

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - UNION COUNTY
DOCKET NO.: UNN-L-407-07;
UNN-L-403-07;
UNN-L-402-07;
UNN-L-421-07
CIVIL ACTION

2004 REALTY ASSOCIATES, LLC

Plaintiffs,

-v-

THE TOWNSHIP OF UNION, THE
TOWNSHIP COMMITTEE OF UNION and
THE PLANNING BOARD OF THE
TOWNSHIP OF UNION,

Defendants.

C.B. MANAGEMENT, LLC, C.B.
PROPERTIES, INC., ET ALS

Plaintiffs,

-v-

THE TOWNSHIP OF UNION, THE
TOWNSHIP COMMITTEE OF UNION and
THE PLANNING BOARD OF THE
TOWNSHIP OF UNION,

Defendants.

FRANCES AND JOHN METTA, ET ALS

Plaintiffs,

-v-

THE TOWNSHIP OF UNION, THE
TOWNSHIP COMMITTEE OF UNION and
THE PLANNING BOARD OF THE
TOWNSHIP OF UNION,

Defendants.

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2 GAISER'S EUROPEAN STYLE
3 PROVISIONS, INC.,
4 Plaintiffs,

5 -v-

6 THE TOWNSHIP OF UNION, THE
7 TOWNSHIP COMMITTEE OF UNION and
8 THE PLANNING BOARD OF THE
9 TOWNSHIP OF UNION,
10 Defendants.

11 Place: Union County Courthouse
12 2 Broad Street
13 Elizabeth, New Jersey 07207

14 Date: October 16, 2008

15 B E F O R E:

16 THE HONORABLE WALTER R. BARISONEK, A.J.S.C.

17 TRANSCRIPT ORDERED BY:

18 JAMES TURTELTAUB, ESQ. (Carlin & Ward)

19 A P P E A R A N C E S:

20 PETER DICKSON, ESQ. (Potter & Dickson)
21 Attorney for 2004 Realty Assoc.

22 JAMES TURTELTAUB, ESQ. AND WILLIAM WARD, ESQ.
23 (Carlin & Ward)
24 Attorneys for C.B. Management, et al, Metta, Gaiser

25 WILLIAM NORTHGRAVE, ESQ. (McManimon & Scotland)
Attorney for Defendants

Andrea M. Sanniola, C.C.R.
2 Broad Street
Union County Courthouse
Elizabeth, NJ 07207

1 THE COURT: This is what I call a consolidated
2 Union redevelopment case. This is a series of
3 Plaintiffs institute suit under multiple docket numbers
4 that were all consolidated for trial purposes. So we
5 are dealing with L-407-07403-07, 402-07 t 421-07. The
6 purpose of today is for me to put my opinion on the
7 record, that we had oral argument, I guess, about a
8 month ago, it was?

9 MR. NORTHGRAVE: September 11th.

10 THE COURT: September 11th. So today is my
11 decision.

12 There are multiple main issues before this
13 Court raised by the Plaintiffs, who challenged the
14 designation of the areas around the intersection of
15 Morris and Stuyvesant Avenues in Union as an area in
16 need of redevelopment under the Local Redevelopment and
17 Housing Law, known as LRHL, codified under N.J.S.A.
18 40A:12A-1 to 40A:12A-22. The first issue is whether the
19 Planning Board of Union applied the proper standards
20 under the LRHL in determining that the necessary
21 criteria were established per statute to find that the
22 designated area was an area in need of redevelopment. A
23 second issue is whether, throughout the course of the
24 proceedings before the Planning Board, whether conflicts
25 of interest that arose, which became fatal to the

1 overall validity of the proceedings.

2 On April 25th, 2006, the Union Township
3 Committee adopted Resolution 2006-125, asking the
4 Planning Board to conduct an investigation into whether
5 the areas surrounding the Morris and Stuyvesant
6 intersection qualified as an area in need of
7 redevelopment.

8 On April 27th, 2006, the Planning Board
9 adopted a Resolution authorizing T&M Associates to
10 prepare a study as to whether this area qualified as an
11 area in need of redevelopment. T&M issued a report
12 dated June 30th, 2006, as to its preliminary findings.
13 Acting at the behest of the Township's Special
14 Redevelopment Council, T&M was advised not to distribute
15 the study to the Township or the Planning Board.

16 On August 24th, 2006, the Planning Board
17 authorized Metro Company to prepare its own study of the
18 area. Stuart Portney presented the Metro Report to the
19 Planning Board at the public hearing on November 30th,
20 2006. Members of the public at this hearing challenged
21 the findings in the Metro Report that the area was in
22 need of redevelopment. A second hearing was held on
23 December 14th, 2006, and a third on December 19th, 2006.
24 The Planning Board, after hearing the testimony was
25 concluded, adopted and -- concluded and adopted the

1 recommendations of Metro report that the area was in
2 need of redevelopment.

3 There is a constitutional basis for
4 redevelopment found in Article 8, Subsection 3,
5 Paragraph 1 of the New Jersey Constitution which
6 authorizes the "clearance, re-planning, development or
7 redevelopment of blighted areas." The section further
8 provides that "such redevelopment shall be a public
9 purpose and a public use for which private property may
10 be taken or acquired. The powers granted to the
11 municipal governing bodies, in this case Mayor and
12 Council, as related to the redevelopment are found in
13 N.J.S.A. 40A:12A-4(a). A municipal governing body,
14 under that statute has the power to:

15 One, cause a preliminary investigation to be
16 made as to whether an area is in need of redevelopment;

17 Two, determine that an area is in need of
18 redevelopment;

19 Three, or that an area is in need of
20 rehabilitation; and

21 Four, adopt a redevelopment plan.

22 The role of the planning boards in
23 redevelopment is established under N.J.S.A. 40A:12A4(b),
24 which gives planning boards the power to:

25 One, conduct, but only when authorized by the

1 governing body, a preliminary investigation and hearing
2 to make a recommendation as to whether an area is in
3 need of redevelopment; and

4 Two, make recommendations concerning a
5 redevelopment plan pursuant to N.J.S.A. 40A:12A-7; and

6 Three, make recommendations concerning the
7 determination of an area in need of redevelopment -- of
8 rehabilitation, rather, pursuant to N.J.S.A. 40A:12A-14.

9 The Planning Board must give public notice and
10 conduct a public hearing before the Planning Board may
11 determine that an area is in need of redevelopment.

12 Such notice, under N.J.S.A. 40A:12A-6(b)(2), shall
13 "specify a date for and give notice of a hearing for the
14 purpose of hearing persons who are interested in or
15 would be affected by a determination that the delineated
16 area is a redevelopment area." The board (and later the
17 governing body) must find that the area meets at least
18 one criteria found in N.J.S.A. 40A:12A-5 in order to
19 find any area in need of redevelopment.

20 It is undisputed in this case, that the
21 properties at issue were classified by Metro Company as
22 in need of redevelopment under Sections (c), (d) and (e)
23 of N.J.S.A. 40A:12 A-5, which states as follows:

24 A delineated area may be determined to be in
25 need of redevelopment if, after investigation, notice

1 and hearing, as provided under Section 6 of N.J.S.A.
2 40A:12A-6, the governing body of the municipality by
3 resolution concludes that within the delineated area any
4 of the following conditions is found:

5 (C) Land that is owned by the municipality,
6 the County, a local housing authority, redevelopment
7 agency or redevelopment entity, or unimproved vacant
8 land that has remained so for a period of 10 years prior
9 to adoption of the resolution, and that by reason of its
10 location, remoteness, lack of means of access to
11 developed sections or portions of the municipality, or
12 topography, or nature of the soil, is not likely to be
13 developed through the instrumentality of private
14 capital.

15 Section (D), areas with buildings or
16 improvements which, by reason of dilapidation,
17 obsolescence, overcrowding, faulty arrangement or
18 design, lack of ventilation, light and sanitary
19 facilities, excessive land coverage, deleterious land
20 use or obsolete layout, or any combination of these or
21 other factors, are detrimental to the safety, health,
22 morals, or welfare of the community.

23 (E) A growing lack or total lack of property
24 utilization of areas caused by the condition of title,
25 diverse ownership of the real property therein or other

1 conditions, resulting in a stagnant or not fully
2 productive condition of land potentially useful and
3 valuable for contributing to and serving the public
4 health, safety and welfare.

5 The issues will be divided and discussed in
6 two parts. The first part is whether the Planning Board
7 properly instructed as a matter of law, and whether they
8 applied the proper standards of criteria in determining
9 the area was an area in need of redevelopment. The
10 second part is, assuming they did properly follow the
11 law, did the proofs amount to substantial evidence to
12 support the rehab -- redevelopment designation.

13 The first part can best be addressed through a
14 review of the transcript testimony of the expert who
15 wrote the Metro Report. Mr. Portney was cross-examined
16 as to his findings as of the December 14th, 2006 hearing.
17 During the course of this examination, the following
18 exchange took place among Mr. Portney, the Planner, Mr.
19 Potter, attorney for the objectors, and Mr. McCarthy,
20 attorney for the Planning Board. See the transcript of
21 December 14th, 2006, Page 51, line 13 through Page 53,
22 line 8.

23 Mr. Potter: Is there any difference between
24 an, "Area in Need of Redevelopment" and "Blighted Area"
25 as used in, I think it is, Article 8, Section 3,

1 Paragraph 1 of the New Jersey Constitution?

2 Mr. Portney: Right now, under the State Law,
3 the term "blighted" doesn't exist. The law was changed
4 back in the early 1990's. It is now an "Area in Need of
5 Redevelopment".

6 Mr. Potter: Are you quite sure of that? The
7 term no longer exists?

8 Mr. Portney: The term in the statute that we
9 are bound to investigate, it doesn't exist. That is why
10 we looked to determine whether or not the statutory
11 criteria for an Area in Need of Redevelopment or an Area
12 in Need of Rehabilitation have been met.

13 We haven't been asked, nor does the statute
14 specifically identify "Blighted Area".

15 Mr. Potter: I wonder if we might have a
16 ruling by Counsel.

17 Mr. Chairman, the term "Area in Need of
18 Redevelopment" or "Redevelopment Area" means the same
19 thing statutorily and constitutionally as "Blighted
20 Area" is used in the Constitution of New Jersey.

21 I just want to be clear on that because in
22 this entire study, I did not see the words "Blighted
23 Area" once and I am very concerned that this Committee
24 understands that when you are talking about "Area in
25 Need of Redevelopment" you are talking about are these

1 properties sources of urban blight?

2 Mr. McCarthy: You have your own
3 interpretation of the law, sir. It is not the correct
4 one, but you could put your own interpretation of the
5 law on the record.

6 Mr. Potter: If you will permit me, I will
7 pull out the actual section of the statute. I don't
8 mean to be argumentative, but I think it is a
9 fundamental point.

10 Redevelopment Area equals Blighted Area and,
11 perhaps, it would be useful if I were to pull that out.

12 Mr. McCarthy: Well, actually, it wouldn't be
13 useful. The statute is what it is, sir, and with you
14 arguing about it tonight will not change the language of
15 it.

16 The township's Special Redevelopment Counsel
17 offered the following statement after Counsel for the
18 Planning Board and Counsel for the Plaintiffs debated
19 the merits of the term "blight". This is Ms. Credido:

20 Ms. Credido: I would like to object. I
21 understand that the witness has given us a great deal of
22 background and his personal experience with the statutes
23 governing redevelopment in the State as they have
24 evolved, but for the clarity of the record, especially
25 considering that the blighted areas haven't been

1 effective for the last fourteen years, I would ask that
2 perhaps you address your testimony or your conclusions
3 and your suggestions this evening, in light of the
4 statute that is currently effective, to the local
5 redevelopment housing law.

6 I think that would assist the Board in more
7 accurately being able to access your statements and your
8 conclusions and recommendations. Transcript of December
9 14th, 2006, Page 111, line three through 17.

10 There is an issue as to which entity she is
11 representing when she objects. Is it the Board, the
12 governing body or the expert? The advice offered by
13 Special Redevelopment Counsel, in any event, I find, was
14 misleading. In Gallenthin Realty Development, Inc. -v-
15 the Borough of Paulsboro, 191 New Jersey 344 (2007),
16 which was decided after this Planning Board hearing, the
17 New Jersey Supreme Court addressed whether blight, in a
18 constitutional sense, must be found for an area to be
19 declared in need of redevelopment under the LRHL.
20 Property, as noted above, under the LRHL can only be
21 designated in need of redevelopment if it fits into one
22 of the eight criteria enumerated under 40A:12A-5 or if
23 there is evidence which shows that the property is
24 necessary for effective redevelopment of other property
25 which satisfies that criteria. Furthermore, the LRHL

1 specifically states that "an area in need of
2 redevelopment" means "blighted area" which, as
3 previously stated, is the standard under Article 8,
4 Section 3 of the New Jersey Constitution. Specifically,
5 the statute says, "An area determined to be in need of
6 redevelopment pursuant to this section shall be deemed
7 to be a "blighted area" for the purpose of Article 8,
8 Section 3, Paragraph 1 of the Constitution." See
9 N.J.S.A. 40A:12A-6(c). The legislative intent to make
10 the term "an area in need of redevelopment" synonymous
11 with the term "blight" is clear, I find, from the plain
12 reading of the statute.

13 The Court in Gallenthin specifically dealt
14 with 40A:12A-5(e), which states that a property may be
15 found in need of redevelopment if it exhibits "a growing
16 lack or total lack of proper utilization of areas caused
17 by the condition of the title, diverse ownership of the
18 real property therein or other conditions, resulting in
19 a stagnant or not fully productive condition of land
20 potentially useful and valuable for contributing to and
21 serving the public health, safety and welfare." The
22 Gallenthin Court overturned the designation of
23 Gallenthin's property as an area in need of
24 redevelopment. The Court, in rendering its decision,
25 examined the requirements of Subsection (e) in light of

1 the constitutional requirements of Article 8, Section 3,
2 Paragraph 1 of the New Jersey Constitution. This
3 section of the Constitution reads as follows:

4 Blighted areas clearance, replanning,
5 development or redevelopment; tax exemption or
6 improvements; use, ownership, management and control of
7 improvements,

8 1. The clearance, replanning, development or
9 redevelopment of blighted areas shall be a public
10 purpose and public use, for which private property may
11 be taken or acquired. Municipal, public or private
12 corporations may be authorized by law to undertake such
13 clearance, replanning and development or redevelopment;
14 and improvements made for these purposes and uses, or
15 for any of them, may be exempted from taxation, in whole
16 or in part, for a limited period of time during which
17 the profits of and dividends payable by any private
18 corporation enjoying such tax exemption shall be limited
19 by law. The conditions of use, ownership, management
20 and control of such improvements shall be regulated by
21 law.

22 The Court in Gallenthin stated:

23 Further, the Blighted Areas Clause authorizes
24 governmental entities to exercise eminent domain power
25 in respect of in "blighted areas". The provision grants

1 authority to those entities only to the extent allowed
2 by our State Constitution. The clause operates as both
3 a grant and limit on the State's redevelopment
4 authority. The contention that the clause cannot be the
5 basis for invalidating municipal action is, thus,
6 incorrect. See Gallenthin at Page 359.

7 The Court concluded in examining the history
8 of the term "blight" that, "although the meaning of
9 "blight" has evolved, the term retains its essential
10 characteristic; deterioration or stagnation that
11 negatively affects surrounding properties." See
12 Gallenthin at 363.

13 The Court expressed concern over the slippery
14 slope interpretation of the Borough of Paulsboro, which
15 found Gallenthin's property in need of redevelopment
16 because it was not fully productive. The Court noted
17 that such a broad interpretation would qualify most
18 property in the State as eligible for redevelopment.
19 See Page 365. The Court also opined that in order to
20 qualify under Subsection (e), not only did the property
21 have to be stagnant and unproductive because of issues
22 of title, diversity of ownership, or other similar
23 conditions, but it also had to inhibit "the 'proper
24 development' of surrounding properties because it had
25 reached a state of deterioration or stagnation that has

1 a decadent effect on surrounding property." That is
2 also Page 364 of Gallenthin. The Court recognized in
3 reversing the Appellate Division that "although
4 community redevelopment is an important municipal power,
5 the authority is not unfettered. Our Constitution
6 restricts government redevelopment to 'blighted' areas."
7 Page 373 of Gallenthin.

8 A recent unpublished Appellate Division case,
9 City of Long Branch -v- Anzalone, et al, Docket
10 A-0067-06T2, which was decided on August 7th, 2008,
11 citing Gallenthin, reiterated that, and I quote, "it
12 is... the Blighted Areas Clause that controls when
13 redevelopment is the sole public purpose for a taking."
14 Anzalone at Page 16. The Appellate Division noted that
15 "Gallenthin explained that the ordinary meaning of
16 'blight' did not extend to an area which the only
17 negative -- in which the only negative condition was
18 suboptimal land use. Instead, the word 'blight' and
19 thus the Blighted Areas Clause, required the area to be
20 characterized by physical or social deterioration that
21 threatened to become intractable." That is
22 Gallenthin -- that is not -- Anzalone case at Page 16.
23 The Appellate Division also reiterated, and again this
24 is a quote, "the Legislature relied on the Blighted
25 Areas Clause as the authority for all of the statutes in

1 the prior acts that it would later incorporate in the
2 LRHL, including provisions that were reenacted with only
3 'cosmetic' changes under 40A:12A-5(a) through (e).
4 There is nothing in Gallenthin or in the legislative
5 history to suggest that the provenance of those five
6 provisions was anything other than parallel. While they
7 may not be equally evocative of decay they, nonetheless,
8 share the essential characteristic of describing
9 conditions of deterioration or reasons for deterioration
10 by which an area can reach a level of degeneration that
11 threatens to degrade other areas and that it is unlikely
12 to be remedied by private investment. We believe the
13 Court, and there they are referring to the Supreme
14 Court, would have used the same analysis and apply the
15 Blighted Area Clause in the same manner if the
16 municipality had relied on either sections (a), (b),
17 (c), or (d) instead of (e)."

18 Thus, for an area to be determined in need of
19 redevelopment the requirements, I find, of the Blighted
20 Area Clause must be satisfied.

21 According to the Appellate Division, "under
22 Gallenthin, the absence of substantial evidence of
23 blight invalidates all of the City's findings under
24 40A:12A-5." See Page 18, in Anzalone. This Court will
25 address the substantial evidence later in the opinion.

1 The instructions by Special Redevelopment Counsel to the
2 Board, this Court finds on the issues of whether it
3 needed to find blight was erroneous. Not only were the
4 instructions erroneous, to make matters worse they
5 clearly influenced the Board's decision. Board member
6 O'Hara made the following comments before voting to
7 recommend the area is in need of redevelopment. I'm
8 quoting:

9 "It makes my blood boil when I listen to all
10 the people here talking about blight. I don't know
11 where the blighted areas are; whether it be on
12 Stuyvesant Avenue or Morris Avenue, or any place else.

13 You have to go to some other towns to see
14 blighted areas. I definitely have not seen any area in
15 this business area that should be called "blighted".

16 I know that the business area definitely needs
17 to be spruced up, but I don't think that the Township
18 can be called "blighted".

19 Eminent Domain was one of the big things that
20 was kicked around. I would not support something like
21 that, and the people deserve that. That we don't want
22 Eminent Domain, but when we are talking about blight, I
23 don't see where there is any Blighted Area where we are.

24 The report that we have is an excellent
25 report, and I will be supporting it." Transcript of

1 December 19th, 2006, Page 128, line 17 through Page 129,
2 line 11.

3 These comments were made, which clearly show
4 Mr. O'Hara did not believe that the area was blighted,
5 but, nonetheless, he was supporting the report which
6 alleged the area was in need of redevelopment because
7 the bulk of the Board, I find, was told blight was not
8 an element of the statute. Likewise, Board Member
9 Perkins made the following comments, and again I quote.

10 "We have been charged and we have been
11 recharged with the emotionality of those words "Eminent
12 Domain". It is not our consideration, and it has been
13 stated over, and over again the word "blight" was tossed
14 around. That is a frightening word. It was purposely
15 tossed around, and we all know that word because we have
16 good common sense.

17 I really understand the reluctance of those
18 who have pride in their work, and in their history and
19 in the community, but as the Metro Study states, that
20 can be swayed slightly in that it recognized the
21 potential for some property within a particular study to
22 not, necessarily, meet the redevelopment criteria. That
23 is one Page 42.

24 So after reviewing all the comments and the
25 submissions, I think there is substantial credible

1 evidence to support this area. I will be voting that
2 way." Transcript December 19th, 2006, Page 127, line 19
3 through Page 128, line 12.

4 Similarly, Chairman Gechtman stated the
5 following:

6 "I think we have to look at it," again this is
7 a quote, "and we have to understand what we are doing
8 and we have to go forward. My feeling is that I don't
9 like what I see. I want to see something better and
10 it's just going to be a matter of how we could put this
11 plan together." Transcript December 19th, 2006, Page
12 129, line 23 to Page 30, line 3.

13 It's clear that the Board members relied on
14 the advice of Special Redevelopment Counsel and the
15 Board's own attorney in drawing conclusions as to
16 whether the area in question was blighted and in need of
17 redevelopment. The advice of Counsel stated that blight
18 was not necessary to show any areas in need of
19 redevelopment. As Gallenthin and Anzalone make clear,
20 however, if the standard of blight as enunciated in the
21 State Constitution is not met, redevelopment under the
22 LRHL pursuant to Sections 5(c)-(e) is not proper.

23 There is also a fatal flaw to the Planning
24 Board's adoption of the Metro Report, I find, in the
25 fact that this report failed to utilize the proper

1 statutory criteria for designated area in need of
2 redevelopment.

3 The Study described the ranking system used to
4 determine that this area was in need of redevelopment as
5 follows: Again, this is a quote.

6 The general convention used in the analysis
7 and mapping was to designate parcels in "Need of
8 Redevelopment" if they exhibited at least two or more
9 statutory criteria or redevelopment constraints. For
10 instance, if a property was ranked in fair or worse
11 condition and did not conform to one or more of the
12 current zoning standards, that property was also
13 designated as "In Need of Redevelopment". There is
14 nothing in the statute that says that, nothing. There
15 is a reference to zoning in the sense of -- a general
16 reference, but nothing specific. And, certainly, it
17 doesn't talk about fair property. If a property --
18 again, I go on with the statement as contained in the
19 report that we relied on, "If a property were rated in
20 good condition or better, but was considered either
21 obsolete, underutilized or faulty in terms of
22 arrangement and did not conform to one or more current
23 zoning standards, that property was also designated "In
24 Need of Redevelopment" because it, too, met the
25 statutory criteria." That is not the law based on

1 Gallenthin, nor Anzalone. Nothing about current zoning
2 standards is -- triggers a property that is in good
3 condition as being in need of redevelopment. It can't
4 be blighted.

5 The use of these subjective criteria of, and
6 that is what I'm finding, they are subjective criteria
7 of a fair to worse condition makes clear that the report
8 on which the Planning Board relied did not follow the
9 proper standards for a determination of blight as is
10 required in this case, under Section (c)-(e) of
11 40A:12A-5, especially in light of being told blight is
12 not a requirement for redevelopment. This Court finds
13 that under the standards expressed in the Metro Report
14 that it is the opinion of Metro that land which is in
15 fair condition or even in good condition and, therefore,
16 not deteriorated or stagnant and did not have a decadent
17 effect on surrounding property, but if it violates
18 zoning and is not put to a fully productive use should
19 be determined as an area in need of redevelopment.
20 Could be blighted, considered blighted or in need of
21 redevelopment if it violates zoning. That is not what
22 the statute says. Metro, basically, says that if it
23 violates the zoning laws and is in good condition, but
24 not productive, it's in need of redevelopment. That is
25 not what the law says under Gallenthin or Anzalone.

1 This is directly contrary, I find, to the holding in
2 Gallenthin, that it has to be blighted and it has to
3 lack a fully productive use. This is not a proper
4 ground on which a determination of redevelopment should
5 be made. It has to be blighted. See Gallenthin, at
6 365. Furthermore, it's clear from a reading of the
7 statements made by the Planning Board members at the
8 hearings that some members did not believe the area in
9 question to be blighted, but still recommended the area
10 to be classified as an area in need of redevelopment.
11 This is contrary to the correct wording of 40A:12A-6(c).
12 It's quite apparent that the Metro Report, and
13 subsequently the Planning Board, misapplied the proper
14 law in making the determination of this area as being in
15 need of redevelopment. The standards used in the report
16 of using a ranking system of fair to good which, I find,
17 does not correlate to blight, as stated above. Further,
18 using a criterion, again to quote, "and did not conform
19 to one or more current zoning standards," is not the
20 criteria. That type of broad statement is not in the
21 statute and doesn't equate to blight. Even though the
22 property was found to be good or better, but did not
23 conform to current zoning, Metro said it was in need of
24 redevelopment. The mere fact that it does not comply to
25 current zoning does not make it blighted. Whether a

1 property complies with current zoning or is in
2 conformity with the master plan does not make it
3 blighted from the constitutional sense which formed the
4 basis for the Board members' opinions, taken together
5 with the reliance by the Board members on the improper
6 advice of Counsel as to the statutory and constitutional
7 requirements of the LRHL. It indicates that the
8 recommendation of the Board as to whether this area in
9 question was in need of redevelopment was not based on
10 law under the LRHL and was unconstitutional as violative
11 of the Blighted Area Clause. I find, therefore, the
12 determination of this area as one in need of
13 redevelopment, on this basis must be vacated.

14 Plaintiffs in this case also argue that
15 although there is a presumption of validity of the
16 governing body's determination, the record before the
17 Planning Board does not contain the requisite
18 substantial credible evidence required under 12A-5, to
19 support the redevelopment designation. I'm going into
20 this because I, obviously, said there was a
21 constitutional basis, but I'm going into the second part
22 of the case only because if I am reversed in the event
23 of a repeal -- of an appeal, I want to cover the issues
24 as I see, particularly as it relates to the substantial
25 evidence question.

1 The Plaintiffs cite Levin -v- Twp. Comm. Of
2 Bridgewater, 57 N.J. 506 (1971). Plaintiffs argue that
3 the Metro Study was flawed, in part, because of its
4 heavy reliance on subjective, unsubstantiated ranking
5 system and non-conformance with current zoning, neither
6 of which establish blight, I've already found.

7 The Study describes the ranking system as
8 follows, and, actually, I'm not going to read it again
9 because I read it once. So I'm relying on that same
10 quote that is contained within the Metro Plan, as
11 prepared.

12 As plaintiff points out in his brief, neither
13 in the Metro Report or in Mr. Portney's testimony is any
14 effort made to directly relate ranking system of poor to
15 good to the specific criteria of the statute. It should
16 also be noted that nowhere in Subsection (c), (d) or (e)
17 of 12A-5 is conformance or non-conformance of zoning
18 standards mentioned as a condition for qualifying a
19 property in need of redevelopment, except for a
20 reference under Subsection (d), referencing excessive
21 land coverage and deleterious land use. That is the
22 only way you could, possibly, correlate the statute to
23 violation of zoning ordinance. Even that is somewhat of
24 a stretch.

25 In fact, during his testimony, Mr. Portney had

1 the following to say about how zoning non-conformance
2 factored into his analysis:

3 "Well, again," this is a quote, "I was hoping
4 that I clarified that in my opening statement. We look
5 at a number of factors when we look at property.
6 Obviously, we look at a physical condition of the
7 property and we really look to utilize an objective
8 criteria which is spelled out in the Study, itself, and
9 then we look at the layout of the buildings and
10 properties.

11 We look at how they relate to other properties
12 in the area and we also look at zoning. What I said was
13 zoning.

14 Whether our property conforms or not to
15 current zoning, or had multiple instances of
16 non-conforming, points out that it is an indicator of
17 other possible conditions or characteristics with the
18 property. That could mean the layout of the property is
19 inefficient, and I'm not suggesting that if an existing
20 non-conforming use has been grandfathered, I'm not
21 commenting on the legal aspects of the zoning.

22 I'm commenting on the fact that it indicates
23 other factors that have an insufficient -- inefficient
24 layout, a faulty arrangement, or a poor design or
25 obsolete design."

1 So he's trying to correlate it to the criteria
2 of the statute, but I'll show you later how he doesn't
3 successfully do that.

4 To finish his quote, "So, it's just one factor
5 that we look at when we investigate the redevelopment
6 criteria." You just can't, generally, refer to zoning,
7 period. See the transcript of December 14th, 2006, Page
8 65, line 9 through Page 66, line 9.

9 While he tries to correlate this to Section
10 (d) of the statute, he does not indicate how the zoning
11 deviation equates to one of the criteria, and he never
12 does that. As plaintiffs point out, no reported or
13 unreported decision discusses that the general
14 non-conformance with current zoning standards is related
15 to the criteria under the statute, although excessive
16 land coverage and deleterious land use can be
17 considered, clearly, under the statute.

18 Plaintiffs allege that the subjective ranking
19 system relied upon by Mr. Portney in the Metro Report
20 bears little relation to the standards of the 12A-5.
21 While the ultimate support of the Planning Board for
22 determining the Union County Study Area -- the Union
23 Study Area in need of redevelopment relies entirely on
24 the Metro Report. Mr. Portney, I find, failed, in many
25 instances, to describe how the ranking system relates to

1 statutory requirements. There are many instances
2 lacking factual support to show why a ranking of "fair"
3 or "poor" would equate to what is required under the
4 statute. The substantial evidence standard, on which a
5 finding of "an area in need of redevelopment" is based
6 is not met if the municipality's decision is only
7 supported by an expert's net opinion or relies on
8 criteria not contained within the statute. ERETC -v-
9 City of Perth Amboy, 381 New Jersey Super. 268, at 277
10 through 281 (Appellate Division 2005). This fact is
11 further supported by the Gallenthin Court, which writes:

12 "In general, a municipality must establish a
13 record that contains more than a bland recitation of
14 applicable statutory criteria and a declaration that
15 those criteria are met. Because a redevelopment
16 designation carries serious implications for property
17 owners, the net opinion of an expert is simply too
18 slender a reed on which to rest that determination."

19 That is Gallenthin at 373. Since substantial
20 evidence of the statutory criteria under 12A-5 is
21 necessary to designate an area of redevelopment, this
22 Court will discuss whether defense met its burden of
23 substantial evidence in its determination that the area
24 was in need of redevelopment.

25 The Metro Report classifies property, as I

1 said earlier, from good to poor and uses a formula that
2 if a particular property meets two of Metro's criteria
3 previously mentioned, the property is in need of
4 redevelopment. Individual Plaintiffs dispute these
5 findings and allege that Metro never did an internal
6 inspection of the property, and that while the exterior
7 inspection may have shown that some properties may have
8 had some cosmetic problems, they were not dilapidated or
9 deteriorated or in such a state of disrepair that it was
10 detrimental to the safety, health or welfare of the
11 community, and in need of redevelopment. They allege
12 those properties could be improved with minor repairs by
13 property owners, and that the report and testimony does
14 not show enough physical or social deterioration to
15 become intractable, and I agree with the Plaintiffs,
16 quite candidly, with that.

17 The Plaintiffs allege that Metro, through Mr.
18 Portney, gave a net opinion that the property in
19 question was fair or poor by only giving a physical
20 description of the exterior of some of the properties to
21 a block by block analysis. While the expert addresses
22 some specific conditions for some properties he did not,
23 under this formula, show that the condition of those
24 specific properties were so bad as to amount to blight,
25 in his opinion, and that they contributed to a

1 deterioration of the area, but, nonetheless, the area
2 was blighted. He did not find, as an example, there was
3 any building that was so deteriorated or in such a state
4 of disrepair or in a state of deterioration to become
5 intractable and contributed to blight. Rather, he used
6 a combination, I find, of subjective factors, including
7 whether a property was fair, poor or good in combination
8 with a reference to some statutory criteria.

9 As an example, he would use diverse ownership
10 or that the property may violate a zoning ordinance
11 because it has something as innocuous as a side yard
12 violation, or that it is a preexisting non-conforming
13 use. He says he didn't consider that when he gave the
14 instruction, but yet in his report he does consider it
15 and speaks about it. If he then finds a property is in
16 fair condition and it meets two of his standards, even
17 if they are not listed criteria under Section 5, he
18 finds it an area in need of redevelopment. He uses this
19 two-step approach to conclude that the property is in
20 need of redevelopment, even though the property is in
21 fair condition. He never, however, shows that there is
22 such a level of deterioration or stagnation that
23 negatively affects surrounding properties. See
24 Gallenthin at Page 362-363. That is required. He does
25 not show, through his analysis, a condition of

1 deterioration. He fails to show how a property in fair
2 condition is at such a level of deterioration that it
3 degrades other areas.

4 Yet, another example. Mr. Portney discusses
5 the rear of the buildings that abut the municipal
6 parking lot on the northwest side of the intersection of
7 Morris and Stuyvesant and finds that the facades need to
8 be painted. These are quotes from the report. "Their
9 garbage cans are exposed and dumpsters are exposed and
10 not closed and these -- and there may be
11 non-conformance," that is the words, "there may be
12 non-conformance to zoning," and he maintains, "This
13 shows an area is in need of redevelopment." This is not
14 the type of deterioration envisioned under Gallenthin.
15 It is not the level of degeneration that threatens to
16 degrade other areas. There is very little in this Metro
17 Report or Mr. Portney's testimony to show that the
18 physical conditions of these properties have contributed
19 to any social problems or criminal activity, or anything
20 close to it. Rather, as stated by the Planning Board
21 members in the transcript, it shows the area needs to be
22 spruced up, that there is more potential for some of the
23 property, and that the area can be more productive.
24 That is not the standards under Gallenthin or Anzalone.
25 This does not amount to blight.

1 As stated in Gallenthin, at Page 365, if
2 blight was equated with more productive use, then it
3 would be forced redevelopment if the threshold were
4 nothing more than the possibility of a more profitable
5 use of the land.

6 Yet another example. Mr. Portney speaks about
7 the fact that virtually all of the parcels are
8 individually owned, and cites diverse ownership as
9 criteria under Section 8 of the statute, and he opines,
10 therefore, that the area is in need of redevelopment.
11 Yet, as stated in the Anzalone decision, previously
12 quoted, diverse ownership is meant to cover only
13 individual properties with convoluted ownership, not
14 individual lot ownership, which would make virtually
15 every residential neighborhood vulnerable to
16 redevelopment. He used the wrong standard, again.

17 This idea of revitalization, as opposed to
18 blight can be seen in Subsection II of the Metro Report
19 captioned, "Overview of Conditions in the Study Area,"
20 particularly Section (e) and (c) of that portion. In
21 section (e) Mr. Portney speaks of the area being spread
22 out, less compact, buildings being nondescript, and not
23 like more traditional downtowns with retail on the
24 street level and residential or office use above. He
25 doesn't speak of deterioration. Rather, he addresses

1 more productive uses. He discusses, under Subsection
2 (f) of the report if this area supports the objectives
3 of the Master Plan and the efforts to support and
4 enhance economic well being. He says on Page 8, quote,
5 "In summary, review of the Township's Master Plan
6 reexamination reveals a concern and commitment to
7 rehabilitate, revitalize and redevelopment," I'll leave
8 a section out, "in a manner that protects, enhances the
9 area's retail viability and promotes new and
10 complimentary residential development downtown." Again,
11 there is nothing about deterioration, dilapidation or
12 anything close to it, or blight, but, rather, what he's
13 saying is it's not fully productive property or there is
14 a failure to reference any other statutory criteria when
15 you read that.

16 He admits on Page 15 that the survey of the
17 structures involved was only an exterior evaluation.
18 Also, he states on Page 15 what he observed as to the
19 physical characteristics of the properties which were
20 all, as I said, exterior. He qualifies the properties
21 block by block of whether that property is good, fair or
22 poor based on those observations, in other words, a
23 block by block description, and gets into individual
24 properties in a block by block analysis, and I'll go
25 through every one because it shows, I think, what I

1 consider to be a total lack of the application of the
2 criteria, and that this evaluation was subjective.

3 On Block 2032, one poor with no reasons given,
4 at all, for why it's poor, three fair, one good.

5 On Block 313, one good.

6 Block 2314, no ratings given, but says there
7 is one vacant building, lot 15, and one vacant retail
8 store, but with no indication of whether those
9 buildings, themselves, are in good condition, poor
10 condition or any other kind of condition. He doesn't
11 evaluate it, or how long they were vacant, or why they
12 are vacant, nothing, just a reference there is one
13 vacant building, that happened to be a florist shop that
14 was a retail business, and the other one had to be a car
15 dealership.

16 On Block 2315, two fair, one poor because of a
17 damaged sidewalk, and a retaining wall, and excessive
18 signage, but nothing negative about the buildings,
19 themselves.

20 2316, one fair and three good.

21 2317, two fair and two good. I'm talking
22 about individual buildings, obviously.

23 2319, four good and one fair to good.

24 2320, two fair and five good.

25 2801, now there are three poor that are

1 designated here. Three poor, with one building
2 exterior. He says, deterioration. A concrete walk
3 poor. Weeds in the lot, chipping of paint, but, again,
4 no other reference to any substantial structural defects
5 or dilapidation, and he shows one fair building.

6 2902, four fair, three good, one good, good to
7 excellent.

8 2903, twelve fair, seven good to fair, and
9 nine good. This is the area I noted earlier whether he
10 mentioned the facades of being in poor condition, but he
11 characterizes the twelve buildings as fair, seven good
12 to fair, and nine good. How is that dilapidation,
13 deterioration? How is that blight, stagnation? Call it
14 what you will.

15 2904, one poor, but no reason given why it's
16 poor. Two fair, no reasons. Four good to fair. Two
17 good, and one excellent. There is no reference in
18 any -- of any building is in disrepair, and even in a
19 poor to fair category.

20 Block 2905, one good.

21 2906, two fair, one good to fair, two good.

22 2907, two fair, two good.

23 2916, two good.

24 4211, the lot -- in the lot, paving area, is
25 fair, but there is no fencing or landscaping with poor

1 signage. That has nothing to do with the criteria under
2 the statute.

3 And 4213, two fair, one good with being
4 described as new and well maintained. It's new and well
5 maintained. Why is it not excellent and only good?
6 These -- this is why all this is subjective.

7 4214, three fair, eight good to fair, eight
8 good. Again, references as to issues involving facades
9 being unsightly, and dumpsters being unscreened. That
10 is not criteria under the statute. The parking lots are
11 said to be unattractive because they are significantly
12 paved over. Well, that is what a parking lot is
13 supposed to be, paved over with asphalt, and a lack of
14 landscaping. Put landscaping in, don't take property.
15 No finding that they are poorly maintained.

16 5207, three fair, two good to fair, and four
17 good.

18 5208, we, finally, get to another poor. One
19 piece of property poor with no reference as to why it's
20 poor. Reference is made to the facade and sidewalk
21 being -- the facade being chipped paint, or whatever,
22 and sidewalk being cracked. That doesn't mean an area
23 is in need of redevelopment with a particular property
24 because the sidewalk is cracked.

25 He does say, as I said, that one particular

1 property is underutilized as in an older obsolete use,
2 and he references that property. That is the first
3 example that he, at least, addresses a criteria under
4 the statute, one piece of property. But, again, no
5 reference how it affects the whole area as a whole or
6 how it has a detrimental effect on other properties so
7 as to require the area to be in need of redevelopment.

8 On 5212, two fair, one fair to good. Again,
9 no references to why this structure is fair, but he says
10 the use, a car repair shop, represents an older obsolete
11 automotive use that is a preexisting non-conforming use.
12 Earlier he says he's not relying on preexisting
13 non-conforming use, and here that is exactly what he
14 relies on. And how is an automotive repair business an
15 obsolete use? People need to get their cars fixed. Why
16 is this an obsolete use? Why is it underutilized? Yet
17 the building, itself, is in fair condition. He throws a
18 criteria in, but doesn't correlate it in terms of what
19 the property is as to the amount to be blighted under
20 the statute, yet the building, itself, as I said, is in
21 fair condition. There is nothing to show it's adversely
22 affecting health, safety or welfare. There is a general
23 reference about cars backing in and out onto the street.
24 That happens on everybody's driveway. There is a total
25 of 124 lots out of, which under Mr. Portney's analysis,

1 7 are in poor condition, and of the 7, with 2 of these
2 there is no reason as to why they are poor.

3 On another, I mean, there is a reference only
4 why they are poor -- sorry. There is no reference, at
5 all, as to two on another. It is because it has a
6 damaged sidewalk, or damaged retaining wall, or
7 excessive signage. Again, no reference to
8 deteriorations or problems with the structure.

9 Still with another one there is a conclusion
10 that it is poor because it's deteriorated with no
11 reference as to what the deterioration is. That is net.
12 But without detail why there is another two -- but
13 without detail why, and yet another two with no
14 references as to why they are poor.

15 Finally, there is one property that is poor
16 because the facade is unattractive and the sidewalk is
17 cracked. None of these physical characteristics, I
18 find, show blight, or that the structure is poor, or
19 that they subject other areas or other buildings to a
20 blight condition.

21 The property owners maintain that the
22 properties are not deteriorated, and while they may not
23 be modern, I find, they are not blighted. They also say
24 that the overwhelming individual areas and the
25 individual properties may have minor aesthetic problems,

1 but I find that did his not equate to blight. The
2 report shows there is only two vacant stores, one is a
3 retail florist shop and the other a car dealership. I
4 find this is insufficient, considering the entire area
5 you are dealing with, to show that it satisfies the
6 criteria under Subsection (c) to show this area is
7 blighted and in need of redevelopment.

8 While properties that are not, themselves,
9 deteriorated can be included in the Redevelopment Area,
10 there still must be an overall deterioration of the area
11 to the extent that there is blight. While the expert,
12 Mr. Portney, ranks the buildings and says what factors
13 he considered in classifying each building as poor, fair
14 and good, he never states or shows that any building was
15 in such a state of decay or disrepair to amount to
16 blight. His limited references are to cosmetic issues
17 with only 7 of 124 buildings even classified as poor.
18 There is, virtually, nothing to show the buildings were
19 unsafe, unsanitary, dilapidated, or anything else under
20 the criteria. There was a lack of substantial evidence,
21 I find, to show that even the poor buildings, even if
22 assumed to be poor, adversely affected the living or
23 working conditions as required.

24 If you look at the photos attached to the
25 report you can plainly see these buildings are not

1 dilapidated, unsightly or substandard. There is nothing
2 to show blight, under the Gallenthin standards. This is
3 exactly what the Board members found and discussed, that
4 the area is not blighted.

5 There is not, I find, substantial evidence
6 under Section (c) of the statute to show that any land
7 has been vacant for substantial periods of time, meaning
8 10 years or more. That is the statutory criteria.
9 There is nothing in this record to show that. The only
10 reference as to vacant land is as I mentioned earlier.
11 Under Section (d) there is insufficient evidence showing
12 dilapidation or obsolescence. There is minimal, if any
13 obsolescence in reference to one of the buildings I
14 mentioned earlier, with no references to overcrowding,
15 lack of ventilation, light or sanitary facilities.
16 While there may be some obsolete layout of one or two
17 buildings, there is no showing that it is detrimental
18 either to health, safety, welfare, or morals of the
19 community, and does not contribute to the extent of
20 making other areas undesirable or in need of
21 redevelopment.

22 Finally, under subsection (e) with proofs or,
23 rather, lack of proofs of blight, demonstrate that the
24 underutilization alleged only relates to the
25 possibilities of more profitable uses, which is not

1 enough under Gallenthin. There is not substantial
2 evidence that shows blight. There are no adverse
3 conditions of title, no convoluted ownership issues,
4 individual ownership not being a factor, nor anything to
5 show the area is stagnant. As stated in Gallenthin, and
6 the fact that the area can be put to better use or can
7 be more productive is not sufficient to satisfy the
8 constitutional requirements of blight.

9 I find, therefore, even if the Board correctly
10 applied the law, which I find it did not, the Plaintiff,
11 I find -- excuse me, the defendant, I find, failed to
12 meet its burden of proof of substantial evidence to show
13 that the area was in need of redevelopment. I find,
14 therefore, that the findings of the Board were arbitrary
15 and capricious in determining that the area was blighted
16 and in need of redevelopment.

17 The next issue confronting this Court, as
18 alleged by some of the Plaintiffs, is whether the
19 proceedings held before the Planning Board were
20 adversely affected by various conflicts of interest.
21 While this Court finds that no single issue, by itself,
22 would be determined to be fatal to the validity of the
23 proceedings, viewing the conflicts together, doubt is
24 cast, I find, as to whether the proceedings, as a whole,
25 were tainted because of those alleged conflicts.

1 There is a question as to the involvement of
2 the Township Committee Member Joseph Florio at the
3 Planning Board hearings, in light of the fact that he
4 felt he must abstain from voting. There is also a
5 question presented as to whether the role played by
6 Special Redevelopment Counsel at the Planning Board
7 hearings adversely affected the Board's decision. Each
8 of these conflicts will be examined more closely.

9 Finally, there is a question of whether the
10 Mayor usurped the authority of the Board and/or
11 improperly influenced the Planning Board.

12 The -- if a Planning Board member was to be
13 disqualified from a particular case due to a potential
14 conflict of interest, there are limitations placed on
15 the amount of involvement this member may have at the
16 proceedings. In Szoke -v- Zoning Board of Adjustment of
17 Monmouth Beach, 260 New Jersey Super. 341 (Appellate
18 Division 1992), which I notice is a zoning matter not a
19 redevelopment case, a board member recused himself from
20 voting on a particular application. However, the board
21 member involved himself in the hearings by making
22 statements, even going so far as to place his opinion as
23 to the ultimate disposition of the matter on the record.
24 The Court, in holding that the board member's
25 involvement improperly influenced the proceedings, and I

1 quote, wrote:

2 "We do not know the reason for the
3 disqualification, but the fact that Thayer felt
4 participation would be improper...is sufficient, in
5 itself, to make any participation by Thayer improper
6 and, if that participation was capable of forming a
7 substantive part of the deliberative process, to require
8 the Board action be voided." That is Szoke at Page 343.

9 If a board member who otherwise should not
10 have taken part in the hearings does so, and this has
11 the potential to taint the outcome of the proceedings,
12 the action of the Board pursuant to this improper
13 influence should be voided. The Appellate Court held in
14 other zoning cases, similarly:

15 "Moreover, a Zoning Board member who," this is
16 a quote, "is disqualified from voting may not use his
17 office and whatever influence he may yield to influence
18 the votes of the other members. That is, it is
19 insufficient to decline to vote while still seeking to
20 influence what the vote will be. Such conduct requires
21 a vacate of the zoning resolution." Again, that is a
22 zoning case, not a redevelopment case.

23 State -v- Schenkolewski,
24 S-c-h-e-n-k-o-l-e-w-s-k-i, 301 New Jersey Super., 115,
25 at 145 (Appellate Division), certificate denied 151 New

1 Jersey 77, (1997) decision. It is clear that a board
2 member who chooses to abstain from voting may not
3 participate in those proceedings in any way so as to
4 influence the outcome. According to Cox on Zoning,
5 which is -- obviously, applies to zoning matters and not
6 redevelopment cases, "Where a board member is
7 disqualified...either upon a member's own initiative or
8 a board determination, the member should physically
9 remove himself from the presence of the board. That is
10 Cox on Zoning, Page 57, Section 3-2 (2008) handling.

11 Clearly, under the Title 40A council member
12 can be a member of the Planning Board, there is no
13 question about that, but that is not the issue in this
14 case. Rather, the issue is should the person who
15 recuses himself participate and make any comments before
16 the board and, if so, if not, if he does and it's
17 improper, did it influence the board. Here Mr. Florio
18 participated in the December 19th, 2006 hearing before
19 the Board. He made a statement, questioned Peter Steck,
20 a witness before the Board. Mr. Florio, in particular,
21 made comments as to the direction he wished the Board to
22 take in making its recommendation. He stated in
23 relevant part: See transcript of December 19th, 2006,
24 Page 47, line 18 through Page 48, line 7. Again, I
25 quote,

1 "I'm sure Counsel covered this very well, but
2 I would think that the reexamination report is much more
3 accurate as to where we want to go in terms of the
4 recent amendments to the previous Master Plan." Again,
5 not a criteria under statute. "If you listen to the
6 public right now, they are asking for more retail and
7 better retail. That is not the standard. So these are
8 the kind of things that the reexamination report has
9 cited, and there are a lot of technicalities here
10 tonight, but the reexamination report is more accurate
11 and more up-to-date consideration."

12 First of all, this is, again, a
13 misrepresentation as to what the law is as it relates to
14 blight. This is not blight as defined by the Supreme
15 Court or Gallenthin. Later in a hearing, in response to
16 a question posed to the Board by an interested citizen,
17 Mr. Florio responds:

18 "I've been on the Township Committee for ten
19 years, and I lived in this town since 1969. The one
20 thing I hear most is Union Center is not what it used to
21 be 20 years ago. We want to get stores, some stores
22 back. I'm not saying businesses aren't there and aren't
23 okay," no stagnation is what he's talking about, "they
24 want some bigger stores, bigger retail stores. They
25 want the Union Center to have foot traffic. When you

1 are talking crime in the streets, I didn't say anything
2 about that. I was trying to address a point of which we
3 are hearing from the public. Maybe you don't agree with
4 that, and that is okay, but for everyone of you who say
5 we don't need this, there is 20 who will say we need to
6 have better retail, bigger retail. It is something that
7 will make our Center more vibrant, again. That is what
8 I was trying to address." Transcript, December 19th,
9 2006, Page 70, line 8 through Page 70, line 4.

10 Again, this, in itself, is a misstatement of
11 the law and is not blight under Gallenthin. Beside the
12 fact that Mr. Florio was not talking about blight, but,
13 rather, a more productive downtown, it's clear that Mr.
14 Florio indicated his opinion as to the outcome of the
15 Board's vote and made, as well as reinforced, an
16 inaccurate misstatement of the law previously given.
17 Furthermore, it's clear that Mr. Florio was personally
18 involved in a significant way in the hearings before the
19 Planning Board. His choice not to vote on the matter at
20 the hearing's conclusion gives rise to suspicion as to
21 why he involved himself in the matter in the first place
22 if he was not going to vote on it. This is exactly the
23 type of potential conflict the Szoke Court counseled
24 against in zoning matters. Moreover, Mr. Florio's
25 statements and questioning applied the improper

1 standards under Gallenthin, the LRHL, and the Blighted
2 Areas Clause of the New Jersey Constitution. Not only
3 did he participate when he should not have, but he also
4 participated in perpetuating the improper manner in
5 which the redevelopment of this area was judged. It is
6 fair to assume that Mr. Florio's reasons for not
7 participating in the vote were similar to those of the
8 may or who declined to vote or to participate in
9 hearings because of the possibility that Mayor and
10 Council would have to vote on the recommendations of the
11 Planning Board. While the Mayor chose not to
12 participate in any way regarding his opinion as to the
13 outcome of the case, Mr. Florio interjected himself in
14 significant ways throughout the proceedings. While I
15 find that this conflict, in and of itself, may not have
16 been fatal to the validity of the theme, it clearly
17 casts a taint over the manner in which the proceedings
18 were concluded and on what the Board believed was the
19 applicable law, and could have clearly influenced the
20 eventual determinations made by the Board.

21 Plaintiffs also allege that Special
22 Redevelopment Counsel hired by the Township unduly
23 influenced proceedings before the Planning Board,
24 which through actions that included objecting to witness
25 testimony, advising the Planning Board of relevant law,

1 and otherwise injecting herself in a manner inconsistent
2 with her role as Counsel to the Township. It is noted
3 Special Redevelopment Counsel was retained by the
4 Township. Plaintiffs rely on Wilson -v- Long Branch, 27
5 New Jersey 360 (1958), to support their conflict
6 argument in this area. The Court stated, "It is plain
7 from the record that the city solicitor appeared at the
8 hearings and advised the Planning Board as to procedure
9 and rulings on evidence. This was done despite the
10 presence of the Board's own attorney. The intrusion was
11 improper, even though motivated in good faith." See
12 Page 396 of the Wilson decision. However, the
13 plaintiffs failed to recognize that the Wilson Court did
14 not find the involvement of the city solicitor fatal to
15 the validity of the proceedings. Defendants argue that
16 Special Redevelopment Counsel hired by the Township for
17 purpose of overseeing the redevelopment plan did not act
18 as an advocate for the Planning Board in any capacity.
19 Defendants rely upon the argument that the attorney
20 represented only the Township, and that the Planning
21 Board had Counsel present at all proceedings relating to
22 the case, and that was Mr. McCarthy, as I mentioned
23 earlier. Special Redevelopment Counsel at the
24 proceedings, however, conducted cross examination of
25 objectors' witnesses, a role primarily reserved for the

1 Planning Board Counsel. Counsel advised the Board as to
2 the applicability of the LRHL, but made improper
3 statements, as previously stated, of how the law should
4 be applied. This Court finds from the transcripts that
5 these statements were relied on by the Board in making
6 its ultimate determination that the area in question was
7 in need of redevelopment. The manner in which Counsel
8 interjected at the hearings evidences a strong showing
9 of improper influence over the Board by an attorney
10 hired to represent the Township's interests. This
11 directly impinged upon the impartiality of the Board to
12 make findings independent of the governing body.

13 It's clear that an attorney representing a
14 municipality may not also represent a subordinate agency
15 of that municipality, such as planning boards or zoning
16 boards. N.J.S.A. 40:55D-24, again, which deals with
17 zoning, expressly prohibits a municipal attorney from
18 acting as legal counsel to a Planning Board. This is so
19 because of the importance in maintaining impartiality
20 where public interest is concerned. While Special
21 Counsel was not a municipal attorney, I find it was
22 retained by the governing body. There is an unpublished
23 opinion Township of Bloomfield -v- 110 Washington
24 Street, Docket L-2318-05, that was decided on August
25 3rd, 2005, that, obviously, it's not binding on me, I

1 know that, that explained that a municipal attorney
2 cannot serve as counsel to the Planning Board to advise
3 it because the advice may vary depending on the policy
4 and approach of the agency and the governing body
5 because of their differences in their respective
6 responsibilities and functions, and that is exactly what
7 you have under redevelopment, different responsibilities
8 and different functions from the Planning Board to Mayor
9 and Counsel. See the Township of Bloomfield at Page 9,
10 citing Opinion Number 117, at 90 New Jersey Law Journal
11 745 (1967). Advising both the Township and the Planning
12 Board presents a conflict of interest because of the
13 incompatible nature of the bodies arising out of the
14 duties, obligations and interests of each independent
15 body. Opinion Number 67, 88 New Jersey Law Journal 81
16 (1965). The Rules of Professional Conduct governing
17 actions by lawyers when the conflict may exist. Rules
18 of Professional Conduct 1.8(k) states that:

19 "A lawyer employed by a public entity, either
20 as a lawyer or in some other role, shall not undertake
21 the representation of another client for representation
22 presents a substantial risk that the lawyer's
23 responsibilities to the public entity would limit the
24 lawyer's ability to provide impending advice or diligent
25 and competent representation to either the public entity

1 or to the client."

2 A Planning Board has an interest or has
3 interests that are inherently different from those of
4 the municipality in which the Board sits, both under the
5 redevelopment statute and in zoning matters. See
6 William Cox, again in zoning cases, where he states:
7 "Because Boards of Adjustment and Planning Boards are
8 quasi judicial bodies, their judgments must be free from
9 the taint of self-interest." That is Cox on Zoning,
10 Section 3-1.1, Page 43 (2007). When Special
11 Redevelopment Counsel for the Township appears at the
12 Planning Board hearings and participates, as Counsel did
13 in this case, a taint of conflicting interest becomes
14 more of a problem. Special Counsel here goes beyond
15 just giving advice to make sure there is compliance with
16 the redevelopment law. Counsel here, I find, became
17 adversarial.

18 Here Special Redevelopment Counsel was
19 retained by the Township to provide expertise to insure
20 that the redevelopment law was properly being followed.
21 However, Counsel conceded that role during the
22 proceedings before the Planning Board because Special
23 Redevelopment Counsel not only objected to statements
24 made, as an example, by Mr. Hudacsko, H-u-d-a-c-s-k-o,
25 an objector's expert witness, but also responded towards

1 the witness on behalf of the Planning Board.

2 Specifically, Counsel stated the following:

3 Ms. Credido: "I would like to object. I
4 understand that the witness has given us a great deal of
5 background and his personal experience with the statutes
6 governing redevelopment in the State as they have
7 evolved, but for the clarity of the record, especially
8 considering that blighted areas haven't been effective
9 for the last fourteen years, I would ask that, perhaps,
10 you address your testimony or your conclusions and your
11 suggestions this evening, in light of the statute that
12 is inherently effective to the local redevelopment law.

13 I think that would assist the Board in more
14 accurately being able to access your statements, and
15 conclusions, and recommendations."

16 Well she is, basically, saying the expert
17 doesn't know what he's talking about. That is the
18 bottom line. She is rendering an opinion by objecting.
19 She is telling the Board, meaning Mr. Hudacsko, as the
20 witness is not using the correct law to support his
21 opinions and findings. Counsel's statements and actions
22 at the Planning Board hearing showcased a strong
23 potential for conflict. Her statements and actions at
24 the hearing could be construed as acting on behalf of
25 the Planning Board and representing the Planning Board's

1 interests. This infringed upon the Planning Board
2 Counsel's role, and these actions presented the clear
3 direct conflict with her role as Special Redevelopment
4 Counsel for the Township. The dual representation
5 effectuated by Special Redevelopment Counsel created a
6 situation wherein the Planning Board effectively lost an
7 element of its neutrality. Township's Counsel took part
8 in the proceedings as Counsel -- sorry. Special Counsel
9 hired by Counsel took part in the proceedings as Counsel
10 for the Planning Board in a manner that threatened the
11 necessary impartiality of the Planning Board regarding
12 the Township's interests in redevelopment. Such
13 influence had the potential to place the Planning Board
14 in the position where the Township called the shots, in
15 plain simple English, thus disregarding, I find, the
16 required separation of the two governmental entities as
17 required under the previously cited redevelopment
18 statute. Although the Planning Board was represented by
19 its own Counsel throughout the proceedings, the evidence
20 strongly indicates that Special Redevelopment Counsel
21 became the Planning Board's Counsel during the course of
22 the proceedings. While it is true that Special
23 Redevelopment Counsel is not the municipal attorney, nor
24 shares the duties and obligations of a municipal
25 attorney, I find, in the circumstances of this case,

1 that Special Redevelopment Counsel's interests in
2 representing the Township were sufficiently analogous to
3 the responsibilities of the Township's attorney, if they
4 were a Township attorney. Based on Special Counsel's
5 role, the governing body pre-referral, the Planning
6 Board and Counsel's involvement before the Planning
7 Board, Special Redevelopment Counsel was hired to
8 represent the Township and not the Planning Board, and
9 yet Special Redevelopment Counsel acted as if Counsel
10 for the Planning Board during the course of the hearing.

11 I find, therefore, for these reasons, that
12 Special Redevelopment Counsel's conflict of interest
13 tainted the impartiality of the proceedings. I find
14 that these conflict issues directly influenced the
15 Planning Board's determination that the areas
16 surrounding Morris and Stuyvesant Avenues intersection
17 was an area in need of redevelopment, as a result of the
18 Board's findings and recommendations -- and as a result,
19 the Board's findings and recommendations should be
20 vacated.

21 The standard in the report relied on by the
22 Board in making their determination, as well as the
23 advice given to the Board by its own Counsel and
24 Township's redevelopment Counsel, were inconsistent with
25 the requirements of the LRHL, the holding in Gallenthin,

1 and the constitutional requirements under the Blighted
2 Areas Clause. Therefore, because of the conflicts of
3 interest raised by the participation of Mr. Florio, as
4 well as the interjections of Special Redevelopment
5 Counsel, I find the neutrality, impartiality and
6 validity of the Board hearings are seriously in
7 question. For these reasons, on the basis of multiple
8 conflicts, I find, existed, I find in favor of the
9 Plaintiffs for this reason also, in addition, for the
10 other two previously cited, and I find that the
11 determination of the area of being in need of
12 redevelopment should be vacated.

13 Clearly, I'm granting the relief, as
14 requested, and entering judgment in favor of the
15 Plaintiff.

16 Any cross motion for summary judgment, for the
17 reasons expressed in the opinion, is -- that cross
18 motion is denied.

19 All right. Counsel, thank you. I don't think
20 I have any exhibits that I'm holding for anybody in this
21 case. The attachments were, really, to all briefs and
22 everything that was submitted, including the pictures I
23 referenced, they were attached to the Metro reports.

24 I will do a form of judgment and send it out
25 to you.

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Thank you.

C E R T I F I C A T I O N

I, Andrea M. Sanniola, C.C.R., License Number XI01097, an Official Court Reporter in and for the State of New Jersey, do hereby certify the foregoing to be prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of my stenographic notes taken in the above matter to the best of my knowledge and ability.

Andrea M Sanniola
Official Court Reporter
Union County Courthouse

10-24-08
Date