: -- because it -- where's the public purpose? This is not for the arena.
THE COURT: Where's your evidence of that?
MR. HEIART: But where -- they're the ones who have the burden, when they're going to take a property of showing that it's for a public purpose. We don't have that burden, Your Honor. The city, and the housing authority carried the burden to show that when you're going to take property, and include it in a -- in a redevelopment plan, that it meets a public purpose. That's their burden to prove, not ours. They have to live up to that burden.
THE COURT: They just did. They came into court. They said, here, Judge, here's the arena.

Here's the pedestrian passageway. Here's all the testimony we took that said the best use for this neighborhood. We want to get rid of this industrial stuff. We want it to be residential, commercial, retail, sports, and entertainment.

MR. HEIART: But, the fact is, and the evidence in the record show, the redevelopment agreement, and the testimony shows the only reason they're taking this is to give it over to Edison.

THE COURT: No, but here's my problem.

MR. HEIART: They're not going to --

THE COURT: Well, now, stop. Stop. Just repeating it doesn't help the Court. Where is that evidence. Where is the evidence that that's, quote, the only reason they've taken the Iron Mountain building?

MR. HEIART: There's no other evidence before the Court from the city, or the housing authority that says it's not. They've agreed. They've stipulated. The -- the reason they're taking the building is because --

THE COURT: No, no, no. And here's -- here's what this comes down to. When I said before that there are times when it -- it strikes me as nefarious, and other times when it strikes as innocent, it's nefarious

if there was a project footprint drawn, said here's what we're going to do, we're going to build an arena. It's going to be X size. We're going to do this around the surrounding neighborhood, and then Edison came in, and said, I'll tell you what, you want my property in that arena area, I'll give you my property, but draw the project footprint bigger than you've already drawn it, because I want to -- I'll -- I'll give you my property if I can develop that piece of property over there. That's when it gets nefarious. It's a chronological issue, and you haven't come to court with -- other than that, it's really just, you know, here's a project area. I draw a big circle around a certain neighborhood. A person owns a piece of property, and says, I'll tell you what, I'll give it to you for free as long as you give me the other piece over here. That's not nefarious. That's -- that's legitimate.

MR. HEIART: I believe it is nefarious, Your Honor, with all due respect, because they're saying --

THE COURT: Well, no, once they've decided -- but you see -- if the decision -- if the decision has been made, here are the boundaries of the area that has to be redeveloped. And here are the uses that -- that would be permitted in the redeveloped area, and here's what we want to see happen in the redeveloped area.

That is classic. The city can go out, and condemn each, and every property in that area.
MR. HEIART: And they should have condemned -- condemned Edison's property.
THE COURT: Stop right there. Do you agree that they could have condemned your property directly?
MR. HEIART: Only if it was a public purpose, Your Honor.
THE COURT: Do you agree that if when drew that circle, in that redevelopment neighborhood, that they could have come directly to you, and condemned your property?
MR. HEIART: No.
THE COURT: Why not?
MR. HEIART: Only if it served a public purpose.
THE COURT: There public purpose --
MR. HEIART: Then why did Edison place -- sure --
THE COURT: Your carting and horsing it here. Here's the redevelopment area. They draw it. They say, we want a sports arena. We want pedestrian traffic. We want some retail space. We're going to revitalize downtown Newark. Here's the redevelopment area, and when they draw the circle your property is in

it.
MR. HEIART: Right. Our property.
THE COURT: Okay. You have stipulated that an arena is a public purpose.
MR. HEIART: This is not being taken for an arena, Your Honor.
THE COURT: Counsel, do not argue with me. I'm asking you, have you stipulated an arena is a public purpose?
MR. HEIART: Yes. The case law supports that.
THE COURT: Okay. Leave Edison out of this mix. If the city came knocking on your door two years ago, and said, hi, you're in the redevelopment area. We're taking your property, and Edison wasn't in this mix, you have a challenge, or no?
MR. HEIART: Yes.
THE COURT: Why?
MR. HEIART: The challenge -- well, assuming -- pushing the time barred issue aside --
THE COURT: I just said, leave Edison out of this. They drew a circle.
MR. HEIART: Right. Right. Right. And I'm arguing under the local redevelopment housing law, if we were timely, Your Honor, we would have been able to

challenge it as not being blighted. Two, that it doesn't serve a public purpose, because it's not --

THE COURT: Why is not serve a public purpose?

MR. HEIART: Because the arena is built, Your Honor, and this building is -- is not -- is not on the arena site. The arena is up already. This is on Edison Place, further back from the arena, and it's being taken to give to a private developer.

THE COURT: No, no, but it's -- well, you say taken to give to a private developer. That's my question. If they came knocked on your door, and said, okay, need the property. We have a whole arena development going on here, you're saying you can still challenge it as not being for a public purpose?

MR. HEIART: It's not for the -- the footprint of the building is not where the arena is being built --

THE COURT: Okay. So, your argument is they -- they can take as much property as they need to build an arena, but the pertinent use is --

MR. HEIART: That's a public purpose. Correct.

THE COURT: Hold on. Stop. Don't correct until you know what I'm asking. I could asking, but,

you know, we don't like record storage places anymore, and you can go, okay? You say correct, your case is over. The pertinent uses to an arena. So, now we need to get the people from the arena downtown to the train, and we need them to feel safe when they do that. So, we need some retail establishments open past 4:30, and we need some restaurants open, and we need some other entertainment, maybe a bar here, or a late night snack place there, and so, we have to do a whole neighborhood, and they draw the line, and your property is included in the neighborhood. Do you agree, or disagree, that your public use argument -- you don't have a public use argument, it is --

MR. HEIART: I would disagree, Your Honor, on this whole basis.

THE COURT: All right. So, your -- let me -- hold -- your position is, you can build the arena in the middle of the ghetto, and not worry about how people are going to get there, how you're going to attract them to it, how you're going to get them in, and out of it. You just build it on the footprint of the arena, and, at that point, that -- that's the only public purpose. Anything other than that is not public purpose.

MR. HEIART: No, I would -- I would agree

that building roads, you know, church, a school, things like that, that would all be a public purpose. But if you're going to take a private property, and they would have to do it under the local redevelopment housing law, keeping Edison out for the moment, they would either have to go under A-3, or 5. Five saying blight criteria. A-3 saying it's necessary for the effective redevelopment of the overall project, and we would argue that, under Glenton, you need substantial credible evidence to meet either three or five, and we would challenge it on that criteria saying, it should have never been included in the beginning.

THE COURT: Well, assume your time barred. So, in other words -- I mean, I realize -- see, and I -- and I think part of the problem is, when I ruled that you were time barred, I don't think everybody was putting all their cards on the table. That's your argument. Your argument is, basically, you shouldn't have been included in the plan.

MR. HEIART: We shouldn't have been designated under the local redevelopment housing law one, and then, subsequently, two, based on that designation, we shouldn't be included in the plan, because we're listed as an optional site in the plan.

So, it's a twofold argument. You time barred

the first one --

THE COURT: Well, where is anybody from -- I'm going to be candid. I have a deja vu every time you come. You just file the same brief. There's never any new facts. There's never any deposition testimony. There's never any -- you've never -- as I see it, you've never argued that there's no public purpose here.

MR. HEIART: I believe that was in our brief, Your Honor.

THE COURT: Show me where that is? You've argued about the land swap issue, and how the argument about advancing a private issue, as I see it, has always been argued in reference to Edison, but I don't see anywhere where you've ever argued that your property, itself, if it is dedicated to the uses that are set forth in the redevelopment plan, that those uses are not public uses.

MR. HEIART: I would argue that Section 3, on Page 12 of our brief encompasses that argument, Your Honor.

THE COURT: Whenever tells me an argument is, quote, encompassed, that usually tells me it's not actually there.

MR. HEIART: I -- I say right here, at the

bottom of Page 12, "a plan which primarily benefits a private developer" --

THE COURT: Okay. I'm not talking about Edison. I asked you, you -- I've never seen anyone -- anywhere here where you've made the argument, quite apart from what Edison is going to do with the property, that you couldn't have been included because there's no way that parcel of property is being taken for a public purpose.

MR. HEIART: They'd have to show what that public purpose is, Your Honor.

THE COURT: Where do you argue that?

MR. HEIART: If you go onto to Page 13, we do argue that. It's the top line. "The plan must be necessary to accomplish a public purpose."

THE COURT: Right. Right. I've got canned argument here. Where --

MR. HEIART: City's current action --

THE COURT: And then all of your arguments are tied to, the actions are driven by Edison's interests, and, therefore, they don't serve a public purpose. That's -- what I'm saying to you is, I don't see anywhere, where -- first you say an arena is a public purpose. No question. Hands down. You don't even address that.

Today you're arguing the rest of it, the restaurants, the pedestrian walkways, those aren't necessarily public purposes.

MR. HEIART: We're saying, if they wanted --

THE COURT: Are they public purposes?

MR. HEIART: They can be --

THE COURT: Are they? In this plan, are they public purposes?

MR. HEIART: Again, we have to go back to the time barred argument, Your Honor.

THE COURT: Are they -- leave out the time part. Are the pedestrian walkways, and the restaurants, and the entertainment places, are they public purposes under the law?

MR. HEIART: Not -- not unless they comply with the local redevelopment housing law. No --

THE COURT: Are they public purposes, counsel?

MR. HEIART: -- they're not a public purpose. Not unless they comply with the statute --

THE COURT: Yes or no? I said no -- no conditions attached. Yes or no?

MR. HEIART: Your Honor, with all due respect, that's unfair. I mean, it's --

THE COURT: I get to ask unfair questions,

I'm the judge. Okay.
MR. HEIART: It's -- it serves a public purpose if it complies with the local redevelopment housing law.
THE COURT: Okay. Can you answer the question with a yes or a no?
MR. HEIART: No, I can't.
THE COURT: All right. Let me hear from you, counsel. Have you understood them to say, in the course of these arguments, that these purposes are not -- I always have understood the argument that it's aid at benefitting Edison.
MR. WILSON: That's the argument.
THE COURT: All right. Have you understood the argument to go further than that, and to say that it's aimed at benefitting Edison, and there's no public purpose to doing that?
MR. WILSON: No, their argument is, it's aimed at benefitting Edison, and, therefore, it's not a public purpose. It doesn't say that it's not a public --
THE COURT: I must tell you, counsel, that's what I've always understood your argument to be. I -- I've always understood your argument to be, it's aimed at benefitting Edison, therefore, it can't possibly

serve a public purpose, not that the inclusion of the property in the plan, otherwise, did not serve a public purpose.
MR. HEIART: That was our initial argument at the time you denied our argument -- yes, that was our initial argument. Once that was time barred, Your Honor, our other argument is exactly how you paraphrased it, that they -- it doesn't -- just because -- when Edison comes into here, it still doesn't alleviated the need to show a public purpose. Giving land to a private developer, and shielding them from condemnation, it's not a public purpose.
THE COURT: Well, you -- you're defining the purpose as protecting Edison. He's defining the purpose as -- am I right? We're going to implement the redevelopment plan?
MR. WILSON: Of course, the public purpose argument is long since gone, and -- and plaintiff keeps coming back to that, because they have nothing to support their claim. Their claim here today should be that the plan is arbitrary, and capricious. That's the only door that you gave them to go through. They refused to go through that, because they have nothing to support that. They, in turn, rather argue arguments that you've already ruled are time barred, and now they

-- they come into today, and say, oh, Judge, you're wrong, we want to argue these anyway, and that's all they've done for the past hour is argue the same things that they argued before. There's absolutely nothing new before this Court. It's their burden -- it's their burden to prove the arbitrary, and capriciousness, and they've not done that, Judge.

THE COURT: Okay. I agree with the city. It is the plaintiff's burden to prove that the city acted arbitrarily, and capricious -- capriciously in including this parcel of property within the redevelopment plan. Plaintiff hasn't done that. The plaintiff hasn't come forward with anything other than an argument regarding -- an argument that, basically, says, it can't possibly serve a public purpose because its true purpose was to effectuate a land swap with Edison Properties.

When this case first came to the Court I provided the plaintiff with an opportunity to conduct discovery. As a matter of fact, every time there were motions filed after substitutions of attorneys by the defendant, where the Court somewhat incredulously asked, when it realized it was the same motion, why did you file it without giving over the discovery?

The plaintiff has conducted, or been allowed

to conduct whatever discovery the plaintiff wishes to conduct. That discovery has been completed, and I don't see anything in the plaintiff's moving papers, before me today, that would establish that the city exceeded the boundaries -- permissible boundaries in developing the plan allowed under the statute.

Now, let me make clear the following: The plaintiff's argument here today that the inclusion of what I call the Iron Mountain property, within the area of the redevelopment plan, seems to me, as I listen to it more carefully, the argument is nothing more, nothing less than an argument that I've already ruled is time barred. To the extent that the -- the plaintiff's argument is the condemnation, or the inclusion of the area in the redevelopment plan doesn't serve a public purpose. The only argument the plaintiff has made, in that regard, is an argument regarding whether or not Edison Properties benefits by virtue of the city's actions. That's not what's meant by the question, or that's not a way to answer the question, does the condemnation, or did the redevelopment area, and the associated condemnations fulfill a public purpose.

The question when one asks public purpose questions are things such as the questions were asked

here today. Is an arena a public purpose? Are the pedestrian walkways that get people from the arena down to the train station, are they public purpose. Is it a public purpose to say that the arena is not going to work unless there's some retail establishments around it, and some restaurants, and some things that will stay open past five o'clock?

That debate is not a debate, or an argument that the plaintiff has made in these papers that have been submitted in the motion for summary judgment, or, quite frankly, that I've seen anywhere before. Their argument has always been that this property was included in the redevelopment area, and everything else was sort of a sham around it to make it look like it had been legitimate, but it had really only been done to benefit Edison Properties.

The difficulty is, the plaintiff has not come forward with proof of that. The only thing the plaintiff has come forward with proof of is that Edison Properties has a redevelopment agreement with the city. That redevelopment agreement involved some land swap. Edison owned the property that -- that the footprint of the arena was to be built on. They swapped that property for some other property in a redevelopment area. In -- already in the -- they swapped that

property, for other property in the redevelopment area. To the extent that the plaintiff's claim here is that the -- that the -- it doesn't serve a public purpose because Iron Mountain's property was included in the redevelopment area strictly, and solely for the purpose of facilitating this land swap. Plaintiff, simply, hasn't come forward with any evidence of that.

There's been no time line presented. There's been no chronology of events associated with the condemnation presented. There's been no testimony of anyone presented. The only thing that's been presented is it was a redevelopment plan, or redevelopment area defined. There was a land swap involved in it, and that's all I have.

Now, from that, I cannot assume or infer arbitrary, or capricious activity. For that reason, the plaintiff's motion for summary judgment will be denied.

Now, the city's motion for summary judgment, everybody agrees that discovery is completed here, yes?

MR. WILSON: Yes, Judge.

MR. HEIART: Yes, Your Honor.

THE COURT: Yes. Okay. It seems to me, then, the city's motion must be granted. If there's nothing else to be found, or to be presented to the

Court then what's here is there's a redevelopment area. There's -- it's drawn not just with reference to the main use, the arena, which both parties, I want to note for the record, the plaintiff agrees, an arena is a public purpose, and that land can be condemned for purposes of constructing an arena, and there's no evidence that including what I call a pertinent use is. I don't mean that in the zoning sense of the word. I mean it in a practical sense of the word. Pedestrian walkways, you know, elimination of vacant buildings, development of other sorts of -- I believe the plan refers to mixed residential, and commercial, if I've got that right? Did I get that right? Yes? Uses in that area, in the Court's view, there's been no claim that those uses are not public uses, and so, there being no evidence that there was anything -- I think I used the word nefarious before -- that there was anything nefarious, unlawful, or not permitted under the statutes in connection with the land swap with Edison, the plaintiff having come forward with no evidence to support what is, basically, a claim, or an argument, the Court's going to grant the city's motion for summary judgment.

We'll send those orders out in the next couple of days, all right? Thank you,

counsel.

* * * * * *

CERTIFICATION

I, DEBRA L. STOREY, the assigned transcriber, do hereby certify the foregoing transcript of proceedings at the Essex County Superior Court, on July 16, 2007, on Tape Number 1, index 5 to 3843, is prepared in full compliance with the current Transcript Format for Judicial Proceedings, and is a true and accurate compressed transcript to the best of my knowledge and ability.

Dated: July 25, 2007

DEBRA L. STOREY, AD/T 494
KLJ TRANSCRIPTION SERVICE