IN THE

Superior Court of New Jersey
Appellate Division

Docket Nos. A-191-06, A-192-06, A-194-06, A-195-06, A-196-06, A-197-06, A-198-06, A-199-06 and A-654-06 AND A-067-06

CITY OF LONG BRANCH,
a Municipal Corporation in the State of New Jersey,
Plaintiff-Respondent,
v.
GREGORY P. BROWER, et al.,
Defendants-Appellants,

AND

CITY OF LONG BRANCH,
a Municipal Corporation in the State of New Jersey,
Plaintiff-Respondent,
v.
LOUIS THOMAS ANZALONE and LILLIAN ANZALONE,
Defendants-Appellants.

ON APPEAL FROM A FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION (SAT BELOW: Hon. Lawrence M. Lawson, A.J.S.C.)

BRIEF OF AMICUS CURIAE PUBLIC ADVOCATE OF NEW JERSEY

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INTEREST OF THE AMICUS CURIAE

The Department of the Public Advocate was reconstituted as a principal executive department of the State of New Jersey on January 17, 2006, pursuant to the Public Advocate Restoration Act of 2005, P.L. 2005, c.155 (N.J.S.A. 52:27EE-1 to -85). The Department is

authorized by statute to "represent the public interest in such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest." N.J.S.A. 52:27EE-57. The public interest is defined broadly to include an "interest or right arising from the Constitution, decision of court, common law or other law of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. 52:27EE-12.

The ultimate and enduring mission of the Department of the Public Advocate remains the same as when it was originally created in 1974, and when the Supreme Court described it in 1980: "to hold the government accountable to those it serves and . . . [to] provide legal voices for those muted by poverty and political impotence." Township of Mount Laurel v. Department of the Public Advocate, 83 N.J. 522, 535-36 (1980).

It is the judgment of the Public Advocate that this case, which involves the use of eminent domain to take modest seaside homes for private redevelopment, implicates the "public interest." N.J.S.A. 52:27EE-12; see Department of the Public Advocate, Reforming the Use of Eminent Domain for Private Redevelopment in New Jersey (May 18, 2006), available at http://www.state.nj.us/publicadvocate/reports/pdfs/PAReportOnEminentDomainForPrivateRedevelopment.pdf) (hereinafter "Public Advocate's Report").

PRELIMINARY STATEMENT

The Public Advocate respectfully submits this brief as amicus curiae to bring to the attention of the Court issues that are of concern to every homeowner in New Jersey. The exercise of eminent domain in this case raises a number of procedural and substantive questions that are of critical interest to the people of New Jersey.

The Public Advocate has a special interest in the matter at bar: the right to a home is a basic human right protected by the Fifth Amendment to the United States Constitution and the New Jersey Constitution, and deprivation of that right requires adequate protections. The people of New Jersey are understandably concerned that the exercise of eminent domain for private economic redevelopment can be abused to deprive them of their homes without adequate substantive and procedural safeguards.

Appellants here face such a deprivation. On the record in these appeals, which may be incomplete because the trial court denied both discovery requests and a plenary hearing, it appears that the process leading to the condemnation of Appellants' homes lacked the requisite constitutional protections. The record contains no evidence that the City of Long Branch notified Appellants that their homes might be condemned. The record does, however, include information, disseminated by the City, that might have led Appellants to believe that their homes would not be condemned. The trial court thus appears to have had no evidentiary basis for concluding that the City gave "proper notice." Long Branch v. Brower, No. MON-L-4987-05, slip op. at 31, 51-52 (June 22, 2006). The absence of such notice would have deprived Appellants of the opportunity to challenge the City's inclusion of their neighborhood within the area it designated as "blighted" or "in need of redevelopment." As far as the record reveals, the City also neglected to provide individualized notice to Appellants of any of the hearings on subsequent amendments to the redevelopment plan as the City's decision to take their homes materialized.

When the City ultimately filed these condemnation proceedings, the trial court compounded the earlier procedural defaults by denying discovery requests and approving the condemnation on a summary basis despite disputed issues of fact. For example, Appellants

submitted evidence of potential conflicts of interest that if ultimately proven would call into question the impartiality of the blight designation. Yet the trial court dismissed the evidence as somehow unrelated to "the rights of the condemnees." Id. at 46. The trial court also placed on the homeowners the burden of proving that the blight designation was "arbitrary, capricious or unreasonable." Id. at 31. Although precedent supports this allocation of the burden, the Public Advocate believes that the City should be required to prove the validity of the blight designation it made.

On the merits, the trial court erred both in describing the standard for upholding a blight determination and in finding a sufficient basis in this record to support the determination. Rather than identifying substantial evidence of blight, as the law requires, the trial court relied on the City's ratings based on superficial exterior features. The record contains no evidence of detriment to the community or of even a single violation of an objective code setting health, safety, or habitability standards. Moreover, the court below failed to find that the taking of Appellants' neighborhood was necessary to remediate other, physically separate areas that the City determined to be blighted. A remand is necessary to permit the trial court to assess the evidence of blight under the proper legal standards.

STATEMENT OF FACTS[1]

The Public Advocate submits this brief as amicus curiae in a group of consolidated appeals, Long Branch v. Brower, Nos. A-191-06T2, A-192-06T2, A-194-06T2, A-195-06T2, A-196-06T2, A-197-06T2, A-198-06T2, A-199-06T2 and A-654-06T2, and a single unconsolidated appeal, Long Branch v. Anzalone, No. A-067-06T2. All of these appeals are from a single trial court decision, Long Branch v. Brower, No. MON-L-4987-05 (June 22, 2006).

In February 1994, Long Branch Tomorrow, Inc., was formed as a public-private partnership to study Long Branch's potential for revitalization. Id. at 9-10. Based on Long Branch Tomorrow's study, the City Council of the City of Long Branch passed Resolution 271-95 on August 8, 1995. Id. at 10; Da 222; Da238. That Resolution identified the Long Branch waterfront from Monmouth County's Seven Presidents Park south to Takanasee Lake, as well as west along Broadway, as areas that might benefit from a plan for redevelopment and revitalization. Slip op. at 10; Da 222; Da 238. Resolution 271-95 also requested that the Planning Board of the City of Long Branch determine whether these areas were in need of redevelopment. Slip op. at 10; Da 222; Da 238.

Shortly thereafter, by letter dated August 29, 1995, Edward Williams, the City Fire Official, submitted to Carl Turner, the City Planning Director, a report on his admittedly "cursory inspection" of buildings in the waterfront area north of North Bath Avenue, east of Ocean Boulevard and south of Seaview Avenue. Am. 46-63. That letter informed Mr. Turner that, "We did not make interior inspections, but as per your instructions. We did not reveal the nature of the inspections to the owners or residents when they made contact with us." Am. 46.

[1] Citations to the appendix of amicus Public Advocate are Am. __, and to the appendix of the Anzalone Appellants are Da __.

The inspection included a rating system using superficial criteria such as "deteriorating" paint or siding or cracked or chipped masonry. A combination of any three criteria resulted in rating an entire home as in "poor" condition. Da 227. Even under these superficial criteria, the inspection rated only three (just under 8%) of the 38 homes in the vicinity of and including Appellants' homes as in "poor" condition. Am. 46-63.[2]

Pursuant to Resolution 271-95, the Planning Board conducted a study of the Oceanfront North, Oceanfront South, and Broadway Corridor areas of the City. Da 222; Da 225. Appellants' homes are part of the Oceanfront North area, Da 225; Da 275, in a neighborhood they call "MTOTSA" (an acronym for its three streets, Marine Terrace, Ocean Terrace and Seaview Avenue). Da 179, ¶ 9, Am. 57-61. This is a distinct area bounded by Ocean Boulevard on the west, Seaview Avenue (also forming part of the southern boundary of Seven Presidents Park) to the north, Marine Terrace to the south and the Atlantic Ocean to the east. Marine Terrace separates the MTOTSA neighborhood from the adjacent new, multi-story townhouses already built as part of the City's redevelopment to the south. Ocean Boulevard is a wide, four-lane divided roadway that separates the MTOTSA neighborhood from the inland areas of Long Branch to the west.

That Planning Board study resulted in a January 1996 Report of Findings: Area in Need of Redevelopment, prepared by the Planning Board and the Atlantic Group, a private consulting company. Da 221-237. The Report evaluated the study areas based on Mr. Williams' inspection

[2] Mr. Williams' summary pages are not numbered. The evaluation of homes on Marine Terrace, Ocean Terrace and Seaview Avenue are located in the section entitled, "Ocean Terr., Marine Terr., Cooper Ave.," at Am. 57-61. These three properties are Block 301, Lot 26, 59 Marine Terrace, a house described as "vacant for years," Am. 57; Block 302, Lot 9, 38 Seaview Avenue, Am. 59; and Block 302, Lot 22, 43 Ocean Terrace, Am. 60.

of building exteriors, the number of building permits issued, the number of vacant properties, and the average amount of property taxes paid per square foot of privately owned land. The Planning Board's January 1996 Report concluded that the Oceanfront North area meets the criteria for an area in need of redevelopment under three criteria of the Local Housing and Redevelopment Law, N.J.S.A. 40A:12A-1 to -49 ("LHRL"): N.J.S.A. 40A:12A-5(a), (c) and (e).[3] Da 237. The Report recites that it is intended to be the "statement setting forth the basis for the investigation," as per N.J.S.A. 40A:12A-6(b). Da 222.

The City held a public hearing on the Report on January 16, 1996. Long Branch, slip op. at 12-13. Although the LHRL requires individualized notice to every homeowner in the target area of the blight designation, N.J.S.A. 40A:12A-6(b)(3), no such notice appears in the record.[4] Even if some notice was mailed in accordance with the LHRL, Appellants seem not to have understood that their homes might be subject to condemnation.

The lower court erred when it stated that the Planning Board, in an unspecified report, considered crime records in the area as a factor in its blight designation. Long Branch, slip op. at 10. In fact, neither the January 1996 Report nor the Redevelopment Plan includes any discussion of any alleged crime problem in the MTOTSA neighborhood. See id., slip op. at 10-12; Da 221-237. The record also does not reveal whether any substantive evidence of blight was discussed

[3] The January 1996 Report discusses all three potential redevelopment neighborhoods collectively. It includes findings relative to N.J.S.A. 40A:12A-5(d), but these findings apply only to commercial buildings in the Broadway Corridor, and not to the residential MTOTSA neighborhood, Da 231-232. Accordingly, that criterion was not applied to Appellants' homes.

[4] The City's Planning Director, Carl Turner, recited in his certification that the City provided notice of the blight designation, the Redevelopment Plan, Resolution 38-96, and another unnumbered resolution, but did not provide a copy or state the content of the actual notices, if any, sent by the City to Appellants. Turner Cert. ¶¶ 26-27, Pa 219-221, Am. 78-80.

at any of the public meetings. The trial court merely reiterated the City's superficial and secretive exterior inspection, the number of building permits issued, the lot and building sizes and uses, and the tax revenues generated by the MTOTSA neighborhood, which the Planning Board relied upon to support its finding of blight. Slip op. at 10-12.

The City adopted the Planning Board's findings in the January 1996 Report on January 23, 1996, by way of Resolution 38-96, and directed the Planning Board to begin developing a Redevelopment Plan. Am. 78, ¶ 26; Am. 64-66. On May 14, 1996, the City adopted the Planning Board's proposed Redevelopment Plan, Da 245-266, with Ordinance 15-96, Da268-269.[5] That Plan lists 12 objectives, including "Conserve sound, well-maintained single-family housing to the extent possible, and encourage residential development through infill." Da 251, ¶ k; see also Da 178, ¶¶ 5-6; Long Branch, slip op. at 12. The Plan also states that, "The amount of relocation required to implement the Redevelopment Plan is expected to be moderate at most, given the policy encouraging infill." Da 262. The City, its consultants, and attorneys prepared Design Guideline Handbooks, Da 271-275, that outlined "the Development rules for the Oceanfront Redevelopment Zone," Da 272-275, including Appellants' homes. One of those Handbooks includes color-coded maps showing the MTOTSA neighborhood as "infill residential." Da274-275; Da 178, ¶¶ 5-6; Long Branch, slip op. at 12. Appellants' homes are not marked for condemnation on these maps. Those Handbooks were circulated to the public in early 1996, and Appellants have certified that they led them to believe that their homes would

[5] The trial court erred by stating that this single ordinance both accepted the findings of the Planning Board that the designated area was in need of redevelopment and adopted the proposed Redevelopment Plan. Slip op. at 12. In fact, Ordinance 15-96 only adopted the proposed Redevelopment Plan. The City Council already had adopted the Planning Board's designation of the areas in need of redevelopment in Resolution 38-96.

not be condemned. Da 178, ¶ 5. At either the January 1996 hearing on the blight designation or the May 1996 hearing on the Redevelopment Plan, the City displayed a three-dimensional model of the redevelopment area that shows the small homes of the MTOTSA neighborhood intact. Am 86.[6]

In addition, Appellants Louis and Lillian Anzalone, long-time residents of Long Branch, allege that one or more City officials, including the Mayor, assured them that their home would not be condemned. Da 178, ¶ 5. Based on the objectives stated in the Redevelopment Plan, the color-coded maps, the three-dimensional model, and the express statements of City officials, Appellants have certified that they "had 'no reason to believe that their property would be condemned'" and no reason to object to the redevelopment designation or Plan. Da 178; Long Branch, slip op. at 12.

The record does not include a denial by the City of those public assertions. Instead, the City maintains that Appellants should have known that the City might condemn their homes, since their preservation as "infill housing is an alternative which was allowable, but not a requirement pursuant to the [Redevelopment] Plan." Am. 92, ¶ 16; Long Branch, slip op. at 13. The City also claims that, "Any drawings in the plan which may show infill, were and are for illustrative purposes only." Am. 92, ¶ 16; slip op. at 13. The City claims that Appellants received notice that their homes might be subject to condemnation because the Redevelopment Plan included the statement that "The City reserves the right to condemn property if private negotiations fail and the property or properties in question are judged essential to achieve

[6] The April 1996 Plan contained density targets, in dwelling units per acre, and it is unclear how the existing single family homes might have been incorporated into a plan to meet these targets, Da 258. Whatever inferences might be drawn from these density targets, however, they do not constitute meaningful notice to homeowners that their homes might be condemned.

objectives intended by the Plan." Da 261; Am. 91 ¶ 14. The trial court noted the City's contention that, "either residential infill or planned residential development was always a part of the Redevelopment Plan," Long Branch, slip op. at 50, but also observed that the evidence of record is inconclusive as to whether the City had decided to condemn Appellants' homes, or to preserve them as a residential infill alternative, in 1996. Id. at 41, n. 2.

Despite the diametrically opposite evidence of record as to whether the City notified Appellants that their homes might be subject to condemnation, the trial court made no findings of fact as to whether and when Appellants received such notice or the contents of that notice. The trial court instead stated the legal conclusion, unsupported by any citation to the record, that the City had provided "proper notice." Id. at 31, 51-52.

On April 11, 2000, the City Council adopted Ordinance 9-00. Am. 105-108; Am. 94, ¶ 22. Ordinance 9-00 states that it amends Ordinance 15-96 in accordance with an attached Exhibit A. Exhibit A, ¶ I states that it amends Section 8, the Acquisition Plan, on page 14 of the Redevelopment Plan, by adding a new paragraph. Am. 107. That new paragraph authorizes the City to "acquire through eminent domain or otherwise" those properties listed on Schedule B of an agreement entitled, "An Agreement Between The City Of Long Branch And Beachfront North LLC For The Redevelopment Area Designated As Beachfront North," dated February 22, 2000. Am. 107; Am. 109-135. Although the attachments to this Agreement list properties within the MTOTSA neighborhood for acquisition for Phase II of the redevelopment, Am. 121-132, Appellants' properties do not appear among those to be acquired through eminent domain.

The trial court stated that "The passage of Ordinance 9-00 was procedurally proper in that notice and a public hearing preceded the passage of the Ordinance." Slip op. at 15, n. 1. That statement, however, contains no reference to any evidence of record as to what notice, if any, the

City provided to Appellants of Ordinance 9-00, or whether such notice, if provided, advised Appellants that the amendments to the Redevelopment Plan under Ordinance 9-00 might subject their homes to condemnation. Nor does the record reveal any evidence that the City advised Appellants at the public meeting that their homes might be condemned, or notified Appellants before or during the meeting of their right to contest the Plan amendments.

On January 23, 2001, the City Council passed Ordinance 2-01, which authorized the City to acquire, through negotiation or condemnation, all properties within the redevelopment area, listing on its Exhibit A the tax block and lot numbers of the MTOTSA neighborhood. Da 16-18. Again, the trial court recited that the City passed Ordinance 2-01 "[a]fter proper notice and a hearing," slip op. at 15, but without citing any evidence of record as to what notice if any the City provided to Appellants. Ordinances 9-00 and 2-01, enacted respectively four and five years after the public meetings on the blight determination and the Redevelopment Plan, materially amended the Plan with respect to Appellants' properties. These Ordinances eliminated the preservation as residential infill of all intact single-family housing in the MTOTSA neighborhood, functionally edited the text of the Plan, the color-coded maps, and the three-dimensional model, and contradicted the City's earlier alleged representations.

PROCEDURAL HISTORY

On January 11, 2006, the City commenced this summary condemnation action by verified complaint and order to show cause, under the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 et seq. and the Local Housing and Redevelopment Law, N.J.S.A. 40A:12A-1 to -49, in a summary action, by order to show cause, see R. 4:67-1, -2. Appellants responded by moving to dismiss the complaint. See R. 4:67-4. Appellants' motion raised material questions of fact challenging the City's authority to condemn their properties including, inter alia, that the City failed to comply with the procedural and substantive requirements of the LHRL and denied their due process rights. Appellants presented evidence that they did not receive adequate notice that their homes would be subject to condemnation, that the publicly presented redevelopment plan led them to believe that their homes would not be subject to condemnation, that public officials represented that their homes would not be subject to condemnation, that the City has no authority to condemn their homes because their neighborhood is not and was not blighted, and that potential conflicts of interest throughout the redevelopment process undermined its validity. Nevertheless, the trial court failed to hold a hearing or to make findings on those disputed material facts, contrary to R. 4:67-5. The trial court viewed the condemnation as presumptively valid and placed the burden of proof upon Appellants to show that the blight designation was arbitrary and capricious. By decision dated June 22, 2006, the trial court dismissed Appellants' challenge and allowed the City to proceed to condemnation. The homeowners appeal from the trial court's denial of their motion to dismiss the City's condemnation action and failure to allow discovery, to hold a hearing or to make findings on disputed material facts that are critical to determining the validity of this condemnation proceeding.

ARGUMENT

POINT I

A REMAND IS NECESSARY TO VINDICATE APPELLANTS' RIGHT TO PROCEDURAL DUE PROCESS.

Appellants face the loss of their homes without a fair process leading to this result. The record contains no evidence that Appellants received adequate notice that their homes might be subject to condemnation. Appellants did not receive an adequate hearing to contest the designation of their homes for condemnation. The burden of proof should have been on the City to establish, not on Appellants to disprove, that the MTOTSA neighborhood is "in need of redevelopment." Moreover, ethical irregularities may have violated Appellants' right to an impartial decision-maker. The trial court compounded these violations by failing to permit discovery, admit evidence, hold a hearing, or make findings regarding these procedural defaults. These due process violations undermine the trial court's conclusion that the City has the authority to condemn Appellants' homes.

A. THE RECORD IN THESE APPEALS CONTAINS NO EVIDENCE OF NOTICE TO THE HOMEOWNERS THAT THEIR HOMES MIGHT BE SUBJECT TO CONDEMNATION.

The condemnation of a person's primary residence implicates fundamental human rights that require adequate due process protections that were not provided here. Due process requires that a deprivation of property be preceded by notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). The property owner must be given fair notice of the pending deprivation of the property right and an opportunity to dispute the claims

against him. Fuentes v. Shevin, 407 U.S. 67, 81 (1972). Moreover, "[i]f the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." Id.

The United States Supreme Court has emphasized that notice must be more than symbolic: "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Mullane, 339 U.S. at 315. The New Jersey courts likewise recognize that "[d]ue process requires that deprivation of property by state action be preceded by notice and an opportunity to be heard." Township of Jefferson v. Block 447a, Lot 10, 228 N.J. Super. 1, 4 (App. Div. 1988) (citing Mullane, supra, 339 U.S. at 313).

This Court has analyzed due process requirements in the context of a condemnation action under the Eminent Domain Act.

> "The critical components of due process are adequate notice, opportunity for a fair hearing and availability of appropriate review." Schneider v. City of East Orange, 196 N.J. Super. 587, 595 (App. Div. 1984), aff'd, 103 N.J. 115, cert. denied, 479 U.S. 824 (1986); see also Department of Comm. Affairs v. Wertheimer, 177 N.J. Super. 595, 599 (App. Div. 1980). "'Due process of law' includes reasonable notice of the nature of the proceeding and a fair opportunity to be heard therein." Weiner v. County of Essex, 262 N.J. Super. 270, 287 (Law Div. 1992). "The fundamental requisite of notice involves 'such notice as is in keeping with the character of the proceedings and adequate to safeguard the right entitled to protection.'" Wertheimer, supra, 177 N.J.Super. at 599 (quoting State v. Standard Oil Co., 5 N.J. 281, 305 (1950), aff'd, 341 U.S. 428 (1951)). However, what due process demands depends upon the specific facts presented. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); In re East Park High School, 314 N.J. Super. 149, 160 (App. Div. 1998).

Borough of Keyport v. Maropakis, 332 N.J. Super. 210, 220-221 (App. Div. 2000) (emphases in original).

The Local Housing and Redevelopment Law, N.J.S.A. 40A:12A-1 to -49, authorizes municipalities to undertake redevelopment, but only in accordance with the process specified in the statute. First, a municipal governing body may direct its planning board to investigate whether an area proposed for redevelopment meets the statutory criteria for such designation. N.J.S.A. 40A:12A-6(a). Then, the statute requires public notice and 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 blighted. N.J.S.A. 40A:12A-6(b)(2). "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." N.J.S.A. 40A:12A-6(b)(3). The planning board also must prepare, and append to that map, "a statement setting forth the basis for the investigation." N.J.S.A. 40A:12A-6(b)(1). The municipality must mail that hearing notice to the owner of each property within the proposed redevelopment area. N.J.S.A. 40A:12A-6(b)(3).

Implicit in the LHRL provision requiring individualized notice to property owners of the blight designation hearing, N.J.S.A. 40A:12A-6(b)(3), is that the municipality must make clear the anticipated effects of a blight designation upon their property. Without knowing the effects of the blight designation upon their own interests, homeowners would have no idea whether to object to that designation. Yet the record contains no evidence of what notice if any the City may have provided under N.J.S.A. 40A:12A-6(b)(3).

For their part, Appellants maintain that they received no express notice that the redevelopment process could result in the condemnation of their homes but were instead led to believe their homes would survive intact. Da178, ¶¶ 5, 6. The obfuscation began at the outset. The City Fire Official advised the City Planning Director in August 1995 that, "per your instructions," during his investigation of whether Appellants' homes were "in need of

redevelopment," he did not inspect the interiors of their homes and did not reveal the nature of the inspection when owners or residents inquired. Am. 47.

At either the January 1996 hearing on the blight designation or the May 1996 hearing on the Redevelopment Plan, the City displayed a three-dimensional model of the redevelopment area, showing the small homes of the MTOTSA neighborhood surviving as residential infill. Am. 86. And Appellants attest that the Mayor advised them that their property would be designated as "residential infill" and would not be taken. Da178, ¶¶ 5-7.

Moreover, the Planning Board's proposed Redevelopment Plan, Da 245-266, which the City adopted on May 14, 1996, Da268-269, lists among its objectives: "Conserve sound, well-maintained single-family housing to the extent possible, and encourage residential development through infill." Da 251, ¶ k. The City, its consultants, and attorneys prepared Design Guideline Handbooks, Da 271-275, that purported to outline "the Development rules for the Oceanfront Redevelopment Zone," Da 272, including Appellants' homes. One of those Handbooks includes color-coded maps showing the MTOTSA neighborhood as "infill residential." Da274-275. Those Handbooks were circulated to the public in early 1996. Da 178, ¶ 5. Appellants state that, because the City did not inform them that the redevelopment designation or Plan might lead to the condemnation of their properties, but instead advised them that their homes would not be taken, they had no reason to object to the redevelopment designation or Plan, id., let alone to retain the professional help necessary to challenge the City's actions.[7]

[7] Challenging a blight designation is an expensive proposition. Beyond lawyers, it will, in practice, also require expert testimony and research. See Levin v. Bridgewater, 57 N.J. 506, 528 (1970), appeal dismissed, 404 U.S. 803 (1971); ERETC v. Perth Amboy 381 N.J. Super. 268, 274 (App. Div. 2005); Stahl v. Paterson Bd. of Finance, 62 N.J. Super. 562, 575 (Law Div. 1960), aff'd, 69 N.J. Super. 242 (App. Div. 1961) (presenting expert testimony to object to blight designation). See also Wilson v. City of Long Branch, 27 N.J. 360, 390, cert. denied, 358 U.S.

After the public hearing on the blight designation, the LHRL requires only limited public notice of the municipality's subsequent actions. When it passes the ordinance making the designation, for example, individualized notice is due only to those who filed a written objection to the resolution identifying a specific area for redevelopment. See N.J.S.A. 40A:12A-6(b)(5). Accordingly, those who did not object to the resolution in writing, perhaps because they did not receive notice of its effects on them, would not receive notice of its adoption. Id. Nor would they have the right to apply within 45 days to the Superior Court for review of the blight designation by action in lieu of prerogative writ. N.J.S.A. 40A-12A-6(b)(7). Thus an initial failure to provide adequate notice has a domino effect, depriving the property owner of a series of rights that would otherwise have flowed from his or her first, timely objection.

When the City amended its 1996 Redevelopment Plan and decided to condemn Appellants' homes, by adopting Ordinance 9-00 in April 2000 and then Ordinance 2-01 in January 2001, the record does not establish the notice that was provided to Appellants or whether it was adequate to inform Appellants that their homes might be condemned. At this stage, the LHRL provides: "no notice beyond that required for adoption of ordinances by the municipality shall be required for the hearing on or adoption of the redevelopment plan or subsequent amendments thereof." N.J.S.A. 40A:12A-7(c). The Open Public Meetings Act requires only notice by publication of a public meeting that will consider adoption of an ordinance. N.J.S.A. 10:4-8(d). Thus, again, because Appellants did not file written objections to the original blight

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873 (1958); Kimberline v. Planning Bd. of Camden, 73 N.J. Super. 80, 83 (Law Div. 1962) (in upholding the blight designation, the court in each case specifically noted lack of expert testimony supporting the objection). No rational property owner will undertake this considerable expense if led to believe that his or her home is not a target for condemnation. Such a homeowner will present no expert testimony, and perhaps no defense at all, to the planning board.

designation in 1996, they were not entitled by law (as objectors are) to individualized notice of the amendments to the Redevelopment Plan that targeted their homes for condemnation. Yet, when the sufficiency of the original notice is in serious question, due process entitles Appellants to individualized notice of the effects of amendments to the Redevelopment Plan upon their homes, of their right to challenge those amendments, and of the consequences of failing to do so.

As a matter of procedural due process, property owners are entitled to meaningful notice making explicitly clear that a blight designation and redevelopment process can lead to the taking of their homes. Township of Jefferson, supra, 228 N.J. Super. at 4; Borough of Keyport, supra, 332 N.J. Super. at 220-221. A remand is necessary for discovery, the submission of evidence, and findings of fact on whether and at what point the City gave Appellants sufficient notice.

B. APPELLANTS DID NOT RECEIVE AN ADEQUATE HEARING TO CONTEST EITHER THE CITY'S DESIGNATION OF THEIR NEIGHBORHOOD AS BLIGHTED OR THE TRIAL COURT'S APPROVAL OF THE CONDEMNATION OF THEIR HOMES.

"The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914). Due process requires that, before a deprivation of property, the owner must receive an "opportunity for hearing appropriate to the nature of the case." Mullane, supra, 339 U.S. at 313. The form of hearing can vary "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]." Boddie v. Connecticut, 401 U.S. 371, 378 (1971). Here, Appellants should have had the opportunity at the municipal hearings to contest the City's initial designation of their neighborhood as blighted and the subsequent amendments to the redevelopment plan that

targeted their homes. In addition, the homeowners were entitled to a plenary hearing on these matters in the trial court.

As to the municipal hearings, if notice was constitutionally insufficient, see supra Point I.A., then Appellants were deprived also of a fair opportunity to be heard. "The purpose of notice under the due process clause is to apprise an affected individual of, and permit adequate preparation for, an impending hearing which may affect their legally protected interests." Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1, 13 (1978); see United States v. Raffoul, 826 F.2d 218, 222 (3d Cir. 1987). A fortiori, the deprivation of notice subverts the right to be heard.

Because municipal hearings are before the very body that decides whether to use eminent domain, New Jersey law entitles property owners to review before an independent tribunal, the court. The New Jersey Supreme Court has prescribed more than one procedure for a trial court to ensure the due process rights of a property owner. In Lyons v. City of Camden, for example, the Court explained the procedure in the trial court when a property owner challenges a blight determination by an action in lieu of prerogative writ. The Court instructed trial courts not only to review the municipal record, but also to admit and consider new evidence, including the examination and cross-examination of witnesses:

> At the hearing in the Law Division in such cases customarily the entire record made before the planning board, including particularly the stenographic transcript of the evidence adduced there, is introduced by consent of the parties. Of course, the city council record is submitted also. Rarely, however, does it consist of anything more than the confirmatory resolution of blight based on the proceedings before the planning board. The party attacking the blight declaration may then offer any additional pertinent evidence by means of witnesses or documents in support of his claim that the action of the board was not supported by substantial proof. That procedure was followed in Wilson v. Long Branch, 27

> N.J. 360, 391, cert. denied, 358 U.S. 873 (1958); Sorbino v. City of New Brunswick, 43 N.J. Super. 554, 562-563 (Law Div. 1957); Stahl v. Paterson Bd. of Finance, 62 N.J. Super. 562, 574 (Law Div. 1960), aff'd, 69 N.J. Super. 242 (App. Div. 1961). In addition, . . . there is no sound reason why the plaintiffs may not produce for testimonial examination any witnesses who testified or made reports or furnished documents on matters relevant to the board's finding of blight at the legislative hearing. . . . It must be kept in mind that at the board hearing cross-examination was not permitted. . . . If, at the close of the plaintiffs' case, the municipality or the planning board wishes to supplement the existing record by further competent evidence, it should be allowed to do so. The trial court's decision as to whether the resolution of blight is supported by substantial evidence should then be made upon the entire proof submitted.

48 N.J. 524, 533-534 (1967); see also Levin, supra, 57 N.J. at 527-528, 537 (court should review blight designation de novo unless challenger intentionally withheld evidence from planning board).

In the trial court, a homeowner has the right to contest the need for the condemnation and to interpose every legal defense to which he or she is entitled before the court proceeds to the appointment of commissioners. "[A]ll issues raised as to the right to exercise the power of eminent domain and other like preliminary matters are to be determined in the cause before the court enters judgment of appointment." State v. New Jersey Zinc Co., 40 N.J. 560, 572 (1963); see also State v. Orenstein, 124 N.J. Super. 295, 298 (App. Div. 1972).

The Eminent Domain Act specifically directs that a trial court first determine whether the exercise of eminent domain is appropriate:

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

N.J.S.A. 20:3-5 (emphasis added). In fact, when a homeowner challenges the authority of a municipality to condemn, "all further steps in the action shall be stayed until that issue has been finally determined." N.J.S.A. 20:3-11 (emphasis added).

Here, Appellants' certifications raise disputes as to critical material facts that should have led to a plenary hearing. Appellants allege that they were not notified that the blight designation or the Redevelopment Plan might lead to the condemnation of their homes; that they had the right to contest the blight designation or the Redevelopment Plan; that they had to file written objections immediately; or that the consequence of failing to do so would deprive them of adequate notice and an opportunity to object at subsequent stages of the process. They allege instead that the City reassured them that it would not condemn their homes. These allegations are material to determining whether the City has denied Appellants due process of law.

Despite these factual disputes, the trial court summarily approved the appointment of condemnation commissioners without holding a hearing as described in Lyons, supra, 48 N.J. at 533-34; R. 4:73-1; R. 4:67-2; R. 4:67-5; Long Branch, slip op. at 20-21. Because the record does not establish that Appellants have had a fair opportunity to contest the redevelopment designation or Plan, due process requires a remand.

C. THE CITY OF LONG BRANCH SHOULD CARRY THE BURDEN OF PROVING THAT APPELLANTS' NEIGHBORHOOD IS BLIGHTED.

The current state of the law in New Jersey improperly places on the homeowner the burden of showing that his or her property is not blighted. "The decision of the municipal authorities that the area in question is blighted came to the Law Division invested with a presumption of validity. To succeed, plaintiffs had the burden of overcoming that presumption and demonstrating that the blight determination was not supported by substantial evidence."

Levin, supra, 57 N.J. at 537 (citing Lyons, supra, 48 N.J. at 532-534; Lyons v. City of Camden, 52 N.J. 89, 93, 98 (1968); Wilson, supra, 27 N.J. at 390-391; N.J.S.A. 40:55-21.6 (repealed)). This burden of proof can as a practical matter deprive homeowners of meaningful review of a blight designation. Because the inquiry is whether there is substantial evidence to support the determination, property owners must prove the negative, i.e., that there was not substantial evidence. Proving a negative is difficult at best.

Constitutional law supports reallocating the burden of proof to the City. Generally, the government must carry the burden of proof in situations involving deprivation of a constitutionally protected right. Watson v. Memphis, 373 U.S. 526, 533 (1963). In free speech cases, for example, once the plaintiff establishes a burden upon the constitutional right, the State must prove that its regulation is narrowly tailored to further a compelling government interest. R.M. v. Supreme Court of N.J., 185 N.J. 208, 217 (2005). Similarly, equal protection violations under the New Jersey Constitution demand that the State justify the offending classifications. See, e.g., Planned Parenthood v. Farmer, 165 N.J. 609, 642 (2000) (classifications burdening reproductive choice); Lewis v. Harris, 188 N.J. 415, 423 (2006) (classifications burdening marriage).

Likewise, when the state seeks to restrict a person's liberty through a criminal prosecution, "the Constitution protects every criminal defendant 'against conviction except upon [the government's] proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" United States v. Booker, 543 U.S. 220, 230 (2005) (quoting In re Winship, 397 U.S. 358, 364 (1970)). Also in the criminal context, when the prosecution introduces evidence obtained through a voluntary search, the state bears the burden of showing

that the search was voluntary and that the defendant understood the right to refuse. State v. Johnson, 68 N.J. 349, 354 (1975) (interpreting New Jersey Constitution).

Article VIII, Section 3, paragraph 1 of the New Jersey Constitution creates an individualized right against government overreaching by limiting the use of eminent domain for private redevelopment to those instances involving "blighted areas." The factual predicate of "blight" thus places a constitutional limitation on government action; it follows that government should bear the burden of establishing the basis by which that limitation is lifted. Otherwise, the constitutional protection itself is threatened.

Given the undisputed deprivation of a constitutionally protected property interest when the government condemns homes, the municipality should bear the burden of justifying a taking by proving that substantial evidence supports the blight designation. Such a reallocation of the burden would put redevelopment cases in line, not only with cases affecting other constitutional rights, but also with civil litigation generally. Normally, the plaintiff has the burden of proof, whereas here, it is the owners, defending their constitutionally protected property rights, who must carry the burden. That allocation does not comport with constitutional principles of fairness.

Common sense and efficiency also support shifting the burden of proof to the City. While the City is required by statute to research and record all the evidence it uses to substantiate its finding of blight, N.J.S.A. 40A:12A-6, the property owners are the ones who must carry the burden of proof when that finding is challenged in court. This makes no sense. In other contexts, courts have found that access to information is relevant to allocating the burden of proof. In cases involving discrimination based on disability, for instance, the New Jersey Supreme Court has held that it is "fair to impose the burden of proof on the employer to show

that it reasonably arrived at the opinion that the applicant was unqualified for the job. The employer has the special knowledge, expertise and facts within his control to determine qualifications needed for any particular job classification." Andersen v. Exxon Co., U.S.A., 89 N.J. 483, 500 (1982). In shareholder suits against corporations, the courts have shifted the burden to the corporation to prove the fairness to shareholders of an array of challenged transactions. See, e.g., Brundage v. New Jersey Zinc Co., 48 N.J. 450, 476 (1967) (mergers of companies with common directors); Grato v. Grato, 272 N.J. Super. 140, 150-52 (App. Div. 1994) (freeze-out maneuvers in a closely held corporation); see also Nopco Chem. Div. v. Blaw-Knox Co., 59 N.J. 274, 282-83 (1971) (where plaintiff sued all carriers of a damaged good, but had no affirmative proof as to which handler caused the damage, "'reason and ordinary common sense dictate'. . . that the burden should be shifted to 'those parties most likely to possess knowledge of the occurrence to come forward with facts peculiarly within their possession.'") (internal citations omitted). Similarly here, when the City has assembled the evidence of blight, it is in the best position to carry the burden of proof on this issue in court.

In reaction to the United States Supreme Court's recent decision eroding federal protections against the exercise of eminent domain in Kelo v. City of New London, 545 U.S. 469 (2005), 29 states have passed legislation, ballot initiatives, or constitutional amendments requiring municipalities to prove by clear and convincing evidence the need for redevelopment. United States Government Accountability Office, Eminent Domain: Information about Its Uses and Effect on Property Owners and Communities Is Limited, November 2006, GAO-07-28; see, e.g., Mich. Comp. Laws, § 1.10.2 (effective December 23, 2006). Some scholars have supported this approach. See, e.g., Susan Crabtree, Public Use in Eminent Domain: Are There Limits after Oakland Raiders and Poletown?, 20 Cal. W.L. Rev. 82, 107 (1983). In addition, the often cited

hornbook Nichols on Eminent Domain identifies several states, including New Jersey, that are moving towards stronger oversight of eminent domain. 2A-7 Nichols on Eminent Domain § 7.08 (Lexis 2006). Because of New Jersey's explicit constitutional limitation on the use of eminent domain for private redevelopment except upon a showing of blight, because equity and efficiency demand a reallocation and because of the general evolution of the law, New Jersey should place the burden of proof on the municipality to demonstrate that there is substantial evidence of blight on the record.

D. ALLEGED ETHICAL IRREGULARITIES IN THE CITY'S BLIGHT DETERMINATION AND ADOPTION OF A REDEVELOPMENT PLAN REQUIRE REVERSAL AND REMAND FOR ADDITIONAL FACTFINDING.

Appellants alleged that three members of the Long Branch City Council had potentially disqualifying conflicts of interest between their official positions and their status as shareholders, officer, and employees of the former Monmouth Community Bank, N.A. ("the Bank"),[8] which helped to finance the redevelopment. In addition, the homeowners alleged potential conflicts involving two of the law firms that have represented the City and other actors in the redevelopment process. The trial court did not have before it a complete factual record relative to these potential conflicts, such as a full chronology of all material events, the terms of the Bank's loans to the redevelopers, and the scope and timing of the law firms' relationships with the City, the redevelopers, and the Bank. Without these critical facts, the trial court erred when it denied Appellants discovery and ruled that the potential conflicts were "tenuous" or not "realistic." Slip op. at 41, 46.

Common law principles guaranteeing a fair and impartial tribunal have long governed "the participation of public officials in matters in which they have a personal interest."

Wyzykowski v. Rizas, 132 N.J. 509, 522-523 (1993). "The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case. . . . No definitive test can be devised." Griggs v. Princeton, 33 N.J. 207, 219 (1960) (quoting Van Itallie v. Franklin Lakes, 28 N.J. 258, 268 (1958)). "The question will always be whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn duty." Van Itallie, supra, 28 N.J. at 268. "Actual proof of dishonesty need not be shown. An actual conflict of interest is not the decisive factor, nor is 'whether the public servant succumbs to the temptation,' but rather whether there is a potential for conflict." Wyzykowski, 132 N.J. at 524, (quoting Griggs, supra, 33 N.J. at 219) (other internal citations deleted).

Our courts have a long history of voiding local government measures involving conflicts of interest that result when public officials regulate land use in a way that stands to benefit them or others in their circle. In Griggs v. Princeton, for example, the New Jersey Supreme Court invalidated a blight determination by the Princeton Borough Council where two participating councilmen were professors at Princeton University. The University in turn had a controlling interest in Princeton Municipal Improvement, Inc., an entity that owned properties in and near the proposed blighted area, that had engaged in numerous rebuilding projects in the area, and that was a potential redeveloper for the blighted area. Its controlling investment in Princeton Municipal Improvement gave the University a significant financial interest in the outcome of the blight designation and the redevelopment project. 33 N.J. at 219. The Court observed, "it is most doubtful that participation by a councilman in a municipal action of particular benefit to his employer can be proper in any case." Id. (quoting Pyatt v. Mayor & Council of Dunellen, 9 N.J.

[8] Now the Central Jersey Bancorp, see https://www.cjbna.com/site/pr2005/010305.pdf.

548, 557 (1952)). "[W]e perceive the rule to be that the mere existence of a conflict, and not its actual effect, requires the official action to be invalidated." Id. at 220-221. The Court thus found disqualifying conflicts of interest by the two Councilmen-Professors and invalidated the blight determination. Id. at 221.

Similarly, in Aldom v. Borough of Roseland, 42 N.J. Super. 495 (App. Div. 1956), this Court voided a zoning ordinance where the company that employed a councilman who voted for the ordinance would be benefited. The ordinance rezoned a parcel from residential to industrial use in order to allow that company to undertake industrial operations on it. The court emphasized that

> too much refinement should not be engaged in by the courts in an effort to uphold the municipal action on the ground that his interest is so little or so indirect. Such an approach gives recognition to the moral philosophy that next in importance to the duty of the officer to render a righteous judgment is that of doing it in such a manner as will beget no suspicion of the pureness and integrity of his action.

42 N.J. Super. at 502 (internal citations deleted). The court explained, "The personal or private interest which disqualifies may be identified generally as one which is different from that which the public officer holds in common with members of the public," including any interest the councilman might have in assisting his longtime employer. Id. at 507. Finally, the court held that, although the ordinance "had sufficient affirmative votes to pass without [the conflicted councilman's] participation, [that] does not save it from being voided . . . . The infection of the concurrence of the interested person spreads, so that the action of the whole body is voidable." Id. at 507-508.[9]

[9] See also Pyatt, 9 N.J. at 555-557 (voiding the vote for an ordinance vacating a public street where two of the Borough Councilmen who voted for it were employees of a private corporation

The principles embodied in these cases were later codified in the 1991 enactment of the Local Government Ethics Law. N.J.S.A. 40A:9-22.1 to -22.25. The Local Government Ethics Law mandates compliance with certain ethical standards and specifically prohibits a variety of potential conflicts. Among these:

> No local government officer or employee or member of his immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity which is in substantial conflict with the proper discharge of his duties in the public interest . . .
>
> No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment . . . .

N.J.S.A. 40A:9-22.5(a), (d). Thus, under both the common law and the governing statute, an official action is void if public officials participating in it have some special interest in the outcome that calls their impartiality into question.

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that would benefit substantially from the resulting opportunity to expand); Barrett v. Union Twp. Comm., 230 N.J. Super. 195, 200, 205 (App. Div. 1989) (voiding a municipal council vote when a councilman's mother resided in a nursing home favored by the zoning amendment); Sokolinski v. Woodbridge Twp. Mun. Council, 192 N.J. Super. 101, 105 (App. Div. 1983) (enjoining the votes of Board of Adjustment members employed by or related to employees of the Board of Education, which benefited from the subject variance); Zell v. Borough of Roseland, 42 N.J. Super. 75, 81-82 (App. Div. 1956) (invalidating a zoning ordinance where a member of the planning board who voted for the ordinance was a member of a church that would have benefited from it); but see Van Itallie, supra, 28 N.J. 258, 269, 272 (upholding zoning amendment although participating councilman's brother held "lower echelon" position in benefited corporation); Wilson, supra, 27 N.J. at 395-396 (before enactment of the Local Government Ethics Law, upholding municipal blight designation although two planning board members were officers and shareholders and mayor was shareholder in bank that held some mortgages on properties within the area, and third member was municipal health officer and resided about 300 feet from area).

In this case, City Councilman Anthony Giordano III is Senior Vice President and Chief Financial Officer of the Monmouth Community Bank, slip op. at 18, 45, and treasurer of its holding company. City Councilman David G. Brown is employed by the bank as a messenger. Id. at 45. Moreover, both Councilmen Giordano and Brown, as well as Councilman Michael DeStefano, are shareholders in the Bank. Id. at 18, 45. The Bank extended a $2.5 million line of credit to Beachfront North, LLC, the redeveloper of the MTOTSA area, and a $2 million line of credit to Pier Village, LLC, a redeveloper in another area of Long Branch. Id. at 17. The first advances on these lines of credit were in 2001 and 2002, and they were repaid in full in 2002 and 2003. Id. The dates of the applications and approvals and the terms of the guaranty for these lines of credit are not in the record.

The financial interests of three City councilmen in the Bank, and the Bank's employment of two of those councilmen, raise important questions of fact. Appellants were entitled to discovery to determine whether any of them had a pecuniary or personal interest with the potential "to impair his objectivity or independence of judgment," N.J.S.A. 40A:9-22.5(d), when he voted on the blight designation, the Redevelopment Plan, the Plan amendments, or any other relevant City Council business. See R. 4:10-2(a) (broad scope of discovery allowed). The trial court denied discovery, however, and dismissed the ethics allegations out of hand. Slip op. at 46. The court reasoned that Appellants failed to show the detriment to themselves from any alleged conflict of interest. Id. Yet the financial and employment relationships between the councilmen and the Bank presented ample potential for influencing the Council to condemn the MTOTSA neighborhood. Discovery would explore whether these potential conflicts were sufficient to invalidate any of the Council votes that led to the condemnation of Appellants' homes,

regardless of whether Appellants can prove actual self-dealing. See Wyzykowski, 132 N.J. at 524.

Appellants were also entitled to discovery about potential conflicts of interest arising from the City's relationships with the law firms that represented it at various stages of the redevelopment process. The question in this regard is not whether the lawyers themselves engaged in any conduct in violation of the rules that govern the legal profession; that is a separate and distinct inquiry.[10] The question instead is the one presented in municipal ethics cases generally: "whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn duty." Van Itallie, supra, 28 N.J. at 268. Such circumstances could arise out of a municipality's relationship with any professional in its employ, whether lawyer, engineer, planner, or other. In particular, the question here is whether a citizen, knowing the relevant facts, might reasonably believe that the City of Long Branch leaned toward certain redevelopers or a certain bank in part because of the professional relationships its lawyers had with those entities.

In Township of Lafayette v. Board of Chosen Freeholders, 208 N.J. Super. 468, 474 (App. Div. 1986), this Court invalidated a county's selection of a sanitary landfill site when the county counsel also had extensive professional dealings with a private client who owned the chosen site. The county counsel was a shareholder in and president and board chair of a bank primarily owned by this private client, and the counsel's law firm "handled almost all of the

[10] See R.P.C. 1.8(k) ("A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client."); In re Supreme Court Advisory Comm. on Prof'l Ethics Opinion No. 697, 188 N.J. 549 at 12, n.1 (2006).

bank's legal work." Id. at 471. During its representation by this counsel, the county chose his client's site for the landfill, although a consultant earlier retained by the county to evaluate potential sites ranked the client's property 38th out of 91. Id. On these facts, this Court held that "[a] reasonably-minded citizen has to conclude there was a disqualifying interest when the advice of County Counsel leads to a significant business opportunity for an individual with whom he had a business relationship to the extent of the one that existed here." Id. at 474. As always in conflicts cases, "it is the mere existence of the interest, not its actual effect, which requires the official action to be invalidated." Id. at 473.

In this case, James G. Aaron, Esq., of the Ansell Zaro firm serves as municipal counsel to the City of Long Branch and has held this position since 1995. Slip op. at 16. He also sits on the board of directors of the Monmouth Community Bank, Am. 155, 156-157, 161, 162-163; his firm represents the Bank, Da 296; and his firm represented one of the redevelopers until sometime in 2002, when it joined the project, slip op. at 16; Da 296, 298. In addition, the Greenbaum Rowe firm represented the City as Special Redevelopment Counsel until it withdrew in 2002 when a redeveloper it also represents joined the project. Slip op. at 16; Da 204, 289, 292. Arthur Greenbaum, lead partner in the firm, has sat on the board of directors of that redeveloper, K. Hovnanian, since 1992. Slip op. at 16; Da 288. Appellants should have been allowed to explore through discovery the scope and timing of these overlapping relationships. Only such investigation would permit a full and fair record to be developed on whether these relationships would, in the perception of a reasonable citizen, create a substantial risk of impairing the City's independence of judgment in crafting and implementing the redevelopment. The trial court erred in dismissing the conflicts allegations without permitting the Appellants to

question those involved, review documents, and otherwise test and develop the record. Slip op. at 42-44.[11]

A similar refusal to allow discovery on a potential conflict recently led to reversal of this same trial court in Haggerty v. Red Bank Zoning Board, 385 N.J. Super. 501, 516 (App. Div. 2006). There, the plaintiff property owners alleged that the Red Bank Zoning Board had conflicts of interest that rendered the proceedings invalid. The trial court denied discovery, finding the alleged conflict too speculative. The record revealed that the father of the vice-chairperson of the zoning board served as "of counsel" in a firm that had previously represented one of the applicants in another matter before the zoning board. The vice-chairperson testified that she was not aware of the work her father's firm had done for the applicant, and did not recuse herself. The trial court found insufficient evidence as a matter of law to establish any disqualifying conflict of interest. On appeal, this Court reversed, concluding that the limited evidence already in the record established that the vice-chairperson had a disqualifying conflict of interest. Emphasizing that "the public is entitled to have its representatives perform their duties free from any personal or pecuniary interests that might affect their judgment," id. at 512

[11] In addition, Appellants may be entitled to discovery about the activities of former Long Branch Councilman and Council President John Zambrano, who voted on the redevelopment at issue here. In July 2006, subsequent to the trial court decision, Councilman Zambrano pleaded guilty to a federal extortion charge and resigned from the City Council. Asbury Park Press, July 21, 2006, available at http://www.app.com/apps/pbcs.dll/article?AID=/20061007/NEWS/110110171 (last viewed Dec. 21, 2006). The extortion charge involved a telephone call Mr. Zambrano placed on November 19, 2003, to the City of Long Branch Building Department, recommending for "demolition" work an FBI informant whom he believed to be a contractor willing to pay bribes to secure work. In return, Councilman Zambrano admitted accepting a payment of $1,000. Councilman Zambrano's guilty plea did not specify whether the anticipated "demolition" work involved any portion of the "area in need of redevelopment."

(citing Wyzykowski, supra, 132 N.J. at 522-523; Barrett, supra, 230 N.J. Super. at 200), the Court invalidated the challenged zoning board proceedings. 385 N.J. Super. at 517.

The conflicts of interest alleged in this case are anything but unrelated to the validity of the redevelopment designation and plan. If in fact the council members took any relevant vote at a time when they knew that the Bank they worked for and partially owned would help to finance the redevelopment, the official action resulting from that vote is void. Likewise, if the City's lawyers had substantial business relationships with the Bank or the redeveloper at a time when they gave the City pertinent legal advice on the redevelopment, any official act potentially influenced by that advice is void.

POINT II

THE RECORD DOES NOT CONTAIN SUBSTANTIAL EVIDENCE OF BLIGHT.

A. THE STANDARD FOR REVIEWING A MUNICIPALITY'S BLIGHT DETERMINATION IS WHETHER IT IS SUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE OF RECORD.

The New Jersey Constitution requires that eminent domain be exercised for redevelopment only to alleviate blight. "The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired." N.J. Const., art. VIII, § 3, ¶ 1 (emphasis added). Our Constitution mandates a finding of blight as a precondition for taking property for private redevelopment. Forbes v. Board of Trustees of South Orange Twp., 312 N.J. Super. 519, 528-529 (App. Div. 1998). Accordingly, Appellants have a right protected by the New Jersey Constitution to stay in their homes unless the City establishes that the taking is necessary to remedy blight. See Department of the Public Advocate, "Reforming the Use of Eminent Domain for Private Redevelopment in New Jersey," May 18, 2006, at 12-13, xi, Am. 14-15, Am. 35.

Under both the LHRL and the case law, the test for reviewing a blight determination is whether substantial evidence supports the municipality's determination. N.J.S.A. 40A:12A-6(b)(5) ("The determination, if supported by substantial evidence . . . shall be binding and conclusive . . . ."); Levin, supra, 57 N.J. at 537 ("If a reviewing court finds that the determination was grounded on substantial evidence, it must be affirmed."); Lyons, supra, 52 N.J. at 98 (affirming blight designation because "substantial evidence supports the municipal determination"); Lyons, supra, 48 N.J. at 532-34 ("The function of the Law Division as prescribed by the statute is to decide whether the determination of the public body is supported by substantial evidence."). The substantial evidence test is an objective analysis of the quality and quantity of the proofs presented and is designed to ensure that the determination is founded on solid, credible, and relevant evidence.

New Jersey courts have sometimes invoked what on the surface appear to be alternative standards for reviewing blight determinations, including whether the municipality's action was "arbitrary and capricious" or "corrupt, irrational or baseless." Wilson, supra, 27 N.J. at 391 (explicitly reserving the question whether, "if the evidence shows that the municipal determination was not arbitrary or capricious, it follows, as of course, that the evidence in support is substantial"); see also, e.g., Lyons, 48 N.J. at 533 ("Absence of such support [by substantial record evidence] would indicate arbitrary and capricious action."); Concerned Citizens of Princeton, Inc. v. Mayor & Council, 370 N.J. Super. 429, 453 (App. Div. 2004) ("Thus, the burden is on the objector to overcome the presumption of validity by demonstrating that the redevelopment designation is not supported by substantial evidence, but rather is the result of arbitrary or capricious conduct on the part of the municipal authorities.").

Similarly, in this case, the trial court relied upon several formulations to uphold the blight designation. Appearing at times to place the burden of proof on the City, as the Public Advocate urges, the court held that "the municipality will prevail by establishing 'some reasonable basis for its legislative action,'" slip op. at 25 (citation omitted), or by "support[ing] its determination with substantial evidence," id. at 32. At other times placing the burden on the homeowners, the court stated, "A challenger can overcome a presumption of validity only by proofs that there could have been no set of facts that would rationally support a conclusion that the enactment is in the public interest," id. at 29, or that the determination is "arbitrary, capricious, or unreasonable," id. at 31. Elsewhere, the trial court stated it would uphold a municipality's finding of a public purpose for the exercise of eminent domain absent "an affirmative showing of fraud, bad faith, or manifest abuse." Id. at 50.

These various statements of the standard set too low and shifting a bar to protect the due process rights of a person whose home is threatened with condemnation so that it may be redeveloped for other private uses. The initial determination of "blight" is a question of historical fact regarding the condition of the properties in question. As such, it is either proved or disproved by objective evidence. "Blight" is not a question of judgment or discretion as to what an area should become in the future, as to which an abuse of discretion standard may be appropriate. The Pubic Advocate invites this Court to dispel such misunderstandings by articulating a clear and unitary substantial evidence test, drawn from the methodology the New Jersey courts actually employ in reviewing blight designations.

Our State Supreme Court consistently has searched the record for real evidence of blight. In the seminal case of Wilson v. City of Long Branch, supra, after upholding the Blighted Area Act against an array of constitutional challenges, the Court went on to approve the municipality's

blight determination based on an extensive review of the record: in one area, 41 of 71 dwellings were substandard in that they showed: "serious conditions of disrepair, either of the outside walls, roof, foundation, inside walls, floors or ceilings; . . . did not come up to standards for legal permanent construction; or . . . lacked such major facilities as running hot water . . . ." 27 N.J. at 392. In another, mainly unimproved area, six of ten parcels were in tax delinquency, and the city held foreclosure title to two parcels. Id. at 393. All in all, "[t]he blighted territory comprised 74.8% of the net project area of 93.2 acres." Id.

A decade later, in the Lyons v. City of Camden cases, supra, after a remand for completion of the record, 48 N.J. at 535-537, the Supreme Court affirmed the municipality's blight designation based on a "skilled and thorough" survey by defendants' experts, including interior and exterior inspections of the buildings that found most of them substandard, 52 N.J. at 95. Similarly, in Levin, supra, the Court reviewed at length the metes, bounds, history, and characteristics of the target area -- including, for example, evidence about diversity of ownership and disputed titles relevant under LHRL criterion (e) -- before affirming a blight designation on the ground that the area was "then and thereafter stagnant, undeveloped and unproductive. . . . [I]t had become an economic wasteland." 57 N.J. at 537-38.

This Court has followed the Supreme Court's example by carefully reviewing municipal blight determinations. In ERETC, supra, 381 N.J. Super. at 280, for example, this Court rejected a blight determination based on "conclusory" testimony by a planner who admitted that he "did not inspect the interiors of buildings, did not review applications for building permits, did not review occupancy rates or the number of people employed in the area." Conversely, in Hirth v. City of Hoboken, 337 N.J. Super. 149 (App. Div. 2001), this Court affirmed a blight determination based on "detailed block-by-block findings concerning the condition of buildings

in the proposed redevelopment area and the nature and level of the economic activity being conducted there." Id. at 163. These inspections revealed that "the area as a whole appears to be suffering from a substantial degree of long-standing vacancy of land, commercial and industrial building abandonment, lack of maintenance and a general sense of stagnancy and under-utilization." Id. at 162;[12] see also Forbes, supra, 312 N.J. Super. at 530 (affirming blight designation based on "substantial evidence that the Village's central business district as a whole was becoming stagnant, deteriorated, obsolescent, and that its economic vitality was seriously declining"); Maglies v. Planning Bd. of East Brunswick, 173 N.J. Super. 419, 423 (App. Div. 1980); Kimberline, supra, 73 N.J. Super. at 86(enumerating as among the factors supporting blight determination, "[t]he deterioration and obsolescence of the buildings, the use of those properties which were once single residences for housing many families . . . the hazardous and inadequate streets . . . the almost total deterioration of the sidewalks"); Stahl, supra, 62 N.J. Super. at 577. Thus, far from casually affirming flimsy findings, see Chou v. Rutgers, 283 N.J. Super. 524, 539 (App. Div. 1995), this Court searches the record for substantial evidence to support a blight determination, and affirms only when it finds such evidence.

Other states apply the substantial evidence test to review blight designations in the same manner as New Jersey. Describing the substantial evidence standard, the California Court of Appeal stated:

> Defining substantial evidence, one court has well noted: "[I]f the word 'substantial' means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously

[12] Because the trial court had "erred in considering the merits of plaintiff's challenge to the blight determination without reviewing the full record of proceedings before the Board and City Council," Hirth, supra, 337 N.J. Super. at 157, this Court undertook such review itself before reaching its conclusion.

> the word cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case."

Friends of Mammoth v. Town of Mammoth Lakes Redev. Agency, 82 Cal. App. 4th 511, 537 (Cal. Ct. App. 2000) (quoting Estate of Teed, 112 Cal. App. 2d 638, 644 (Cal. Ct. App. 1952)) (superseded by statute on other grounds, Citizens for Responsible Equitable Envtl. Dev. v. San Diego Redev. Agency, 134 Cal. App. 4th 598, 607 (Cal. Ct. App. 2005) (discussing Cal. Pub. Resources Code § 21090)). The court went on to say that a redevelopment agency's findings are not conclusive and that the court is not a "rubber stamp"; it must ensure that the factors in the Community Redevelopment Law are taken into account in blight determinations. Friends of Mammoth, 82 Cal. App. 4th at 537 (citing Emmington v. Solano County Redev. Agency, 195 Cal. App. 3d 491, 498 (Cal. Ct. App. 1987)). In Massachusetts, another jurisdiction with extensive relevant case law, the substantial evidence test requires proof that a reasonable mind might accept as adequate to support a conclusion. Boston Edison Co. v. Boston Redev. Auth., 371 N.E.2d 728, 741 (Mass. 1977). Federal courts apply the same definition of "substantial evidence" in reviewing administrative determinations under the Administrative Procedure Act. See, e.g., Dickinson v. Zurko, 527 U.S. 150, 162 (1999).

In contrast to New Jersey, jurisdictions that apply a pure arbitrary and capricious test often require a showing of willful misconduct such as fraud, bad faith, or conflict of interest to overturn a blight determination. The underlying theory is that blight determinations are legislative or quasi-legislative findings that deserve broad deference in the absence of wrongdoing. See, e.g., Housing and Redev. Auth. v. Minneapolis Metro. Co., 104 N.W.2d 864, 874 (Minn. 1960) ("In determining whether a particular area may be legally selected for

redevelopment, either under the terms of the statute, or in terms of the requirement that the particular project serve a 'public use,' the role of judicial review is severely limited by the rule that the finding of the redevelopment authority . . . is not generally reviewable, unless fraudulent or capricious, or in some instances, unless the evidence against the finding is overwhelming."); City of Phoenix v. Superior Court, 671 P.2d 387, 394 (Ariz. 1983) ("We hold further that the standard of review is limited to questions of fraud, collusion, bad faith or arbitrary and capricious conduct by the governing body."). These cases employ a standard more deferential than New Jersey's substantial evidence test.

The functional differences between the two tests are important. An "arbitrary and capriciousup" determination is a random one with no basis, a whim. It is more aptly applied to discretionary judgments than to factual findings. In jurisdictions that apply a pure arbitrary and capricious test, courts ask whether there was any basis at all for the determination or whether municipal misconduct might call the designation into question. In contrast, jurisdictions, such as New Jersey, that apply substantial evidence review (regardless of what they may call the test) do not limit themselves to these questions. A determination based on insignificant or irrelevant evidence, while not whimsical, is nevertheless invalid for lack of substantial evidence. A substantial evidence inquiry must take into account the amount and the quality of the evidence presented. The maxim that courts should not second-guess a determination that is debatable does not lessen the necessity of substantial evidence. See Lyons, 52 N.J. at 98. A fairly debatable finding is one that is supported by substantial evidence on the side of the municipality, even if also on the opposing side, and is therefore sustainable.[13]

[13] This explains the "presumption of validity" the Supreme Court ascribes to blight designations. See, e.g., Levin, supra, 57 N.J. at 537. This presumption, like any presumption, is defined by the

Here, the trial court erred in relying on an exceedingly deferential standard to uphold the City's blight designation. The court therefore defaulted in the essential tasks of searching the record and holding a hearing to determine whether the City's blight determination was supported by substantial credible evidence.

B. THE SUBSTANTIAL CREDIBLE EVIDENCE OF RECORD MUST BE COMPETENT TO SUPPORT A BLIGHT DETERMINATION. SUPERFICIAL FLAWS OR CONCLUSORY, UNSUPPORTED STATEMENTS ARE NOT ADEQUATE.

A blight determination may be sustained only upon proof both that the property exhibits conditions meeting the statutory criteria and that those conditions are detrimental to the community. The case law indicates that blight declarations targeting residential property usually involve threats to the public health and safety, established with reference to objective legal standards. Here, the City did not provide evidence under any legally established criteria that Appellants' homes are either blighted or a detriment to the community.

A municipality may delineate an area as "in need of redevelopment if, after investigation, notice and hearing as provided in [N.J.S.A. 40A:12A-6], the governing body of the municipality by resolution concludes that within the delineated area any of [certain listed] conditions is found." N.J.S.A. 40A:12A-5. The Planning Board claimed that the MTOTSA neighborhood is

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evidence required to overcome it. The evidence required is, in turn, determined by the standard of review, in this case, substantial evidence. A presumption of validity exists insofar as there is substantial evidence of blight, even if there is equally compelling evidence to the contrary. In such cases, the presumption permits the municipal designation to prevail over an objection.

"in need of redevelopment," i.e. blighted, based on three sections of the LHRL: N.J.S.A. 40A:12A-5(a), (c), and (e).[14] Da 237.

Criterion (a) states that an area is in need of redevelopment if:

> The generality of buildings are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living or working conditions.

N.J.S.A. 40A:12A-5(a) (emphasis added).

The definition of obsolescence is "the process or state of falling into disuse or becoming obsolete." Black's Law Dictionary 1107 (8th ed. 2004). All properties are constantly becoming obsolescent as buildings grow older, more outdated, less valuable, and less productive. Yet not all properties with older structures are blighted. As one California appellate court observed, it is not sufficient for substantial evidence purposes for a town to state a fact that could be true for any property anywhere, such as that buildings age and thus become less valuable. County of Riverside v. City of Murrieta, 65 Cal. App. 4th 616, 627 (Cal. Ct. App. 1998). Because such evidence applies with equal force to all or substantially all property, it does nothing to explain why any particular parcel should be condemned. Subsection (a), however, provides a limiting principle: Obsolescence falls to the level of blight when it is "conducive to unwholesome living or working conditions." N.J.S.A. 40A:12A-5(a). The City failed to provide substantial evidence that Appellants' homes are obsolete, unwholesome or detrimental to the community.

[14] As discussed supra at note 3, the January 1996 Report discusses all three potential redevelopment neighborhoods collectively. It includes findings relative to N.J.S.A. 40A:12A-5(d), but these findings apply only to commercial buildings in the Broadway Corridor, and not to the residential MTOTSA neighborhood, Da 231-232. Accordingly, that criterion was not applied to Appellants' homes.

Well established, objective measures should inform blight determinations pertaining to residences. For example, municipalities have broad powers to identify, and then demolish or repair, any building that has "come into a state of disrepair through neglect, lack of maintenance or use, fire, accident or other calamities, or through any other act rendering the building or buildings, or parts thereof, in a state of disrepair, to the extent that the building is unfit for human habitation or occupancy or use." N.J.S.A. 40:48-2.5a; see also N.J.S.A. 40:48-1, 40:48-1.1, 40:48-2.3 to 40:48-2.6. Regulations issued under the State Uniform Construction Code Act, N.J.S.A. 52:27D-119 to -141, include specific standards to determine when a structure is "unsafe, or unsanitary . . . or . . . constitute[s] a fire hazard or [is] otherwise dangerous to human life or the public welfare." N.J.A.C. 5:23-2.32(a); see generally N.J.S.A. 52:27D-123(a); N.J.A.C. 5:23-1.1 et seq. These regulations contain subcodes that detail substantive standards to determine whether a structure presents a hazard. See, e.g., N.J.A.C. 5:23-3.14 (building subcode); N.J.A.C. 5:23-3.15 (plumbing subcode); N.J.A.C. 5:23-3.16 (electrical subcode); N.J.A.C. 5:23-3.17 (fire protection subcode).

Even code violations are not always enough. In the context of evaluating the condemnation of an apartment building, for example, the Law Division held that a showing of obsolescence required proof that the building was unsafe, not merely that it did not conform to codes for new buildings. Spruce Manor Enters. v. Borough of Bellmawr, 315 N.J. Super. 286, 295-296 (Law Div. 1998); see also, e.g., Wilson, supra, 27 N.J. at 392 (dwellings "did not come up to standards for legal permanent construction"); Lyons, supra, 52 N.J. at 92 ("Fourteen of the residential structures are unoccupied and in such state of disrepair as to be untenantable. Twenty-three residential structures are not connected to the City sanitation system. . . . The

entire area was said to be subject to fires, 255 fire calls having been made from 1961 through 1965.").

In contrast, the method used by the City to evaluate Appellants' homes for blight was superficial and subjective. First, the Planning Board rated homes without proof of any substantive defects. The trial court noted that 17% of the buildings in the Beachfront North sector received a good rating, while 67% of the buildings in Oceanfront South area received a good rating. Long Branch, slip op. at 11, 34-35. The ratings were based on a number of factors including broken windows, deteriorating paint, falling or rotten exterior columns, and cracked or chipped masonry veneer. Id.; Da 227. The City did not introduce a single building or fire code citation or even such an inspection report, or any evidence of a crime problem in the MTOTSA neighborhood. The superficial flaws upon which it did rely are insufficient to support a finding of blight without evidence that they led to "unwholesome living . . . conditions." N.J.S.A. 40A:12A-5(a). Moreover, the findings here do not approach the serious and substantial evidence of blight relied upon in the case law or found in government studies.[15]

[15] In 16.5% of the homes in a typical community in the United States, and in 26.6% of the homes in the central cities of this country, one could expect to find at least one significant external structural defect. The federal government has reported on the condition of 124,377,000 housing units nationwide. The criteria included, inter alia, significant external structural defects such as a sagging roof, missing roofing material, hole in the roof, missing bricks, siding, etc. Of the units surveyed, 100,903,000, or 83.5%, displayed "none of the above" defects. U.S. Department of Housing and Urban Development and U.S. Census Bureau, American Housing Survey for the United States: 2005 (August 2006), available at http://www.census.gov/prod/2006pubs/h150-05.pdf , at 3, Table 1A-2 (last accessed Dec. 1, 2006), Am. 196. A housing unit may have defects in more than one criterion, and the number of defects per unit may not be distributed evenly across socioeconomic categories. In central cities, for example, of the 35,826,000 units surveyed, 26,301,000, or 73.4%, displayed "none of the above" significant external structural defects. Id. at 13, Table 1B-2.

The trial court here compounded the City's failure to support its "blight" determination with substantive evidence by denying Appellants a hearing on the evidence they proffered, such as the opinion of their land use planning expert, John R. Mullin, Ph.D., FAICP.[16] The trial court failed to consider Dr. Mullin's report and does not even discuss it in the opinion. Instead, the court reasoned that such evidence would at most show that the City's decision was "debatable" and therefore the court must defer to the City and uphold its decision. Slip op. at 39. Because the trial court failed to consider the report of Appellants' expert witness, and denied him any opportunity to give oral testimony, Appellants were denied a primary means of contesting the blight designation. See Lyons, 48 N.J. at 533-34; ERETC, supra, 381 N.J. Super. at 275, 280.

Because the City did not prove by competent, substantial evidence either that Appellants' homes are blighted under any objective standard or that they pose any detriment to the community, it has shown no basis for their condemnation under N.J.S.A. 40A:12A-5(a).

An area is in need of redevelopment under criterion (c) if there is substantial evidence of:

> unimproved vacant land that has remained so for a period of ten years prior to adoption of the resolution, and that by reason of its location, remoteness, lack of means of access to developed sections or portions of the municipality, or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital.

N.J.S.A. 40A:12A-5(c).

In support of criterion (c), the Planning Board's January 1996 Report states that 23% of the area within Oceanfront North and 25% of the properties within the entire area proposed for redevelopment consisted of vacant land, of which 16% and 17%, respectively, were vacant for

[16] Preliminary Assessment of Planning Issues, prepared by John R. Mullin, PhD, FAICP, March 1, 2006, Ex. 25 to March 2, 2006 Certification of Danielle A. Maschuci, Esq. in support of Defendants' Motion to Dismiss, Request for a Plenary Hearing and Request for Discovery.

10 or more years. Da 228, 229, 234; Long Branch, slip op. at 11, 12, 36. The Report concludes that increasing vacancy deters private investment which could improve the area and benefit the public.

The LHRL requires more than a showing of vacancy; it requires substantial evidence that the land is not likely to be developed by private capital. Winters v. Township of Voorhees, 320 N.J. Super. 150, 155 (Law Div. 1998). The vacancy rate notwithstanding, this is a neighborhood with ocean views, immediate access to the beach along Seaview Avenue and Ocean Terrace, and a border with Seven Presidents Park along Seaview Avenue. The City failed to present any evidence that so prime a location could not attract private development capital. Conclusory statements do not constitute substantial evidence. See ERETC, supra, 381 N.J. Super. at 278-81 (holding that city's decision was not supported by substantial evidence because witness statements and testimony were conclusory).

In addition, the statute lists the factors that may constitute cognizable disincentives to private investment. N.J.S.A. 40A:12A-5(c). These include location, remoteness, lack of means of access to developed sections or portions of the municipality, topography, or nature of soil. Id. An above-average vacancy rate is not listed in the statute. Moreover, because all criteria actually listed involve physical conditions of the property, vacancy would not seem to be implicitly included either. Thus, criterion (c) has not been met in this case. See N.J.S.A. 40A:12A-5(c).

Criterion (e) states that an area is in need of redevelopment if there is:

> [a] growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

N.J.S.A. 40A:12A-5(e).

Underutilization is an economic concept that refers to a use that is less than optimally efficient at the moment of determination. By definition, all capital improvements depreciate, and even new improvements will underutilize the land they occupy at some later date. While there is no express requirement of a showing of detriment to the community under subsection (e), the statute must be applied in a manner consistent with the general limiting principle of a demonstrable detriment to the community. Like the term "obsolete" in subsection (a), the term "underutilization" in subsection (e) must be read narrowly in order to effect the statutory purpose and comply with the blight requirement of the New Jersey Constitution. N.J. Const., art. VIII, § 3, ¶ 1

As reviewed above with regard to the obsolescence criterion, a showing of detriment to the community is missing from the record. The trial court credited the City with establishing criterion (e) based upon the amount of property taxes generated by the properties and the vacant land within the entire Oceanfront North area, compared with the Oceanfront South area. Long Branch, slip op. at 11, 36.[17] Yet neither the City nor the trial court explained how these facts established that Appellants' homes cause any harm to the community. Any person's modest home in theory could be replaced with a more expensive house that would yield greater tax revenue; however, our State Constitution does not allow the use of eminent domain merely to replace middle-income homeowners with richer ones. Our Constitution requires the exercise of eminent domain to remedy blight. Absent objective evidence that would support a finding of substantive blight and harm to the community, the City may not condemn Appellants' homes merely to generate more tax revenue.

The LHRL criteria that the City relied upon to take Appellants' homes must be read in pari materia with the New Jersey Constitutional requirement that a municipality may exercise eminent domain for private redevelopment only to remedy blight. A literal reading of subsections (c) and (e) would render them facially unconstitutional because their breadth would allow for takings of non-blighted property, and unconstitutional as applied because there is no showing of blight in this case. See Forbes, supra, 312 N.J. Super. at 528 (holding that the finding of blight is a constitutionally mandated precondition to redevelopment); see also Public Advocate's Report, Appendix at ii-viii and authorities cited therein, Am. 26-32 (arguing that historical materials from 1947 New Jersey Constitutional Convention indicate that finding of blight was intended to be a substantive limitation on the use of eminent domain).

Insofar as reasonably possible, however, this Court has a duty to avoid an interpretation of the LHRL that would lead to its invalidation under the Constitution.

> It is a cardinal principle of interpretation that "even though a statute may be open to a construction which would render it unconstitutional or permits its unconstitutional application, it is the duty of this Court to so construe the statute as to render it constitutional if it is reasonably susceptible to such interpretation."

State v. Miller, 170 N.J. 417, 433 (2002) (quoting Garfield Trust Co. v. Director, Div. of Taxation, 102 N.J. 420, 433 (1986)). This rule is grounded in the "the assumption that the Legislature intended to act in a constitutional manner." Right to Choose v. Byrne, 91 N.J. 287, 311 (1982). Courts will "seek to avoid a statutory interpretation that might give rise to serious constitutional questions." Silverman v. Berkson, 141 N.J. 412, 417 (1995); see generally In re Commitment of W.Z., 173 N.J. 109, 126 (2002); State v. Johnson, 166 N.J. 523, 540 (2001)

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[17] The average property tax rate in Oceanfront South was $2.14 per square foot, while in Oceanfront North the rate was $.50 per square foot. Long Branch, slip op. at 11, 36.

(describing "constitutional doubt" doctrine); State v. Mortimer 135 N.J. 517, 523-53 (1994), cert. denied, 513 U.S. 970 (1994) (strengthening mens rea element of hate crimes statute to avoid unconstitutional vagueness).

In addition to reading statutes to avoid constitutional doubt, courts also read them to avoid irrational outcomes: "[W]here a literal interpretation would create a manifestly absurd result, contrary to public policy, the spirit of the law should control." Turner v. First Union Nat'l Bank, 162 N.J. 75, 84 (1999); Carpenter Tech. Corp. v. Admiral Ins. Co., 172 N.J. 504, 521 (2000); see generally 73 Am. Jur. 2d Statutes § 172 (2006) ("A court must construe statutes to avoid unreasonable or absurd results; or, as sometimes stated, a court should not adopt an interpretation which produces absurd or unreasonable results, if such interpretation can be avoided. . . . Furthermore, general terms in a statute should be so limited in their application as not to lead to absurd consequences.") (footnotes omitted).

The LHRL was enacted to alleviate blight, as the New Jersey Constitution mandates, and the various criteria for blight are limitations on the use of eminent domain. See N.J. Const., art. VIII, § I, ¶ 3; see also Public Advocate's Report, appendix at ii-viii, Am. 26-32. The limiting principle of the LHRL is clear from the legislative findings which read, in part:

> There exist, have existed and persist in various communities of this State conditions of deterioration in housing, commercial and industrial installations, public services and facilities and other physical components and supports of community life, and improper, or lack of proper, development which result from forces which are amenable to correction and amelioration by concerted effort of responsible public bodies, and without this public effort are not likely to be corrected or ameliorated by private effort.

N.J.S.A. 40A:12A-2.

The findings indicate that, in enacting the LHRL, the Legislature was concerned, not with economic growth generally, but with a small set of areas with serious and persistent problems unlikely to be corrected by private efforts, the usual source of growth and maintenance. Id. Remedying those problems, and only those problems, is the goal of the statute and marks the outer bounds of the permissible use of eminent domain for private redevelopment. An interpretation that substantially exceeds this limiting principle is against the spirit of the law.

The "underutilization" criterion, if applied literally, would make any and all property within New Jersey a potential target for redevelopment for the simple reason that any property could hypothetically be put to more productive use.[18] In addition, the breadth of property covered under this construction would render the other criteria nullities. Therefore, if another construction is reasonable, that construction must be applied. Requiring a showing of harm to the community would avoid constitutional problems and effectuate the statute's limited purpose.

The Local Redevelopment and Housing Law would violate the State Constitution were it to allow a municipality to exercise its power of eminent domain without substantial evidence of blight. Because the City did not prove by substantial evidence that the MTOTSA neighborhood is blighted, its condemnation for private economic redevelopment violates our State Constitution.

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[18] As Justice O'Connor observed in her dissent in Kelo v. City of New London,

> For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.

545 U.S. 469, __, 125 S.Ct. 2655, 2676 (2005) (O'Connor, J., dissenting) (internal cites deleted).

C. BECAUSE THE MTOTSA NEIGHBORHOOD IS PHYSICALLY SEPARATE FROM AND UNNECESSARY TO THE LARGER REDEVELOPMENT AREA, IT IS NOT SUBJECT TO TAKING BASED ON FINDINGS OF BLIGHT ELSEWHERE WITHIN THAT LARGER AREA.

Courts are generally reluctant to question the boundaries of a redevelopment area, and the LHRL specifically contemplates that non-blighted property may be taken in certain circumstances. See e.g. Lyons, supra, 52 N.J. at 98; Wilson, supra, 27 N.J. at 379. Courts must, however, employ some standard for assessing the relationship between the finding of blight and the scope of the condemned area if the statute is to be fairly applied. When a non-blighted area is necessary to the overall redevelopment, integral to the redevelopment area, and blight predominates in that area, the limited remedial purpose of the LRHL is served.

In Berman v. Parker, the United States Supreme Court held that the taking of two non-blighted properties in Washington, D.C., was not prohibited in a redevelopment scheme because the taking was necessary for effective redevelopment. 348 U.S. 26, 36 (1954). ("If the Agency considers it necessary in carrying out the redevelopment project to take full title to the real property involved, it may do so. It is not for the courts to determine whether it is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation.")

Mr. Berman owned an intact department store within a large substantially blighted neighborhood. The store was isolated in and surrounded by the blighted area. 348 U.S. at 30-31. The neighborhood had so deteriorated that 64.3% of its dwellings were beyond repair. Id. at 30. It contained numerous overcrowded dwellings, lacked adequate streets and alleys, and lacked light and air. Id. at 34. Congress determined that the neighborhood had become "injurious to the

public health, safety, morals, and welfare" and that it was necessary to "eliminat[e] all such injurious conditions by employing all means necessary and appropriate for the purpose," including eminent domain. Id. at 28. Because the store was located in the middle of the blighted neighborhood, its removal was necessary for the condemnation to proceed.

In this case, the trial court noted that "our Supreme Court held that a redevelopment plan is not invalid for including homes or buildings that are not substandard." Long Branch, slip op. at 24 (citing Wilson, supra, 27 N.J. at 379). While this is true enough, there must be some relationship between the evidence of blight and the delineation of the area targeted for redevelopment. For instance, a town could not redevelop an entire neighborhood because a single parcel was blighted. This would be a grossly disproportionate response to the harm the statute seeks to alleviate. Therefore, both the LHRL and the case law establish that the inclusion of non-blighted property in blighted areas is to be judged under standards of necessity, integration, and proportionality.

The LHRL defines an "area in need of redevelopment" in part this way:

> A redevelopment area may include lands, buildings, or improvements which of themselves are not detrimental to the public health, safety or welfare, but the inclusion of which is found necessary, with or without change in their condition, for the effective redevelopment of the area of which they are a part.

N.J.S.A. 40A:12A-3 (emphases added). Thus, the statute itself requires the municipality to establish that the taking of non-blighted property is "necessary" for effective redevelopment, and the non-blighted neighborhood must be "part" of the larger redevelopment area.

Applying these concepts, the courts have held that any non-blighted area marked for condemnation must be "an integral part and necessary to the accomplishment of the redevelopment plan." Wilson, supra, 27 N.J. at 379; see also Lyons, supra, 48 N.J. at 536

(same). The Court in Lyons explained that it would allow condemnation of intact buildings within an overall blighted area only if necessary to ensure the viability of the effort to cure that blight:

> The fact that such an area includes some sound homes or buildings, or even that incorporated therein as an integral part and necessary to the accomplishment of the redevelopment plan is a portion of the municipality containing structures which are not substandard, is not sufficient to provoke a judicial pronouncement that the public agency's determination of blight is based wholly or partly on a palpable abuse of discretion. Denial of the right of the municipality to draw into a blighted area certain houses or buildings which are in good condition might well serve to defeat the over-all legislative purpose, namely, the redevelopment of blighted areas.

48 N.J. at 536 (emphases added). Implicit in this explanation is that the condemnation of intact properties would lack a justifiable public purpose if it were not "integral and necessary" to accomplish the redevelopment plan.

The courts have also emphasized proportionality. Cases upholding blight designations have repeatedly cited the extent of the deterioration. See, e.g., Lyons, supra, 52 N.J. at 95 ("There are 164 dwellings in the smaller area. Defendants' experts found 85 of them to be substandard"); Wilson, supra, 27 N.J. at 393 ("The blighted territory comprised 74.8% of the net project area of 93.2 acres."); Kimberline, supra, 73 N.J. Super. at 84 ("94 structures, or 64% of the total, have been classified as containing building deficiencies, and . . . the area contained a total of 194 dwelling units, of which 154, or 79%, are deficient.").

Case law in other states also supports requiring necessity, integration, and proportionality in drawing a redevelopment area. In Regus v. Baldwin Park, the Court of Appeal in California considered whether substantial evidence supported Baldwin Park's Redevelopment Plan. 70 Cal. App. 3d 968, 973 (Cal. Ct. App. 1977). The area designated for redevelopment contained two

separate, noncontiguous sites: the Puente-Merced site and the South Baldwin Park site. Id. With regard to the inclusion of the Baldwin Park site, the court stated that, while a target area was not required to be blighted in all its portions, "it was required to be blighted when considered as a whole," meaning "conditions of blight must 'predominate' and must injuriously affect the entire area." Id. at 981 (citing Cal. Health and Safety Code § 33321) (italics in original). Applying this standard, the court noted that, even if Puente-Merced was blighted, nothing in the evidence suggested that "the conditions [there] have any effect on South Baldwin Park." Id.; see also Helena v. De Wolf, 508 P.2d 122, 127-128 (Mont. 1973) ("where it is shown . . . that the property is not reasonably necessary to the clearance of the blighted area and prevention of its recurrence, the 'area concept' does not prevail").

Here, the City failed to establish that Appellants' neighborhood itself is blighted. The City's own superficial inspection of the 38 homes in the MTOTSA neighborhood rated only three, or just under 8%, in "poor" condition, Am. 57-61, while much more serious structural defects can be expected in 16.5% of homes nationwide and 26.6% of homes in central cities.[19] Indeed, the trial court itself seems to have found that the MTOTSA neighborhood was not blighted: "The fact that standing alone, the MTOTSA properties should not have been included in the redevelopment area is equally unpersuasive." Slip op. at 38. In this statement, the trial court makes a finding that the neighborhood was intact but simultaneously and improperly dismisses this fact as irrelevant. Having determined that the neighborhood was not blighted "standing alone," id., the trial court should have asked whether this neighborhood was necessary and integral to the redevelopment plan.

[19] See supra note 15.

In fact, unlike Mr. Berman's store, MTOTSA is not located in the middle of a blighted neighborhood. Appellants' homes are located across Ocean Avenue, a four-lane divided roadway, from the inland Broadway area. As in Regus, supra, a large boulevard divides the proposed redevelopment area into two distinct and non-contiguous sites. MTOTSA occupies a corner location bounded by Ocean Avenue to the west, the Monmouth County Seven Presidents' Park to the north, the Atlantic Ocean to the east, and new townhouses to the south. It is self-contained, not "part" of or "integral" to the larger redevelopment area. N.J.S.A. 40A:12A-3; Wilson, supra, 27 N.J. at 379; Lyons, supra, 48 N.J. at 536. The new townhouses are the result of redevelopment already performed in Long Branch to remedy the oceanfront blight caused by the burned and abandoned amusement pier. But, again, the City has not shown by substantial evidence that the blight of the former pier area – now transformed – infected the MTOTSA neighborhood as well. The record simply contains no evidence that Appellants' homes present any harm to any portion of the community. Absent evidence of harm to the community or the necessity to remove Appellants' homes to remedy an objective blight problem, the City has failed to justify the wholesale destruction of the MTOTSA neighborhood.

CONCLUSION

Because the limited record below does not contain evidence sufficient to support the trial court's decision to permit the condemnation to go forward, that decision must be reversed and the case remanded for further proceedings.

Respectfully submitted,

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