

Casino Reinvestment Development
Authority,

Plaintiff/Appellant,

vs.

Charles Birnbaum and Lucinda
Birnbaum,

Defendant/Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000019-16-T1

CIVIL ACTION

ON APPEAL FROM:

SUPERIOR COURT OF NEW JERSEY,
ATLANTIC COUNTY, LAW DIVISION,
ATL-L-589-14

JUDGMENT ENTERED: DENIAL OF
AUTHORITY TO CONDEMN

SAT BELOW: HONORABLE JULIO L.
MENDEZ, J.S.C.

BRIEF OF PLAINTIFF APPELLANT
CASINO REINVESTMENT DEVELOPMENT AUTHORITY

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Table of Contents

PRELIMINARY STATEMENT..... 1

PROCEDURAL HISTORY..... 3

STATEMENT OF FACTS..... 7

 A. General Background..... 7

 B. Powers of CRDA..... 12

 C. CRDA’s Creation of Atlantic City’s Tourism
 District..... 13

LEGAL ARGUMENT..... 17

 I. CRDA Possesses Broad Condemnation Authority and Is
 Subject Only to the Limitations Imposed By the State
 and Federal Constitutions..... 17

 II. The Court Erred By Imposing a “Reasonable Assurances”
 Requirement on CRDA(PA1067-1078)..... 20

 A. There Is No “Adequate Assurances” Requirement In
 New Jersey..... 20

 B. Even If a “Reasonable Assurances” Requirement Was
 Imposed, CRDA Has Already Met And Exceeded Such A
 Requirement..... 23

 1. CRDA’s Role In The Development Process..... 23

 2. CRDA Has Provided More Than Reasonable
 Assurance That The SIMUDP Will Be
 Implemented..... 26

 III. The Court Erred In Holding That CRDA’s Plans for the
 SIMUDP Were Vague and Lacking Specificity(PA1067-
 1068)..... 30

 IV. The Court’s Opinion Will Severely Curtail Development
 Within Atlantic City and Within the State of New
 Jersey..... 33

CONCLUSION..... 36

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Final Order and Opinion Denying CRDA's Right to Condemn,
entered August 5, 2016..... PA1067-1068

TABLE OF AUTHORITIES

Page (s)

CASES

Borough of Essex Fells v. Kessler Inst. for Rehab., Inc.,
289 N.J. Super. 329 (Law Div.1995), aff'd 188 N.J. 531
(2006), cert. denied, 331 U.S. 46 (2007)..... 19, 32

Casino Reinvestment Dev. Auth. v. Banin,
320 N.J. Super. 342 (Ch. Div. 1998)..... passim

City of Trenton v. Lenzner,
16 N.J. 465 (1954), cert. denied, 348 U.S. 972 (1955)..... 31

Kelo v. City of New London,
268 Conn. 1 (2004) aff'd sub nom. Kelo v. City of New
London, 545 U.S. 469 (2005)..... 32

Kelo v. City of New London,
545 U.S. 469 (2005)..... 19

Twp. of W. Orange v. 769 Associates, L.L.C.,
172 N.J. 564, 800 A.2d 86 (2002)..... 19

Mount Laurel Twp. v. Mipro Homes 19
379 N.J. Super. 358, 377 (App. Div. 2005)..... 19

STATUTES

Atlantic City Municipal Stabilization and Recovery Act,
P.L. 2016, c. 4..... 27

Atlantic City Tourism District Act N.J.S.A. 5:12-218 et
seq..... 13

12

Casino Property Tax Stabilization Act, P.L. 2016, c. 5 27, 28, 29

N.J.S.A. 5:12.95.19 28

N.J.S.A. 5:12-144.1 28

N.J.S.A. 5:12-153 8

N.J.S.A. 5:12-160 11, 23

<u>N.J.S.A.</u> 5:12-161 (p)	12
<u>N.J.S.A.</u> 5:12-173.9 <u>et seq.</u>	11, 23
<u>N.J.S.A.</u> 5:12-173.10	11
<u>N.J.S.A.</u> 5:12-182	12, 13, 17, 18
<u>N.J.S.A.</u> 5:12-182 (a)	18
<u>N.J.S.A.</u> 5:12-186	12
<u>N.J.S.A.</u> 5:12-218 <u>et seq.</u>	13, 23
<u>N.J.S.A.</u> 5:12-219	14, 15, 28
<u>N.J.S.A.</u> 5:12-219 (a) (1)	14
<u>N.J.S.A.</u> 5:12-219 (a) (2)	14
<u>N.J.S.A.</u> 5:12-219 (a) (2) (c)	14
<u>N.J.S.A.</u> 5:12-219 (h) (1)	15, 17, 33
<u>N.J.S.A.</u> 5:12-233	31
<u>N.J.S.A.</u> 40:48-8.45 <u>et seq.</u>	29
<u>N.J.S.A.</u> 54:32B-1 <u>et seq.</u>	28

PRELIMINARY STATEMENT

This matter involves CRDA's condemnation of a building in Atlantic City, New Jersey (the "Property") for purposes of fulfilling CRDA's legislative mandate to promote tourism in the City pursuant to the Atlantic City Tourism District Act. The Property is located within the boundaries of CRDA's "South Inlet Mixed Use Development Project" - a multi-use project that will include non-gaming, tourism-focused residential, retail and commercial uses (the "Project"). Despite CRDA's exacting compliance with the laws of this State, the trial court denied CRDA the authority to condemn the Property. In so doing, the trial court exceeded its own authority and infringed upon the power of the legislature to craft redevelopment policy.

The State and Federal constitutions impose only three requirements on condemnors: public purpose, due process and just compensation. Neither due process nor just compensation are at issue in this case and the trial court already correctly determined that CRDA possesses a constitutionally valid public purpose for the acquisition of Property: the promotion of tourism in Atlantic City in furtherance of the Atlantic City Tourism District Act. Based on this determination, the trial court should have authorized CRDA to acquire the Property and proceed with the Project.

Instead, however, the trial court imposed an unprecedented fourth requirement: "reasonable assurances". Pursuant to this extra-constitutional requirement, the Court ordered CRDA to guarantee that CRDA would put the subject property to a specific use within a specific time frame. Despite CRDA's efforts to comply with the court's demand, the court concluded that it was impossible for CRDA to guarantee the project would go forward due to a combination of economic uncertainty in Atlantic City and various pending legislative proposals. The trial court erroneously ruled that this failure to guarantee amounted to a "manifest abuse of eminent domain".

The demand for such a guarantee is contrary to long standing New Jersey law. It also undermines the very purpose of redevelopment - which is to restore areas of the State that are experiencing economic hardship. If redevelopment, in times of economic uncertainty, is a manifest abuse of eminent domain, then there will be no redevelopment in the State. The Appellate Division should reverse the trial court's denial of CRDA's right to condemn and remand this matter for further proceedings in accordance with the Eminent Domain Act.

PROCEDURAL HISTORY

The procedural history of this case is unusual because it has deviated from the long standing procedure established by the Eminent Domain Act, the Court Rules and extant case law. CRDA filed the Complaint and Declaration of Taking in this matter on February 7, 2014. (Pa1; Pa169.) The Court entered an Order to Show Cause on March 10, 2014 and the Order to Show Cause Hearing was initially scheduled for April 21, 2014 and then rescheduled by the Court for May 20, 2014. (Pa176; Pa181; Pa182.)

On April 18, 2014, a motion was filed by the defendants in other condemnation actions brought by CRDA, namely, CRDA v. Sencit F/G Metropolitan associates, et al., Docket L -868-14 and CRDA v. Sencit Vermont Associates, et al., Docket L -869-14, to consolidate those matters with this proceeding. (Pa183.) CRDA opposed that motion by letter brief dated May 1, 2014. By Order dated May 20, 2014, the Court consolidated CRDA v. Sencit F/G Metropolitan associates, et al. and CRDA v. Sencit Vermont Associates, et al. but denied the defendants' application to consolidate this matter with those cases. (Pa609.)

Prior to the Order to Show Cause hearing, Defendants filed an Answer and Affirmative Defenses on April 30, 2014. (Pa199.) Defendants thereafter filed a brief in opposition to the Order

to Show cause on May 8, 2014. (Pa479.) CRDA filed its opposition brief on May 14, 2014. (Pa562.)

Simultaneously with filing their Answer, Defendants filed a motion seeking an Order to convert the matter to a plenary hearing and to permit discovery. CRDA opposed the application, which was denied on June 24, 2014. (Pa635.) The Court, however, issued an Order inviting supplemental briefings on the issues of: (1) public purpose; (2) necessity; (3) blight; and (4) adequate assurances. The Court further ordered a case management conference to take place on August 28, 2014. Id.

Each party submitted supplemental briefings and the Order to Show Cause Hearing took place on October 21, 2014. (Pa747.) After hearing oral argument, the Court affirmed CRDA's right to exercise the power of eminent domain and ruled that the Project constitutes a valid public purpose. (Pa772; Pa773.) In determining that the Project consisted of a valid public purpose, the Court expressly found:

1. "The Atlantic City Tourism District Act is the legislative declaration of a legitimate public purpose."

Id.

2. "The fundamental public purpose of the Atlantic City Tourism District Act is to promote tourism to create and

protect jobs in Atlantic City and to assist the ailing gaming industry." Id.

3. "The Atlantic City Tourism District Act establishes an abundantly appropriate public purpose that passes both Federal and State constitutional muster." Id.

4. "The CRDA is duly authorized to exercise the power of eminent domain for the taking of the Birnbaum Property." Id.

5. "The Tourism District Master Plan and the South Inlet Mixed Use Development Project were adopted by CRDA in accordance with the Atlantic City Tourism District Act." Id.

6. "The Tourism District Master Plan and the South Inlet Mixed Use Development Project contain a sufficient level of specificity to justify the taking of the Birnbaum property by eminent domain." Id.

The Defendants then moved for reconsideration on the basis that, even though the Project was a valid public purpose, certain proposed revitalization efforts would prevent CRDA from moving forward with the Project. In partially granting the Defendants' motion for reconsideration, the Court left its prior ruling in place. (Pa836.) The Court specifically did not reverse its findings of law and fact that a valid public purpose existed for the taking of the property and that the South Inlet

Mixed Use Development Project presented sufficient specificity.

Id.

Instead, the Court raised a new concern about whether or not CRDA was financially and strategically prepared to move forward with the Project that the Court had already approved. All of the issues identified by the Court (CRDA's finances, the status of Atlantic City and recent casino closings) went to the central issue of whether CRDA remains financially and strategically equipped to move forward with the Project. The Court ordered CRDA to provide "reasonable assurances that the Project will be implemented". The Court further ordered that CRDA provide this information within 180 days. At the Hearing held on April 26, 2016, CRDA submitted testimony demonstrating that it is financially and strategically prepared to move forward with the Project. (Pa966-67 at 27:16-28:20.)

At the Court's request, the parties submitted supplemental briefings regarding the legislation signed by Governor Chris Christie on May 27, 2016, S1711 and S1715. CRDA submitted supplemental briefing on the legislation on June 2, 2016 and Defendants submitted supplemental briefing on June 3, 2016. By Order dated August 5, 2016, the Court ordered that CRDA's authority to condemn was denied, finding that CRDA's exercise of the eminent domain power with respect to Defendants' property

exceeded its statutory authority and constituted a manifest abuse of power. (Pa1066; Pa1068.) This appeal followed.

STATEMENT OF FACTS

A. General Background.

In 1976, the New Jersey Constitution was amended to legalize casino gambling in Atlantic City. The purpose of the amendment, according to the amendment's sponsor in the State Assembly, was "to provide a first-class, viable resort economy with natural resources that Atlantic City has always had." Statement of Asm. Steven P. Perskie, Public Hearing before the Assembly State Government and Federal and Interstate Relations Committee on ACR-126, April 14, 1976, at 2. Assemblyman Perskie recognized that an obstacle to this goal was that Atlantic City was without "resources to attract the kind of investment capital that will give us again the type of full-based tourist economy on which the people of Atlantic City can build." Id. Other public benefits sought by the amendment included (1) development of hotels, restaurants, and nightclubs within Atlantic City; (2) the creation of jobs and employment opportunities; and (3) improvement of the tourist industry throughout the entire State of New Jersey, including other cities and destinations. Statement of Asm. Howard Kupperman, Public Hearing before the Assembly State Government and Federal

and Interstate Relations Committee on ACR-126, April 14, 1976, at 6-7.

In 1984, the Legislature created the Casino Reinvestment Development Authority ("CRDA") to oversee the redevelopment of Atlantic City. CRDA is responsible for investing a portion of the casino gaming industry's revenues into economic and community development projects in Atlantic City. Under its enabling statute (N.J.S.A. 5:12-153 et seq.) CRDA was charged with multiple, specific purposes:

a. to maintain public confidence in the casino gaming industry as a unique tool of urban redevelopment for the city of Atlantic City and to directly facilitate the redevelopment of existing blighted areas and to address the pressing social and economic needs of the residents of the city of Atlantic City and the State of New Jersey by providing eligible projects in which licensees shall invest;

b. to provide licensees with an effective method of encouraging new capital investment in Atlantic City which investment capital would not otherwise be attracted by major casino-hotel convention complexes or by normal market conditions and which will not supplant capital, either public or private, that would otherwise be invested in the city of Atlantic City or in the jurisdiction in which the investment is to be made and which will have the effect of benefiting the public at large and increasing opportunities and choices of those of low and moderate income in particular;

c. to provide, further and promote tourism industries in New Jersey and especially Atlantic county, by providing financial assistance for the planning, acquisition, construction, improvement, maintenance and operation of facilities for the recreation and

entertainment of the public which may include an arts center, cultural center, historic site or landmark, or sports center;

d. to provide loans and other financial assistance for the planning, acquisition, construction, reconstruction, demolition, rehabilitation, conversion, repair or alteration of buildings or facilities to provide decent, safe and sanitary dwelling units for persons of low, moderate, median range, and middle income in need of housing, and to provide mortgage financing for such units;

e. to assist in the financing of structures, franchises, equipment and facilities for operation of, expansion of and the development of public transportation or for terminal purposes, including but not limited to development and improvement of port terminal structures, facilities and equipment for public use;

f. to provide loans and other financial assistance for the construction, reconstruction, demolition, rehabilitation, conversion, repair or alteration of convention halls in Atlantic county and the State of New Jersey, including but not limited to office facilities, commercial facilities, community service facilities, parking facilities, hotel facilities and other facilities for the accommodation and entertainment of tourists and visitors;

g. to make loans and assist in the financing of the construction, reconstruction, rehabilitation, repair or acquisition of infrastructure projects, including but not limited to sewage disposal facilities, water facilities, solid waste disposal facilities, roads, highways and bridges;

h. to assist in financing buildings, structures and other property to increase opportunities in manufacturing, industrial, commercial, recreational, retail and service enterprises in the State so as to induce and to accelerate opportunity for employment in these enterprises, particularly of unemployed and

underemployed residents of the jurisdiction in which the investment is to be made; to provide loans and other financial assistance for the planning, developing or preservation of new and existing small businesses as well as the planning, acquisition, construction, reconstruction, rehabilitation, conversion or alteration of the facilities that house these enterprises, particularly those which provide services or employment to unemployed or underemployed residents of the State; and to provide loans and other financial assistance to provide employment training and retraining, particularly for unemployed and underemployed residents of the State;

i. to cooperate with and assist local governmental units in financing any eligible project;

j. to encourage investment in, or financing of, any plan, project, facility, or program which directly serves pressing social and economic needs of the residents of the jurisdiction or region in which the investment is to be made, including but not limited to supermarkets, commercial establishments, day care centers, parks and community service centers, and any other plan, project, facility or program which best serves the interest of the public in accordance with section 25 [C.5:12-173] of this 1984 amendatory and supplementary act;

k. to encourage investment in, or financing of, projects which are made as part of a comprehensive plan to improve blighted or redevelopment areas or are targeted to benefit low through middle income residents of the jurisdiction or region in which the investments are to be made;

l. to make loans for those eligible projects according to the projected allocated amounts to be available;

[m. to establish and exercise authority over the Atlantic City Tourism District pursuant to the provisions of P.L.2011, c.18 (C.5:12-218 et al.); and] 2011 Amendment

n. any combination of the foregoing.

N.J.S.A. 5:12-160.

In 2001, the Legislature passed the "Casino Reinvestment Development Authority Urban Revitalization Act." N.J.S.A. 5:12-173.9 et seq. (the "Revitalization Act"). In its findings, the Legislature reaffirmed that legalized casino gambling is a "'unique tool of urban redevelopment' to facilitate the revitalization of Atlantic City and other distressed municipalities throughout the State." N.J.S.A. 5:12-173.10. The Legislature recognized that since the passage of the Amendment to legalize casino gambling 25 years earlier, the development of Atlantic City's casino industry and CRDA's resultant investments "have greatly benefited the people of New Jersey and have served as a model for many other states and countries that wished to emulate Atlantic City's successful record of casino development and economic growth." Id. The Legislature stated that the purpose of this Revitalization Act was to "establish a new program to facilitate the next phase of Atlantic City's development into a regional, national and international 'destination resort' and at the same time, to insure that substantial commitments are made to projects to revitalize urban areas and promote continued economic growth throughout the State." Id.

In 2011, the Legislature enacted the Atlantic City Tourism District Act (N.J.S.A. 5:12-183 et seq.) and again turned to CRDA for the creation of a new "Tourism District" within Atlantic City that would recharge development, create a family friendly environment, and generally make Atlantic City a destination resort. N.J.S.A. 5:12-186.

B. Powers of CRDA.

The powers of CRDA are expressly set forth in its enabling statute, as amended by the Revitalization Act and the Atlantic City Tourism District Act. These powers include plenary authority to exercise the right of eminent domain in the city of Atlantic City. N.J.S.A. 5:12-161(p). CRDA's power of eminent domain is more fully described at N.J.S.A. 5:12-182, which provides in relevant part:

b. In the event the Casino Reinvestment Development Authority finds it is necessary to complete a project in the city of Atlantic City, the authority may acquire any real property in the city, whether a fee simple absolute or lesser interest and **whether for immediate use, that the authority may find and determine is required for public use, and upon such a determination, the property shall be deemed to be required for a public use** until otherwise determined **by the authority;** and with the exceptions hereinafter specifically noted, the determination shall not be affected by the fact that such property has theretofore been taken for, or is then devoted to, a public use, but **the public use in the hands or under the control of the authority shall be deemed superior to the public use in the hands or under the control of any other person, association or corporation.**

c. If the Casino Reinvestment Development Authority is unable to agree with the owner or owners thereof upon terms for the acquisition of any such real property in the city **for any reason whatsoever**, then the authority may acquire, and is hereby authorized to acquire, after consultation with the appropriate agency of the city by way of notification 30 days prior to the filing of condemnation proceedings, such property, whether a fee simple absolute or lesser interest, by condemnation or the exercise of the right of eminent domain pursuant to the provisions of the "Eminent Domain Act of 1971," P.L.1971, c. 361 (C. 20:3-1 et seq.) and the "Relocation Assistance Act," P.L.1971, c. 362 (C. 20:4-1 et seq.).

N.J.S.A. 5:12-182 (emphasis added).

C. CRDA's Creation of Atlantic City's Tourism District

On February 2, 2011 the Governor signed the Atlantic City Tourism District Act (the "Tourism Act"), N.J.S.A. 5:12-218 et seq., into law. N.J. Gov Msg., 2011 S.B. 11/S.B.12 214th Legislature. The Tourism Act was designed to "revitalize the ailing gaming and tourism industries in Atlantic City." Id. Under the Tourism Act, the CRDA was charged by the New Jersey State Legislature with creating a Tourism District in the City of Atlantic City. See Pa566 at ¶ 2; see also N.J.S.A. 5:12-218 et seq. In order to carry out this mandate, the Legislature granted the CRDA exhaustive powers to transform an entire swath of Atlantic City into a Tourism District that combines existing gaming and entertainment uses with "non-gaming, family centered

tourism-related activities." N.J. S. Comm. State. S.B. 11 (Nov. 15, 2010).

The CRDA's new mandate included defining the boundaries of the Tourism District. N.J.S.A. 5:12-219. The Tourism District had to include

the facilities comprising licensed Atlantic City casinos, casino hotels, and any appurtenant property, any property under the ownership or control of the authority, the Atlantic City Special Improvement District established by ordinance of the City of Atlantic City, any property under the ownership or control of the convention center authority prior to the transfer date, any property within Atlantic City under the ownership or control of the New Jersey Sports and Exposition Authority established pursuant to P.L.1971, c. 137 (C.5:10-1 et seq.) prior to the transfer date, the Atlantic City Convention Center, Boardwalk Hall and any part of the property consisting of the Atlantic City convention center project prior to the transfer date, and any specified part of Atlantic City which the authority finds by resolution to be an area in which the majority of private entities are engaged primarily in the tourism trade, and the majority of public entities, if any, serve the tourism industry.

N.J.S.A. 5:12-219(a)(1). The Legislature set forth minimal boundaries for the area that would become the Tourism District and granted the CRDA to power to, by resolution, adopt the Legislature's mandated boundaries or add to the mandated boundaries. N.J.S.A. 5:12-219(a)(2). Those mandated boundaries included the Birnbaum property. See Pa566 at ¶¶ 2-6; N.J.S.A. 5:12-219 (a)(2)(c). By resolution, the CRDA adopted the boundaries set forth by the Legislature.

Moreover, the Tourism Act charges the CRDA with, among many other duties, the obligation "to facilitate, with minimal government direction, the investment of private capital in the tourism district in a manner that promotes economic development." See Pa566 at ¶¶ 2-6; N.J.S.A. 5:12-219(h)(1). It also expressly authorizes the CRDA to create development projects in the Tourism District. See N.J.S.A. 5:12-219. In accordance with this mandate from the Legislature and the Governor, the CRDA adopted a Tourism District Master Plan on February 1, 2012, and affirmed and readopted the Tourism District Master Plan on February 21, 2012. (Pa570; Pa575; Pa566 at ¶¶ 2-6.) The Master Plan calls for the redevelopment of several areas of Atlantic City including the South East Inlet Neighborhood. Id.

On June 19, 2012, in furtherance of the development of the Tourism District, the CRDA approved the South Inlet Mixed Use Development Project ("SIMUDP"). (Pa566 at ¶ 3; Pa580.) This resolution was adopted in order to facilitate a coordinated plan of future development throughout the Atlantic City Neighborhood Strategy Area (formerly known as the Northeast Inlet Neighborhood Strategy Area; now expanded south and west to include the adjacent area of the South Inlet). (Pa566 at ¶¶ 4-6.) Recognizing the redevelopment of the South Inlet and Absecon Inlet as a critical part of Atlantic City's revival, the

project is envisioned as a vibrant mixed use area that couples new open park space, education, potential research, residential, and retail/entertainment ventures with the current mix of uses, which include the TEN resort casino (formerly Revel) and the Lighthouse District Park Project. Id. at ¶ 5. The goal is to create a 24/7 "live to work" play feel. Id. at ¶ 6. It is anticipated that it will include restaurants, specialty stores, boutiques, educational facilities and residential housing for rent and for purchase, that tie into the open space greenway of the Absecon Lighthouse Park. Id. The CRDA is working on an architectural massing plan that sets forth the types of structures and uses that will be incorporated into the Project. (Id. at ¶ 11.)

LEGAL ARGUMENT

I. CRDA POSSESSES BROAD CONDEMNATION AUTHORITY AND IS SUBJECT ONLY TO THE LIMITATIONS IMPOSED BY THE STATE AND FEDERAL CONSTITUTIONS.

From CRDA's creation in 1984, through to the adoption of the Atlantic City Tourism District Act in 2011, the New Jersey Legislature repeatedly charged CRDA with the implementation of sustainable development within the City of Atlantic City. While the Legislature altered CRDA's specific mandate as the needs of the City and the State have changed¹, one thing remains constant: CRDA is provided with a powerful toolset designed to address the unique challenges that must be overcome to implement any development project in Atlantic City.

Among the tools afforded to CRDA by the Legislature is an extraordinarily broad grant of the power of eminent domain. In 1984, the Legislature reaffirmed this power and expressly recognized, among other things, the inherent development obstacles presented by balkanized land ownership within the City, speculative hold-out tenants and a lack of ready financing. See Statement of Asm. Steven P. Perskie, Public Hearing before the Assembly State Government and Federal and

¹Most recently, in 2011, Pursuant to the Tourism District Act, CRDA's role was expanded to include the promotion of non-gaming tourism development by encouraging "the investment of private capital in the Tourism District." N.J.S.A. 5:12-219(h) (1).

Interstate Relations Committee on ACR-126, April 14, 1976, at 2.
See also N.J.S.A. 5:12-182.

The CRDA's enabling statute, as amended, grants the CRDA all the power of eminent domain possessed by the State of New Jersey, as sovereign, without any of the limitations imposed on municipalities, counties and other political subdivisions:

b. In the event the Casino Reinvestment Development Authority finds it is necessary to complete a project in the city of Atlantic City, the authority may acquire **any** real property in the city, whether a fee simple absolute or lesser interest **and whether for immediate use**, that **the authority may find and determine** is required for public use, and upon such a determination, the property **shall be deemed to be required for a public use** until otherwise determined **by the authority**; and with the exceptions hereinafter specifically noted, the determination shall not be affected by the fact that such property has theretofore been taken for, or is then devoted to, a public use, but **the public use in the hands or under the control of the authority shall be deemed superior to the public use in the hands or under the control of any other person, association or corporation.**

N.J.S.A. 5:12-182 (emphasis added).

The statute is plain on its face. CRDA is authorized to take any property in Atlantic City for any CRDA purpose whether CRDA intends to use the property immediately or in the future.

The Legislature explained the grant of these broad powers to CRDA within the terms of the statute. Specifically the legislature anticipated that "special problems may arise or exist in [Atlantic City] concerning the necessity for the

acquisition of property for projects for the public good." N.J.S.A. 5:12-182(a). The Legislature anticipated that the exact challenge presented here might arise and accordingly imbued the CRDA with the express authority to overcome such a challenge for the benefit of the public at large.

Thus the CRDA's power to acquire property in the City of Atlantic City is restricted only by the limitations set forth in the State and Federal Constitutions: the CRDA must pay just compensation; the condemnee must be afforded due process of law; and the taking must be for a public use.

Neither just compensation nor due process are at issue in this case and the trial court already correctly determined that a valid public purpose exists (Pa773.) After making that determination, the trial court should have authorized CRDA to proceed with this project. ²

Instead, however, the trial court subjected CRDA to an unprecedented "reasonable assurances" hearing in which the Court

² Once the question of public purpose has been decided, the court's role is extremely limited. Kelo v. City of New London, 545 U.S. 469, 488-89 (2005) (quoting Berman, 348 U.S., at 35-36); Mount Laurel Twp. v. Mipro Homes, L.L.C., 379 N.J. Super. 358, 377 (App. Div. 2005); Borough of Essex Fells v. Kessler Inst. for Rehab., Inc., 289 N.J. Super. 329, 337 (Law Div. 1995), aff'd 188 N.J. 531 (2006), cert. denied, --- U.S. 46 (2007)). It is well-established that a reviewing court will not disturb a condemning authority's determination 'in the absence of an affirmative showing of fraud, bad faith or manifest abuse.'" Twp. of W. Orange v. 769 Associates, L.L.C., 172 N.J. 564, 572, 800 A.2d 86, 90 (2002) (quoting City of Trenton v. Lenzner, 16 N.J. 465, 473 (1954), cert. denied, 348 U.S. 972 (1955)).

effectively required CRDA to guarantee that the SIMDUP would proceed under a specific plan in a specific timeframe. This subjective "reasonable assurances" requirement is found nowhere in the State and Federal constitutions, runs contrary to CRDA's express legislative authority to take any property for any CRDA purpose (whether for immediate or future use) and renders redevelopment obsolete in the parts of the State that would benefit most from it.

II. THE COURT ERRED BY IMPOSING A "REASONABLE ASSURANCES" REQUIREMENT ON CRDA (PA1067-1078).

A. There Is No "Adequate Assurances" Requirement In New Jersey.

There is no distinct "adequate assurances" doctrine in New Jersey. This concept originated in the Law Division's 1998 opinion in CRDA v. Banin and a plain reading of that opinion clearly evidences that the concept was only tangential to the Court's principal holding: "where the real purpose of the condemnation is other than the stated public purpose, the condemnation may be set aside." Casino Reinvestment Dev. Auth. v. Banin, 320 N.J. Super. 342, 346 (Ch. Div. 1998) (citing City of Atlantic City v. Cynwyd Investments, 148 N.J. 55 (1997)). This is not a new concept - but rather a new brand of the longstanding principal that a condemnation cannot be based on a fraudulent purpose. See e.g. Mount Laurel Twp. v. Mipro Homes, L.L.C., 379 N.J. Super. 358, 377 (App. Div. 2005); Borough of

Essex Fells v. Kessler Inst. for Rehab., Inc., 289 N.J. Super. 329, 337 (Law Div.1995), aff'd 188 N.J. 531 (2006), cert. denied, --- U.S. 46 (2007)).

The trial court painstakingly twisted this holding into a blanket requirement that redevelopment entities, including state authorities, must provide a guarantee that their projects will move forward with a specific plan and in a specific timeframe. The court's conclusion is a complete misreading of the holding in Banin.

In Banin, a private entity (Trump Casino) proposed that CRDA condemn a parcel of property for parking spaces that would benefit Trump's hotel business by allowing Trump to host additional hotel rooms. Id. at 348-49. Trump made this proposal because recent legislation allotted limited State funding for any development that would increase the number of available hotel rooms in Atlantic City. Id. at 353. CRDA agreed with Trump's proposal and commenced condemnation proceedings for the stated public purpose of supporting hotel room growth in accordance with the recent legislation. Id. CRDA's intention was to sell the property to Trump for hotel parking lot development once it was condemned, but there was no formal requirement in place to guarantee that Trump would not put the property to a different use in the future. Id.

The Court determined that, on the whole, this taking fulfilled a private purpose rather than a public purpose. Id. at 357. The Court considered the lack of "adequate assurance of future public use" as a factor weighing in favor of the determination that the taking was for private, rather than public purposes. Id. The Court also considered several other factors: (1) the taking was instigated by a private party; (2) Trump had an existing casino near the property which might be expanded into the property; and (3) Trump had gone through efforts to secure air rights over the property which suggested it intended to build a structure much more substantial than a parking lot. Id. at 355-56.

This reasoning is inapplicable to CRDA's Tourism District Projects - including the SIMUDP. In fact, the Court should never have reached the "adequate assurances" question because the public purpose at issue here is the promotion of tourism within the Tourism District. The condemned property in this case is already part of the Tourism District and will thus always be subject to Tourism District use. It does not matter if it is put to hotel use, restaurant use, parking lot use, amusement use, park use, pavilion use or any other District use. As long as it remains part of the Tourism District, it is being put to the public use that was declared by the New Jersey Legislature through the Tourism District Act. Unlike in Banin,

there is no risk of a private entity taking control of the property and putting it to something other than a Tourism District use and there is absolutely zero evidence of a Trump-like situation where a private entity is vying to put the property to any other use.

B. Even If a "Reasonable Assurances" Requirement Was Imposed, CRDA Has Already Met And Exceeded Such A Requirement.

As explained above, as a matter of law and fact, Banin's "reasonable assurances" requirement is entirely inapplicable to the issue before the Court. Nevertheless, even if molded to apply to the SIMUDP, CRDA established, unequivocally, at the April 26, 2016 hearing that it is financially and strategically prepared to move forward with the Project.

1. CRDA's Role In The Development Process.

Preliminarily, it is necessary to detail the precise role CRDA plays in the development process. CRDA is the organ of the State of New Jersey responsible for stimulating investment and development in the City. From the time of its creation, CRDA has repeatedly been called upon by the New Jersey legislature to navigate the unique challenges, complexities and opportunities

that exist in the City. See N.J.S.A. 5:12-160; N.J.S.A. 5:12-173.9 et seq.; N.J.S.A. 5:12-218 et seq.

One of the primary challenges facing Atlantic City is a lack of private market development initiatives. (See Pa782-784.) CRDA helps overcome this challenge by acquiring and assembling development ready parcels in key project areas.³ CRDA utilized this process for years to spur successful private developments including: quality housing in the North East Inlet; the Tangers Walk Outlets; the Lighthouse District Park Greenway; and numerous other developments. (Pa965-66 at 25:13-26:2). For each of these projects, and essentially every other CRDA development project, CRDA followed a well-defined formula that has proven to be repeatedly successful. Id.

First, CRDA identifies an appropriate project area that fulfills one or more of CRDA's legislative mandates. (Pa985-987 at 65:1-68:19.) CRDA works with planners, architects and community members to come up with a vision for the project area. Id. This preliminary step usually involves a study of the current land uses and visionary proposals for how the project goals might be implemented.

³ See Pa962 at 19:13-17) ("Our principal responsibility is to assemble property for disposition....to do site improvements when needed to improve it for disposition to the private sector - that is the principal responsibility.").

Once a project area is identified, CRDA's acquisition team creates an inventory of all of the current land uses in the project area and makes substantial efforts to amicably acquire the property in the project area and relocate all residents and business impacted by the project. Id.

CRDA acquires the vast majority of the land necessary for its projects through: voluntary sale, land banking, and inter-government land swaps. In some instances, it is necessary for CRDA to resort to condemnation to acquire all of the property necessary for a project. Id.

After all of the parcels in a designated area have been acquired, CRDA then issues a request for proposals from private market developers. (Pa998 at 91:1-13.) Once a particular developer is selected, CRDA leases or sells the assembled parcels to the developer and the developer takes over the project from that point forward. Id. While CRDA might provide logistical and strategic support to the selected developer, CRDA's primary role in the development process is complete once the parcels are assembled and a developer selected. (Pa962 at 19:13-17).⁴

⁴CRDA proceeds in this manner because, as discussed above, there is little appetite for completely independent private development in the City. (See Pa782-784.) The same is evidenced by the simple fact that there has been very limited independent privately funded development project in the entire City other than Casino projects. (See Pa26.) Without CRDA's initial

2. CRDA Has Provided More Than Reasonable Assurance That The SIMUDP Will Be Implemented.

Having properly identified CRDA's role in the development process, it is unmistakable that CRDA is financially and strategically prepared to move forward with its responsibilities and obligations for the Project.

a. CRDA's Role In The SIMUDP Is Nearly Complete.

With the SIMUDP, CRDA is fulfilling its legislatively mandated role in Atlantic City's future. As explained by Mr. Palmieri and Ms. Rixey during the hearing, CRDA complied with the normal land assemblage formula (detailed above) for this Project:

- First, CRDA identified a project area in the South Inlet. CRDA selected this area for multiple reasons: it conforms to CRDA's legislative mandate under the Tourism District Act to create new private-public developments focused on non-gaming uses; it complements the millions of dollars of development work CRDA completed in the rest of the inlet area including the creation of hundreds of units of residential housing and the lighthouse district park and greenway; and it

acquisition and assemblage of development ready parcels there would be limited development in the City. As explained by Mr. Palmeri (who has more than 35 years of experience as a development official in complex urban environments),⁴ land assemblage is the raison d'etre for all redevelopment agencies. Through the use of inter-government land swaps, land banking programs and eminent domain, these agencies are uniquely suited to assemble developable parcels in balkanized urban environments where private developers would fail due to the unavoidable forces of bureaucracy, hold-out owners, and changing market dynamics. In short, without CRDA's land assemblage function, there would be little to no development in the City.

creates an anchor development in an area that is plagued by non-optimal land uses. (See Pa985-986 at 65-67.)

- CRDA then solicited input from staff, planners, and the Atlantic City community. This input resulted in a vision for the general uses that will ultimately be fostered in the Project area. That preliminary vision is reflected in the draft massing plan entered into evidence as the Defendants' Exhibit B (see Pa914-933.) Importantly, this plan is not meant to serve as a blue print or precise guide to development in the project area, but rather as a means to concretize the abstract concept of non-gaming development. (See Pa979 at 52:1-11.)
- Once CRDA identified this Project area and established a development vision, it set about acquiring the identified parcels and assembling them into a development ready plot. This assembly cost approximately \$9.8 million dollars and was achieved by voluntary sale of land to CRDA, parcel swaps with other government entities and, where necessary, eminent domain. CRDA has now acquired and assembled every parcel in the Project area except for the subject property. (See Pa985 at 65:10-12.)
- Anticipating that the subject property would be acquired, CRDA prepared a request for proposals that it intended to release to potential private market developers. However, CRDA delayed this final step until it has clear title to all property in the Project area - including the subject property. (Pa998 at 91:1-13.)

Thus, CRDA has already completed the bulk of its role in the development of the Project. CRDA spent nearly \$10 million dollars arriving at this point, and is now ready to take the final step - soliciting a developer. (Pa998 at 91:1-13; Pa987 at 68:6-23.) As explained by Mr. Landgraff during the hearing, CRDA

is prepared to solicit private developers - the only impediment is this lawsuit. (Pa998 at 91:1-13.)

b. CRDA Remains Fully Funded And Capable Of Completing The IMUDP.

At the hearing, and in its August 5, 2016 decision, the trial court took judicial notice of the multiple Atlantic City related bills then-pending before the New Jersey Legislature, including the now-enacted Casino Property Tax Stabilization Act, P.L. 2016, c. 5 ("CPTSA") and the Atlantic City Municipal Stabilization and Recovery Act, P.L. 2016, c. 4 ("MSRA"). As explained by Mr. Weiss during the hearing, every iteration of these bills (then-pending and now-adopted CPTSA and MSRA)⁵ reserved CRDA's current assets and current funding commitments.

Specifically, CPTSA expressly provides that notwithstanding N.J.S.A. 5:12-144.1 or N.J.S.A. 5:12-219 (which creates the Tourism District), the monies received from the State Treasurer for the payment of the IAT obligation under N.J.S.A. 5:12.144.1 and N.J.S.A. 5:12.95.19 (internet gambling IAT), "**except for any amount thereof** pledged for the payment of bonds issued by the Casino Reinvestment Development Authority or **otherwise contractually obligated** . . . prior to the effective date of [the Act]," shall be allocated to the City of Atlantic City for purposes of paying debt service on bonds issued by the City

⁵With the exception of the first bill introduced and subsequently vetoed.

prior to the effective date of the act. N.J.S.A. 52:27BBBB-25 (emphasis added).

Thus, the CPTSA in no way threatens any existing CRDA development project - including the South Inlet Mixed Use Development Project. Indeed, CPTSA eliminates rather than creates funding uncertainty by expressly preserving CRDA's current funding for the Project.

Moreover, as detailed by Mr. Palmieri and Mr. Weiss, CRDA possesses multiple sources of funding, including: Retail Sales Tax Rebates under the CRDA's Urban Revitalization Act, N.J.S.A. 54:32B-1 et seq., current IAT balances, residual Parking Fees revenues, Application Fees and residual Hotel Room Fees, N.J.S.A. 40:48-8.45 et seq. T. 20:1-21:15. The only funding source eliminated by the CPTSA is future IAT obligations paid by casino licensees. Thus, CRDA will be able to rely on its alternative funding sources to the extent that it may need to as part of a public-private development agreement.

Further, the trial court erred in finding that the MSRA "exacerbates the uncertainty underlying Atlantic City's future and whether the Birnbaum's property will be put to a public use." Nothing in the MSRA in any way prohibits or restricts CRDA's continued development of the SIMUDP, regardless of whether or not the State takes over Atlantic City. The trial court's finding that the project will not be implemented if it

is not within the City's or the State's economic development plans is pure speculation, unsupported by any evidence whatsoever.

Thus, the trial court clearly erred in finding that the enactment of the CPTSA created sufficient uncertainty to justify halting the further development of the SIMUDP.

* * * *

In sum, even if the "reasonable assurances" standard applies to SIMUDP (it does not), the trial court erred in finding that CRDA failed to satisfy that standard. As demonstrated above, CRDA is financially and strategically prepared to implement the Project, and the Appellate Division should reverse the trial court's decision preventing it from doing so.

III. THE COURT ERRED IN HOLDING THAT CRDA'S PLANS FOR THE SIMUDP WERE VAGUE AND LACKING SPECIFICITY (PA1067-1078).

During the initial Order to Show Cause Hearing and during the Evidentiary Hearing, CRDA presented the Court with CRDA's conceptual plan for the SIMUDP (Pa750 at 6:14-16; 6:24-7:5; Pa 985 at 64:23-65:12.) The Court erroneously rejected this plan as vague and then used that concept of vagueness as a justification for concluding that CRDA engaged in a "manifest abuse of the eminent domain power".

The court's conclusion is erroneous. CRDA is not required to produce plans of exacting specification that identify the specific type, number, or design of the improvements that will be constructed in the project area. As recognized in Casino Reinvestment Dev. Auth. v. Banin, 320 N.J. Super. 342, 355 (Ch. Div. 1998), most large development projects begin with the assemblage of land for a specific public purpose -- here, the creation of a Tourism District. Once the land is assembled, it is presented to developers for the creation of plans that conform to a master plan - here the Tourism District Master Plan. Id.

As discussed above, CRDA is expressly authorized to proceed with development in this manner - it is authorized to take Property whether for immediate use or not. CRDA's decision to proceed in this manner for the SIMUDP (assemble land and then partner with a developer) is in accordance with long standing CRDA practice⁶ and was specifically anticipated by the Legislature when it adopted the Atlantic City Tourism District Act:

The [CRDA], in implementing any of its functions involving the tourism district, including but not limited to, the regulation and encouragement of economic development and the promotion of cleanliness, safety, and commerce, is authorized and directed, notwithstanding any law, rule, or regulation to the contrary, to, in addition to any

⁶See testimony of John Palmieri at Pa966-967 at 27:16-28:9.

public-private partnership entered into pursuant to section 7 of P.L.2011, c.18 (C.5:12-221), enter into public-private partnerships or similar arrangements with private entities in implementing the provisions of P.L.2011, c.18.

N.J.S.A. 5:12-233 (emphasis added).

Accordingly, CRDA's decision to assemble land, based on a conceptual plan, and then partner with a developer for construction specifics can only be overturned by an affirmative showing of bad faith or abuse of discretion. City of Trenton v. Lenzer, 16 N.J. 465, 472-73 (1954).

No New Jersey court has ever considered "plan specificity" as a basis for finding a State condemnation project to be the result of bad faith or abuse of discretion.⁷ The concept of plan specificity was, however, addressed head on and rejected by the Connecticut Supreme Court in Kelo v. City of New London, 268 Conn. 1, 119 (2004) aff'd sub nom. Kelo v. City of New London, 545 U.S. 469 (2005). Applying the same abuse of discretion

⁷This dearth of case law results from the fact that most if not all State condemnation projects have a statutorily approved public purpose and are thus are not subject to bad faith or abuse of discretion review. There is at least one municipal takings case that tangentially discusses a lack of planning, but the condemnor in that case was engaged in a gross exercise of bad faith unrelated to the issue of plan specificity. See Borough of Essex Fells v. Kessler Institute for Rehabilitation, 289 N.J. Super. 329 (Law Div. 1995) (township alleged it was condemning property for "open space" but evidence revealed that the true purpose was to keep out a rehabilitation center because a local citizen group feared "dirty AIDS patients").

standard that exists in New Jersey, and even relying on New Jersey's Banin decision, the Connecticut Supreme Court found:

While there was no development commitment or formal site plan in place for parcel 4A, this is not necessarily indicative of bad faith, unreasonableness or abuse of power. As the trial court stated, "master planning is a process that evolves over time and must be flexible and subject to change as conditions warrant." Similarly, this court has rejected a challenge to a town's condemnation based upon the town's lack of a detailed plan designating exactly what part of the defendants' land it needed for what purpose.

Id. The same reasoning must be applied here. The SIMUDP is a complex project that requires flexibility. It is impossible, in the project's nascency, for CRDA to dictate exactly which hotel, restaurant or public amusement will occupy a specific parcel of land. CRDA does not, after all, actually construct buildings. Rather, CRDA fulfills its legislative mandate by assembling development-ready parcels of land that can then be developed in conformance with the Tourism District Master Plan by creating opportunities for "the investment of private capital in the Tourism District." N.J.S.A. 5:12-219(h)(1).

IV. THE COURT'S OPINION WILL SEVERELY CURTAIL DEVELOPMENT WITHIN ATLANTIC CITY AND WITHIN THE STATE OF NEW JERSEY

The "reasonable assurances" standard imposed by the Court makes development in Atlantic City and other urban environments unworkable. Redevelopment agencies, such as CRDA, were designed to operate under complex conditions in environments where

private market development has failed (See Statement of Asm. Steven P. Perskie, Public Hearing before the Assembly State Government and Federal and Interstate Relations Committee on ACR-126, April 14, 1976, at 2.)

This is the story of CRDA's relationship with Atlantic City. Recognizing the unique challenges posed by increased casino competition and general economic woes within the City, the legislature and the governor charged CRDA with creating a Tourism District and encouraging "the investment of private capital in the Tourism District." N.J.S.A. 5:12-219(h)(1).

That is exactly what CRDA is doing. It is assembling a large development ready parcel in an underdeveloped area of the Tourism District that is rife with development challenges. It will then market this parcel to private developers who could not, or would not, otherwise have entertained the idea of such a development. (Pa961-962 at 17:21-18:9.)

Rather than recognize the unique challenges CRDA was designed to overcome (and is overcoming), the trial court is using those challenges as a basis to prevent CRDA from fulfilling its legislative mandate. Yes - there are economic challenges in Atlantic City - but that is why an organization like CRDA is necessary to spur development. The trial court's position to the contrary is akin to telling a doctor she cannot treat a patient because the patient is already sick.

If redevelopment entities are barred from engaging in redevelopment in times of economic uncertainty, then they might as well not exist.

CONCLUSION

For the foregoing reasons, the decision to deny CRDA's authority to condemn should be reversed, and the matter should be remanded to the Law Division for further proceedings pursuant to the Eminent Domain Act.

Respectfully submitted,

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