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CASINO REINVESTMENT DEVELOPMENT AUTHORITY, a public corporate body of the State of New Jersey,

Plaintiff,

v.

CHARLES BIRNBAUM; LUCINDA BIRNBAUM; LOUISE TAYLOR DAVIS; GERALD GITTENS; THE ATLANTIC CITY MUNICIPAL UTILITIES AUTHORITY; THE ATLANTIC CITY SEWERAGE CO.; and THE CITY OF ATLANTIC CITY,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – ATLANTIC COUNTY
DOCKET NO. L589-14

CIVIL ACTION

BRIEF OF DEFENDANTS CHARLES AND LUCINDA BIRNBAUM IN SUPPORT OF MOTION TO CONVERT CASE TO A PLENARY PROCEEDING AND PERMIT DISCOVERY

Submitted May 1, 2014

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Summary of Argument

This action is an attempt by the Casino Reinvestment Development Authority ("CRDA") to take the longtime family home of Charlie and Lucinda Birnbaum (the "Birnbaum Family Home"). Because the Birnbaums dispute CRDA's right to take this property on both factual and legal grounds, this action cannot be adjudicated on a summary basis. Instead, this case should be converted to a plenary proceeding and the Birnbaums should be permitted to take discovery in order to properly litigate their claims and defenses.

The bare-bones Complaint in this action fails to allege any facts beyond that CRDA has, by resolution, authorized itself to take the Birnbaum Family Home, along with other properties. But CRDA cannot establish its right to take property simply by asserting that it wants to take property. Instead, CRDA's power of eminent domain is constrained by both state and federal law, and (as explained below) the Birnbaums can establish a prima facie case that CRDA lacks the power to take their home.

In brief, CRDA seeks to take the Birnbaum Family Home in service of something called the "South Inlet Mixed Use Development Project"—a project that appears to be (at best) a vague notion rather than a concrete plan. The so-called Project consists entirely of high-blown rhetoric and a handful of "conceptual" drawings provided by the Revel Casino, a private business that stands as the sole intended beneficiary of the Project. The Birnbaums contend (and, in a plenary proceeding, the evidence will show) that this Project fails to satisfy any of the requirements that would allow CRDA to take the Birnbaum Family Home under either state or federal law.

As explained more fully below, the Birnbaums are entitled to prevail on at least five distinct legal theories. First, New Jersey law allows a condemnor to take property only where the condemnor can guarantee the property's future public use, and there is no such guarantee here.

Indeed, there is no guarantee of any future use, much less a public one. Second, the so-called Project is a "redevelopment" taking—but the New Jersey Constitution imposes severe limits on the government's ability to condemn for redevelopment, and CRDA has failed to comply with or even acknowledge these limits. Third, even if the overall Project constituted a valid public use, the Birnbaum Family Home (located at the extreme edge of the area CRDA seeks to condemn) would not be necessary to achieve that public use. Fourth, CRDA's decision to take the Birnbaum Family Home has exactly none of the hallmarks of the planning process for economic-development takings approved by the United States Supreme Court in Kelo v. City of New London, 545 U.S. 469, 477-78 (2005). And fifth, the fact that the Project is being undertaken for the benefit of (and at the behest of) an identifiable private party makes it a "pretextual" taking of the kind rejected both by the Kelo majority and by Justice Kennedy, who was the deciding vote in that case. Id. at 478; see also id. at 491 (Kennedy, J., concurring).

Each of these legal arguments is an independent reason to reject CRDA's right to take the Birnbaum Family Home. As demonstrated more fully below, the Birnbaums have established a prima facie case that they are entitled to prevail on each of these legal arguments and that, if allowed the opportunity to make their arguments at a full adversary hearing following discovery, they will prevail on each of them. For that reason, this Court should convert this action from a summary to a plenary proceeding and stay further steps in this action while the Birnbaums to take reasonable discovery.

FACTS

I. The Birnbaum Family Home.

The Birnbaum family has owned the Birnbaum Family Home at 311 Oriental Avenue in Atlantic City since 1969. Certification of Charles Birnbaum In Support of Motion to Convert

Case to a Plenary Proceeding and Permit Discovery ("Birnbaum Cert.") ¶¶ 1-2. Charlie's parents lived in the second-floor apartment of the Birnbaum Family Home from 1969 to 1987, and from 1988 to 1998, Charlie's mother lived in the first-floor apartment with her live-in caretaker companion. Birnbaum Cert. ¶ 6. From 1969 until his mother's death in 1998, Charlie frequently visited the home—often twice a day—in order to look in on his parents and help them out. Birnbaum Cert. ¶¶ 8-10, 18. Spending time in Atlantic City and at the Birnbaum Family Home in particular played a large role in Charlie's courtship of Lucinda. Birnbaum Cert. ¶ 9. In 1980, Charlie started tuning pianos for casinos in Atlantic City in part so that he could visit his parents frequently at the Birnbaum Family Home. Birnbaum Cert. ¶ 9. Although his mother had several health setbacks late in life, it gave both Charlie and his mother great peace of mind that she was able to spend most of her later years living in the Birnbaum Family Home, rather than a nursing home. Birnbaum Cert. ¶¶ 15-18.

The Birnbaums have always kept the Birnbaum Family home in good condition; Charlie helped his father maintain the home until his father's death in 1987, at which point maintenance of the home became Charlie's responsibility. Birnbaum Cert. ¶ 12. Charlie has made numerous repairs and renovations to the home over the years, and has made arrangements for skilled workers to do repairs or renovations that were beyond his skill level. Birnbaum Cert. ¶¶ 13-14.

Tragically, in November 1998, Charlie's mother and her live-in caretaker were murdered by an intruder in the parlor of the first-floor apartment of the Birnbaum Family Home. Birnbaum Cert. ¶ 19. After the murders, Charlie personally cleaned up the parlor, taking up the carpets, washing the walls, and repainting. Birnbaum Cert. ¶ 20. Rather than dwell in grief, Charlie dedicated the parlor as a memorial to his parents and their love of music, and converted it into a piano studio where he could play the piano to help relax and meditate. Birnbaum Cert. ¶ 21.

Charlie now uses the first-floor apartment of the Birnbaum Family Home as his base of operations for his piano-tuning business. Birnbaum Cert. ¶ 22. Crucially, he uses it as a place to rest during the day between appointments, which makes it possible for him to continue tuning for a living as he deals with fatigue and other symptoms resulting from a serious medical condition. Id. Two long-time tenants occupy the second- and third-floor apartments of the Birnbaum Family Home. Birnbaum Cert. ¶¶ 23-24. Because Charlie values a personal relationship with his tenants, he charges them rent well-below market rates. Birnbaum Cert. ¶ 25.

II. The "South Inlet Mixed Use Development Project."

Since the "South Inlet Mixed Use Development Project" was announced in 2012, the Birnbaums (and others) have diligently been trying to discover what, exactly, the project will do. See, e.g., Birnbaum Cert. ¶¶ 26-29, 33-37, 42. They have been unable to do so—because the "South Inlet Mixed Use Development Project" does not exist, at least not as anything beyond an abstract concept which was approved by a few CRDA resolutions.

A. There is no project development plan, and there are no forward-looking project timelines, project reports or studies, or analyses of alternative proposals for the South Inlet Mixed Use Development Project.

Upon information and belief, there is no actual project development plan for the South Inlet Mixed Use Development Project. Three organizations—including the Institute for Justice, which will represent the Birnbaums in this action upon the pro hac vice admission of its attorneys—have submitted numerous New Jersey Open Public Records Act ("OPRA") requests to CRDA in the past two years requesting documents relating to the project, including specific requests for the project plan.[1] CRDA has never produced any project development plan (or

[1] *See* Certification of Christina Walsh In Support of Motion to Convert Case to a Plenary Proceeding and Permit Discovery ("Walsh Cert.") ¶¶ 2, 4, 6 & Exs. A, C, E; Certification of Olga D. Pomar In Support of Motion to Convert Case to a Plenary Proceeding and Permit Discovery ("Pomar Cert.") ¶¶ 3-5, 10& Exs. A, C; Certification of Adam M. Gordon, Esq. In Support of Motion to Convert Case to a Plenary Proceeding and Permit Discovery

redevelopment plan) in response to these requests. Walsh Cert. ¶ 8; Pomar Cert. ¶¶ 9, 12; Gordon Cert. ¶ 13; Alban Cert. ¶ 16.[2] Upon request of Defendants' counsel for this document, Mr. Lederman, counsel for CRDA, has confirmed that there is no document entitled "South Inlet Mixed Use Development Project." See Alban Cert. Ex. H at 2.

Instead, the "South Inlet Mixed Use Development Project" seems to be an idea that it would be nice someday to do some mixed-use development in the South Inlet area. There is little documentation available beyond a few CRDA resolutions approving or referencing a project of that name. See CRDA Resolutions 12-68, 12-82, 12-83.[3] CRDA Resolution 12-82 describes the project in vague generalities as a "mixed use residential and retail development including restaurants, specialty stores, boutiques and residential housing for rent and purchase that tie into the open space greenway of the Lighthouse District Park Project, and potential uses for a higher educational site within the Inlet." Walsh Cert., Ex. B at WalshOPRA8/20/2012-0011. A handful of other documents offer brief, general descriptions of the project, but nothing about specific development plans or specific land uses for the project. See, e.g., Pomar Cert. ¶¶ 6-9, 11-12; Gordon Cert. ¶¶ 8-13 & Exs. D-H. Upon information and belief, there are no forward-looking project timelines, no project reports or studies, and no analyses of alternative proposals. Walsh Cert. ¶ 8; Pomar Cert. ¶¶ 9, 12; Gordon Cert. ¶ 13; Alban Cert. ¶ 15.

("Gordon Cert.") ¶ 3 & Ex. A; Certification of Dan Alban In Support of Motion to Convert Case to a Plenary Proceeding and Permit Discovery ("Alban Cert.") ¶¶ 2-8 & Exs. A-F.

[2] In response to one such OPRA request, CRDA produced what appears to be a short spiral-bound booklet/presentation entitled "The Inlet Plan: A CRDA-Revel Partnership." *See* Gordon Cert. Ex. E. This document covers a much larger area than the South Inlet Mixed Use Development Project, referencing a wide variety of projects, and does not even appear to specifically reference the "South Inlet Mixed Use Development Project" by name. Instead, it appears to be a promotional presentation produced by Revel or one of its consultants. *See* Walsh Cert., Ex. B at WalshOPRA8/20/2012-0003, -0011 (noting "conceptual plans" presented by Revel to CRDA),; *see also id.* at WalshOPRA8/20/2012-0006, -0014 (noting efforts of Revel and its consultants to develop "a comprehensive plan" for the project); Gordon Cert., Ex. C (email from CRDA's Deputy Executive Director stating that "the Redgate Plan Revel had advanced" is "the better source" for information in response to a request for "more detail about what will be located on the sites after the infrastructure work is complete.").

[3] *See* Walsh Cert., Ex. B, at WalshOPRA8/20/2012-0002-0004 (CRDA Resolution 12-68); *id.* at WalshOPRA8/20/2012-0010-0012 (CRDA Resolution 12-82); *id.* at WalshOPRA8/20/2012-0018-0019 (CRDA Resolution 12-83).

B. To the extent the South Inlet Mixed Use Development Project exists, it involves takings for the purpose of development or redevelopment.

The available evidence about the "South Inlet Mixed Use Development Project" (to the extent it even exists) indicates that it involves takings for the purpose of development (as indicated by the project's name), or redevelopment. Both CRDA Resolution 12-68 and 12-82, which were the preliminary and final approvals for the South Inlet Mixed Use Development Project, contain a "Whereas" clause indicating that the purpose of the project is to fulfill the goals of CRDA's Atlantic City Tourism District Master Plan: "the **redevelopment** and enhancement of Atlantic City, its economy and tourism market." Walsh Cert., Ex. B at WalshOPRA8/20/2012-0002, -0010 (emphasis added). They further indicate that the purpose of the project is to "transform the Inlet District . . . into a vibrant, mixed-use area of the City." Id. CRDA's 2012 Annual Report states that, "CRDA is committed to rebuilding and **redeveloping** the South Inlet." Alban Cert., Ex. I at 14 (emphasis added). The project is also being funded, or is anticipated to be funded, by Economic Redevelopment and Growth Grant ("ERG" or "ERGG") funds from the Revel Casino, as noted in CRDA Resolutions 12-68, 12-82, and 12-83, see Walsh Cert., Ex. B at WalshOPRA8/20/2012-0003, -0011, -0018-0019, as well as CRDA's Atlantic City Tourism District Master Plan. See Alban Cert., Ex. J at page 2-31.[4]

In addition, on July 18, 2012, CRDA hosted an informational public meeting for potential condemnees within the South Inlet Mixed Use Development Project area. Birnbaum Cert. ¶¶ 33-36. At that meeting, CRDA distributed a document entitled "Frequently-Asked Questions About Acquiring Your Property," which explains that CRDA funds "revitalization programs" in

[4] Stating that: "The Revel ERG incentive represents an innovative use of anticipated future tax revenues from a casino project to complete an otherwise stranded development project and to fund needed infrastructure and community enhancements in the South Inlet area."

Atlantic City and exercises the State's power of eminent domain to "accomplish its goals for **redevelopment**." See Birnbaum Cert. ¶ 36 & Ex. F (emphasis added).

C. The South Inlet Mixed Use Development Project appears to be driven largely by the Revel Casino, a private party.

As explained above, very little is known about the South Inlet Mixed Use Development Project. But to the extent anyone knows anything about the project, the entity that knows about it is a private party: Revel Entertainment Group LLC ("Revel"), which owns the massive new (and recently bankrupt) Revel Casino in the South Inlet neighborhood. CRDA Resolutions 12-68 and 12-82, approving the South Inlet Mixed Use Development Project on a preliminary and final basis, respectively, refer to only one other document describing the proposed project—"conceptual plans" presented by Revel to CRDA "and other Atlantic City stakeholders." Walsh Cert. Ex. B, WalshOPRA8/20/2012-0003 -0011. The accompanying Requests for Action by the Atlantic City Development & Project Review Committee explain that: "Presently, Revel representatives have had on-going discussions with the CRDA, the City of Atlantic City and other stakeholders regarding the next steps in developing the area. They have been working diligently with their development team . . . to create a comprehensive plan" for the project. Walsh Cert., Ex. B at WalshOPRA8/20/2012-0006, -0014. The Requests for Action further explain that the proposed project "would be constructed in phases that complement the new Revel Casino and assist with the demands created by the resort." Id.; see also Gordon Cert., Exs. F, H (noting same).

CRDA's Atlantic City Tourism District Master Plan indicates that Revel has taken the reins for the project: "Currently, the developer of Revel is developing plans for a mixed-use redevelopment of the South Inlet area in the vicinity of the resort. . . . We understand that the proposed development would result in the area being built out at a considerably smaller scale

than what the Master Plan contemplates." Alban Cert., Ex. K at 70. Indeed, the only documents produced in response to the various OPRA requests that contain anything approaching a description of the Project's intended result seem to be promotional documents prepared by Revel, or a consultant to Revel, mentioning a CRDA-Revel Partnership, and generally covering a different or larger area than the Project. See Gordon Cert., Exs. D, E. When Goldman Sachs, a prospective investor, asked CRDA's Chief Legal Officer, Paul Weiss, for "more detail about what will be located on the sites" in the South Inlet Mixed Use Project area, apparently no one in CRDA had any idea; instead, CRDA's Deputy Executive Director, Susan Thompson, said the "better source" for that information would be a plan created by a consultant to Revel, and that she would have to talk to a Revel consultant (Ian Jerome, of Jerome Associates) to get that information.[5] Gordon Cert, Ex. C; see also Walsh Cert., Ex. B at WalshOPRA8/20/2012-0006, -0014 (noting that Jerome Associates is a Revel consultant).

Revel's strong influence over the direction of the project likely results from its role in controlling the purse strings by which the project is funded. Both CRDA Resolutions 12-68 and 12-82 explain how Revel is anticipated to fund the project: "investment obligations and eligible entertainment retail district project fund proceeds of Revel are to be allocated to the Atlantic City Inlet Development fund to advance future development projects in the Atlantic City Inlet Neighborhood Strategy Area, subject to the negotiation and execution of an agreement with Revel . . . to . . . dedicate its sales tax rebates authorized through [an ERGG program]." Walsh Cert., Ex. B at WalshOPRA8/20/2012-0003, -0011. The accompanying Requests for Action by the Atlantic City Development & Project Review Committee explain that: "The Fund will be utilized for the advance of predevelopment, land acquisition, development and associated costs

[5] It is not clear if this referenced document was ever produced by CRDA in response to any of the various OPRA requests, but upon information and belief, it may be all or part of Exhibits D and E to Adam Gordon's Certification .

for projects within the Northeast Inlet and South Inlet Areas." Walsh Cert., Ex B at WalshOPRA8/20/2012-0005, -0013. CRDA Resolution 12-83 further discusses how "CRDA and Revel are presently negotiating the terms and conditions of their public-private partnership agreement, including, among other provisions, Revel's dedication of its sales tax rebates [in the form of ERGG Funds] . . . and the CRDA's dedication of the [ERGG] Funds to Inlet NSA projects." Walsh Cert., Ex B at WalshOPRA8/20/2012-0018.

III. CRDA's Plans (Or Lack Thereof) for the Birnbaum Family Home.

Numerous OPRA requests, the diligent attention by the Birnbaums, and the direct questioning of a key CRDA official by Charlie Birnbaum all indicate that no one, including CRDA, seems to have any idea what CRDA plans to do with the Birnbaum Family Home, other than include it in a "land bank" for possible later unspecified use.

A. CRDA has no specific plans for the land where the Birnbaum Family Home Is.

Upon information and belief, CRDA has no specific plans for what it would do with the property where the Birnbaum Family Home is located. CRDA has never provided any explanation to Charlie about what use it has in mind for his home. Birnbaum Cert. ¶ 42. Following a CRDA public meeting, Charlie approached Bunny Rixey, CRDA's Director of Real Estate & Development, and asked what CRDA planned to do with the property where the Birnbaum Family Home is located; she told him that she did not know what they were going to do with his property, but that when she did know, she would contact him and give him further details. Birnbaum Cert. ¶ 37. To date, neither Ms. Rixey, nor anyone at CRDA has done so. Birnbaum Cert. ¶¶ 37, 42. In response to an April 10, 2014 OPRA request for "[a]ny and all documents identifying the intended use(s) for the property located at 311 Oriental Avenue in

Atlantic City (Block 72, Lot 3 of the Atlantic City tax map)," CRDA stated that it had no additional responsive documents. Alban Cert., Exs. E, G.

B. CRDA appears to be planning to take the Birnbaum Family Home for inclusion in a "land bank" with no specified use or timetable.

It appears that CRDA is simply trying to take the property where the Birnbaum Family Home is located for inclusion in a "land bank" that may or may not be put to some unspecified use at some unspecified point in the future. A CRDA map that was attached to CRDA Resolution 12-83 and/or the accompanying June 5, 2012 Request for Action by the Atlantic City Development & Project Review Committee depicts a large "Proposed Land Bank Area" covering much of the South Inlet. See Walsh Cert. Ex. B, WalshOPRA8/20/2012-0021. The Birnbaum Family Home is located within this "Proposed Land Bank Area." Birnbaum Cert. ¶ 43 & Ex. H. In addition, a spiral-bound booklet entitled "The Inlet Plan: a CRDA-Revel Partnership" (obtained through an OPRA request) contains a document titled "The Inlet Plan- Initial Projects" which mentions a "Lank Bank" area. See Gordon Cert., Ex. E. The description of this "Land Bank" area includes a term, "Metropolitan low rise units," which appears to include the area where the Birnbaum Family Home is located. Birnbaum Cert. ¶ 44 & Ex. I. The Birnbaum Family Home is a low-rise, three-unit apartment building on the same block as, and partly adjacent to, Metropolitan Plaza. Birnbaum Cert. ¶ 44.

Further, the available evidence indicates that the purpose of the project is simply to passively create "opportunity" for future development—not present development—as part of CRDA's long-term vision for the Inlet area. A document that was produced by CRDA in response to an OPRA request explains that, "[t]his project was approved to facilitate a coordinated plan of **future** development throughout the Atlantic City Neighborhood Strategy Area." Gordon Cert., Ex. F (emphasis added). CRDA's Atlantic City Tourism District Master

Plan states that, in the Inlet area "[d]evelopment, in response to market conditions, will be more **passive**" and explains that: "The **long-term vision** for the Inlet is for the area to become a stunning mixed use development to include residential, commercial and academic uses. This development is envisioned to occur **as market demand allows**." Alban Cert., Ex. K at 68, 70 (emphasis added). CRDA's 2012 Annual Report further demontrates that there are no specific plans for the project other than to make property available to investors and developers: "demolition on the Metropolitan and Vermont low-rise housing will begin to make way for site development, **creating an opportunity** for interested investors to move right in and begin to transform the neighborhood." Alban Cert., Ex. I at 14 (emphasis added).

C. Nothing legally binds CRDA to limit the future use of the property where the Birnbaum Family Home is located.

Upon information and belief, if CRDA took the property where the Birnbaum Family Home is located, there is no legal obligation for CRDA to put that property to any particular use, nor to restrict any future use of that property. Numerous OPRA requests have revealed no project plan documents that limit future use of the property in the project area, including the Birnbaum Family Home. Walsh Cert. ¶ 8; Pomar Cert. ¶¶ 9, 12; Gordon Cert. ¶ 13; Alban Cert. ¶ 16. Upon information and belief, there are no agreements with Revel or any developer or intended future owner that would limit the future use of the property, and there are no agreements with any financing entity, including the New Jersey Economic Development Authority, that would limit the use of the property. Id. And again, CRDA stated that it had no additional responsive documents in response to an OPRA request for "[a]ny and all documents identifying the intended use(s) for the property located at 311 Oriental Avenue in Atlantic City (Block 72, Lot 3 of the Atlantic City tax map)." Alban Cert., Exs. E, G.

ARGUMENT

In Part I, the Birnbaums explain that where, as here, a property owner contests the government's right to take his property, courts allow discovery and conduct a full fact hearing before any other steps are taken. In Part II, the Birnbaums explain that they have presented a prima facie case (indeed, multiple independent prima facie cases) that CRDA does not have the legal right to take the Birnbaum Family Home.

I. Where The Right to Take Is Contested, Everything Stops Until The Right to Take Is Fully and Finally Adjudicated.

In most eminent-domain actions in New Jersey, the government's right to take the underlying property is not contested, and most takings are therefore resolved in "summary" proceedings. But where the right to take is disputed (as it is here), courts stay the acquisition of the property in order to allow discovery and in-depth factual hearings in which condemnees can properly develop their defenses. See Twp. of Bridgewater v. Yarnell, 64 N.J. 211, 215 (1974) (per curiam) (holding that the trial court erred in allowing a summary proceeding where the condemnees had made a sufficient case to require a full factual hearing); accord Twp. of Readington v. Solberg Aviation Co., 409 N.J. Super 282, 297-301, 329 (N.J. Super. Ct. App. Div. 2009) (extensive discovery allowed and decision rendered 16 months after order to show cause); Twp. of W. Orange v. 769 Assoc., LLC, 341 N.J. Super. 580, 588-89 (N.J. Super. Ct., App. Div. 2001) (discovery allowed and decision rendered eight months after filing of order to show cause), rev'd on other grounds, 172 N.J. 564 (2002); Iron Mountain Info. Mgmt. v. City of Newark, 405 N.J. Super. 599, 610-11 (N.J. Super. Ct. App. Div., 2009) (discovery allowed and motion for summary judgment heard nearly three years after complaint in lieu of prerogative writ challenging condemnation authorization as invalid for being arbitrary and capricious), aff'd 202 N.J. 74 (2010). See also Bergen Cnty. v. S. Goldberg & Co., 39 N.J. 377, 380 (1963) ("the right

of a litigant to be heard is not diminished in the least by the 'summary' nature of the proceeding.")

As Bergen County explains, certain procedural steps may be shortcut in a summary proceeding where parties do not dispute an underlying question of fact or law, but when a party opposing condemnation raises a legal issue, "it [is] entitled to have the issue it raised tried in an appropriate way." Id. at 381. Because the parties in Bergen County disputed some of the underlying facts, a trial was required "on the return day, or on such short day as [the court] may fix."

New Jersey's statutes acknowledge this same basic point. N.J.S.A. § 20:3-11 ("When the authority to condemn is denied, all further steps in the action shall be stayed until that issue has been finally determined."). In other words, if a condemnee challenges the condemnor's right to take his property, all other steps—including the condemnor's right to occupy the property—must be stayed until the condemnee is given a full and fair chance to litigate his claims. See Yarnell, 64 N.J. at 215 (noting that condemnation actions must be stayed until the authority to condemn is "completely determined").

Here, the Birnbaums do contest CRDA's right to take their property, and as set forth in this brief and accompanying certifications, there are serious and unsettled factual issues that go to the heart of whether this attempt at condemnation passes the most elementary legal tests. Therefore, this Court should convert this to a plenary proceeding and hold a full fact hearing once the Birnbaums have been allowed to take discovery. As a matter of law, it should also stay all other proceedings, including CRDA's right to occupy the Birnbaum Family Home, until the right-to-take question is resolved.

The Casino Reinvestment Development Authority here seeks to take the Birnbaums' property for a project that appears to have a name but little or no substance. Under both New Jersey and federal law, agencies may not simply condemn property for ideas of projects that might occur someday in the future. The condemnation of the Birnbaums' property is therefore constitutionally suspect, and the Birnbaums intend to oppose the taking on both constitutional and statutory grounds. To do that, they request that this Court convert this action into a plenary proceeding and that it grant discovery. Given that CRDA approved the "South Inlet Mixed Use Development Project" nearly two years ago (and given that there appears to be no plan to do anything in particular with the property), there can be no need for haste, and the parties and the Court will benefit from taking the time for a properly developed argument about the legitimacy of the use of eminent domain.

This prima facie case (made more fully in Part II below) entitles the Birnbaums to reasonable discovery and a plenary hearing. See, e.g., Yarnell, 64 N.J. at 215; Twp. of Readington v. Solberg Aviation, Co., 409 N.J. Super 282, 320 (N.J. Super. Ct. App. Div. 2009) (reversing grant of summary judgment where important issues of fact required a full trial); Casino Reinv. Dev. Auth. v. Banin, 320 N.J. Super. 342, 347-48 (N.J. Super. Ct. Law Div. 1998) (relying on documents produced in discovery to reject taking).

As far as the Birnbaums' research reveals, permitting plenary hearings (so long as the condemnee can make a prima facie case in favor of his position) is the routine practice in New Jersey. For example, in New Jersey v. Outdoor Sys., Inc., No. A-696-00T3 (Dec. 4, 2001) (unpublished, attached as Addendum A), a billboard owner challenged the right to take property for a highway but presented no evidence supporting the challenge to take. The court denied discovery, explaining "If there is indeed a genuine issue of material fact precluding disposition

of the action on the return date, then clearly the objecting party would be entitled to conduct appropriate discovery. That is to say, the condemnee is not precluded by the summary nature of the proceedings from challenging the condemnation, but in order to do so must make a prima facie showing sufficient to warrant discovery and an evidential hearing." Id., slip op. at 4. The only reason the condemnee in Outdoor Systems was denied discovery, then, is because (unlike the Birnbaums) it had presented no reason to believe that there were genuine disputes between the parties. Id. By contrast, in City of Long Branch v. Anzalone, the Appellate Division reversed a trial court's refusal to convert a condemnation to a plenary proceeding because the condemnees had raised substantial legal objections to the taking and there were material facts in dispute. 2008 N.J. Super. Unpub. LEXIS 2204, at *5 (N.J. Super. Ct. App. Div. 2008) (unpublished, attached as Addendum B). The Birnbaums can locate no cases (published or unpublished) that depart from this basic practice.

In sum, where a condemnee raises significant legal defenses and makes a prima facie case for a valid defense to the condemnation, New Jersey courts convert condemnations to plenary proceedings and allow discovery:

- The court allowed discovery—and stayed proceedings during discovery—in 769 Associates, LLC because the property owners in that case alleged (among other things) that the taking was for a private, rather than a public use. 341 N.J. Super. at 587-88;
- The court in Township of Readington v. Solberg Aviation Co. ordered extensive discovery and heard expert testimony because the parties disputed the existence of sufficient public benefit from the taking. 409 N.J. Super. at 298-300;

- And even when CRDA is the condemnor, courts have allowed discovery where the parties disputed the necessity or public use of the taking. See, e.g., Banin, 320 N.J. Super. at 346-47 (quoting prior opinion rejecting summary judgment and noting the submission of additional materials).

As demonstrated below, the Birnbaums have established a prima facie case that these takings are invalid, and they are therefore entitled to discovery and an opportunity to be heard before CRDA takes their longtime family home.

II. The Facts As Currently Known Do Not Allow CRDA to Condemn the Birnbaum Family Home.

As demonstrated above (at pages 5-12), the facts as currently known tend to show the following things:

First, the South Inlet Mixed Use Development Project is not a Project at all: It is an idea, a vague notion, that imposes no legal obligations on CRDA (or anyone else) to use the land it acquires in any particular way. Second, the South Inlet Mixed Use Development Project (to the extent it exists) is a taking for the purposes of redevelopment, but it meets none of the strict requirements the New Jersey Supreme Court has laid out for such takings. Third, neither CRDA nor anyone else has any plan for what to do with the Birnbaum Family Home after it is condemned—and, indeed, there is no reason to believe that the Birnbaum Family Home is necessary to the Project at all. Fourth, CRDA has failed entirely to undertake the kind of careful planning process that the United States Supreme Court has said is the hallmark of valid economic-development takings under the Fifth Amendment to the United States Constitution. And fifth, the evidence indicates that, to the extent the Project exists, it is being undertaken for the sole benefit of a private entity—to wit, the Revel Casino.

Each of these facts (if true) means that CRDA lacks the legal right to take the Birnbaum Family Home. The Birnbaums are therefore entitled to take discovery and litigate each of these legal defenses before CRDA can be permitted to move forward with this condemnation.[6]

A. Condemnors In New Jersey Are Required To Provide Reasonable Assurances of Future Public Use.

In Casino Reinvestment Development Authority v. Banin, 320 N.J. Super. 342 (N.J. Super. Ct. Law Div. 1998), the court held that where there is a proposal to take property, there must be adequate assurances of future public use. Id. at 353. Here, the Birnbaums contend (and the existing evidence tends to show) that there are no assurances of any particular future use, much less a public one. To the extent a use has been identified, it is purely private: redeveloping the area in a way calculated to benefit the Revel Casino.

Under Banin, these facts would mean that CRDA has no right to take the Birnbaum Family Home. The Birnbaums are therefore entitled to a full adversary fact hearing on this question, and they are also entitled to take discovery (including discovery into the existence of concrete plans for the Project and the legal guarantees—if any—of future public use) before CRDA takes any additional steps or occupies the Birnbaums' property.

B. The New Jersey Constitution Places Strict Limits on Redevelopment Takings.

The South Inlet Mixed Use Development Project, as its name suggests, is a taking whose overall purpose is "development." But pure "development" is not a public use in New Jersey—that is, government agencies may not condemn property merely because they think they might be able to build something better on it. As the New Jersey Supreme Court explained at length in 2007, the power of eminent domain in New Jersey did not originally include the ability to condemn property for redevelopment at all. Gallenthin Realty Dev., Inc. v. Borough of

[6] In the alternative, to the extent CRDA admits any of the facts asserted in support of this Motion, the condemnations are simply invalid as a matter of law and can be dismissed with prejudice without discovery.

Paulsboro, 191 N.J. 344, 360-62 (2007). Only the addition of the Blighted Areas Clause to the New Jersey Constitution created that power, and the redevelopment power was created with strict limits. Id. at 373.

The Blighted Areas Clause only allows property to be condemned for redevelopment of "blighted areas," and it does not permit the condemnation of property that is merely being used "in a less than optimal manner." Id. at 365. See also James R. Zazzali and Jonathan L. Marshfield, Providing Meaningful Judicial Review Of Municipal Redevelopment Designations: Redevelopment In New Jersey Before And After Gallenthin Realty Development, Inc. v. Borough Of Paulsboro, 40 Rutgers Law Rev. 451, 457, n.30 (2009) ("municipalities must first demonstrate that an area is 'blighted' before they can engage in redevelopment."); accord Harrison Redevelopment v. DeRose, 398 N.J. Super. 361 (App. Div.), certif. denied sub nom. Harrison Redevelopment Agency v. Harrison Eagle LLP, 196 N.J. 87 (2008) (reinforcing Gallenthin's holding that blight must be found to in order to exercise powers based on the Blighted Areas Clause).

As far as the Complaint reveals, however, CRDA is simply ignoring these restrictions. The Complaint and all available evidence indicate that CRDA is simply trying to take the Birnbaum Family Home because it can imagine putting something better there—that is, because it believes it is being used "in less than an optimal manner." CRDA has made no effort to assess whether the Birnbaum Family Home or the surrounding area fit within the definition of the Blighted Area Clause. There is no allegation or evidence that the property is "dilapidated" or "deteriorated" or is having a "decadent effect" on surrounding properties as required by Gallenthin. See id. at 362-63, 365. All the evidence indicates that CRDA and Revel think it would be nice to have a mixed-use development in the area instead of the Birnbaums'

townhouse. This kind of taking—premised on the idea that the condemnor can think of a better use than the current owner—has been squarely rejected by the New Jersey Supreme Court.

Because Gallenthin makes clear both that redevelopment takings are strictly limited in New Jersey and that they must be litigated on a full fact record, this Court cannot adjudicate this action without converting it to a plenary hearing and allowing the Birnbaums reasonable discovery into the underlying purpose of the Project.

C. The Available Evidence Shows that Taking the Birnbaum Family Home Is Unnecessary.

New Jersey allows the condemnation of property only if that property is necessary to achieve some public use. See N.J.S.A. § 5:12-182(b) (authorizing CRDA to exercise eminent domain when "necessary to complete a project"); Gallenthin, 191 N.J. at 372 (interpreting New Jersey Constitution's Blighted Areas Clause to only allow non-blighted parcels to "be included in a redevelopment plan if necessary") (emphasis added). Even if the overall South Inlet Mixed Use Development Project is legally valid, then, CRDA would still need to establish that the Birnbaum Family Home, located on the extreme edge of the Project area, is necessary to that Project. The existing evidence indicates that it will be unable to do so.

On this record, this taking would fail the necessity test in two distinct ways. First, there appears to be no reason to include the Birnbaum Family Home in the Project area in the first place. Condemnors in New Jersey do not have limitless discretion to decide what property to condemn, and courts set aside condemnations where the inclusion of a particular piece of property is arbitrary or otherwise unjustified. See Gallenthin, 191 N.J. at 373. (condemnor must "establish a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met"); Yarnell, 64 N.J. at 214-15 (holding that property owners had made out a sufficient prima facie case that the condemnor's proposed sewer-line route was

arbitrary); 769 Assocs., LLC, 172 N.J. at 579 (condemnation may be set aside for abuse of discretion by condemnor).

And the inclusion of the Birnbaum Family Home here is arbitrary. The Home is located on the extreme edge of the Project area. It is not necessary to maintain a contiguous project area—indeed, it is a thumb awkwardly jutting out of an otherwise coherent group of properties. See, e.g., Walsh Cert., Ex. B at WalshOPRA8/20/2012-0007, -0015. It is not part of a larger block of property being condemned—indeed, most of the properties on the Birnbaums' block are being spared condemnation. Id. And, as far as the evidence reveals, CRDA has no particular plans for the Birnbaum Family Home. All of this suggests—and discovery will allow the Birnbaums to confirm—that there is no necessity for this taking.

Second, this taking is unnecessary because CRDA has no concrete plans for any of the properties it is taking. As documented above, the closest CRDA has come to identifying a concrete use for the Birnbaum Family Home is by frankly calling it a "land bank." See supra at 10-11. But courts look to the immediacy and certainty of the condemnor's plans for the property to determine the necessity of the taking. See, e.g., Regents of Univ. of Minn. v. Chicago & N. W. Transp. Co., 552 N.W.2d 578 (Minn. Ct. App. 1996) (rejecting condemnation as unnecessary because it was supported only by "speculative purposes"; "necessity" in the context of eminent domain "means now or in the near future"); Krauter v. Lower Big Blue Nat. Res. Dist., 259 N.W.2d 472, 475-76 (Neb. 1977) (holding that "a condemning agency must have a present plan and a present public purpose for the use of the property before it is authorized to commence a condemnation action . . . The possibility that the condemning agency at some future time may adopt a plan to use the property for a public purpose is not enough to justify a present condemnation."); State ex rel. Sun Oil Co. v. City of Euclid, 130 N.E.2d 336 (Ohio 1955) (land

may not be appropriated for a contemplated but undetermined future use); see also Banin, 320 N.J. Super at 358-59 (when a "public agency acquires . . . property for the purposes of conveying it to a private developer," there must be advance "assurances that the public interest will be protected").

On this record, CRDA's condemnation appears to be the classic example of a plan that has been squarely rejected by courts in other states: "condemn first, decide what to do with the property later." City of Stockton v. Marina Towers L.L.C., 88 Cal. Rptr. 3d 909, 913 (Cal. Ct. App. 2009) (rejecting taking as unnecessary). Discovery will allow the Birnbaums to confirm what appears true from the current record: CRDA has no concrete plans for any of the properties it is condemning, and its condemnations are therefore unnecessary and unlawful.

D. CRDA Appears to Have Failed to Meet the Planning Requirements of Federal Law.

While the United States Supreme Court has held that federal law (unlike New Jersey law) allows condemnations for economic development, it has only held that they are permissible where the condemning agency has undergone an elaborate planning process. As the Court noted in Kelo v. City of New London, the condemnor in that case had considered numerous possible plans and uses, and the city conducted studies and multiple public hearings when considering the plan. 545 U.S. 469, 473-474 (2005); see also Nicole Stelle Garnett, Planning as Public Use?, 34 Ecology L.Q. 443, 447 (2007) (discussing Kelo's "planning mandate" and Justice Kennedy's concurrence "suggesting that the lack of comprehensive planning might render certain takings presumptively invalid"). The Kelo majority explicitly conditioned its approval of the condemnations in that case on "the comprehensive character of the plan [and] the thorough deliberation that preceded its adoption." Kelo, 545 U.S. at 484. Where these elements are missing, courts reject attempted condemnations. See, e.g., Mayor & City Council of Balt. v.

Valsamaki, 916 A.2d 324, 352-53 (Md. 2007) (noting absence of clear plan for the use of condemned property, and contrasting with Kelo); R. I. Econ. Dev. Corp. v. Parking Co., L.P., 892 A.2d 87, 104 (R.I. 2006) (emphasizing difference between condemnor's approach and the "exhaustive preparatory efforts that preceded the takings in Kelo").

The record here indicates neither a comprehensive plan nor thorough deliberations. At best, the record indicates the Revel has shown CRDA some "conceptual drawings" of what it would like to see in its neighborhood, and CRDA has condemned property based on nothing more than these concepts. Discovery will allow this Court to evaluate, on a complete record, whether CRDA has taken enough steps to fall within the boundaries of federal law as laid out in Kelo.

E. The South Inlet Mixed Use Development Project Appears Primarily Intended to Benefit Revel.

All of the available evidence—the fact that CRDA has no concrete plans, the fact that Revel appears to be the only entity with any notion of what it wants done with the properties being condemned, and the fact that CRDA appears, even internally, to defer entirely to Revel's judgment about this Project—indicate that the South Inlet Mixed Use Development Project is not meant to benefit the public at all. It is meant to benefit Revel.

Both the majority and the concurrence in Kelo made clear that courts should reject pretextual takings meant to benefit a private party. Kelo, 545 U.S. at 478; see also id. at 491 (Kennedy, J., concurring). Courts (both before and after Kelo) have routinely held that pretextual takings are unconstitutional. See Armendariz v. Penman, 75 F.3d 1311, 1321 (9th Cir. 1996) (en banc) (invalidating a taking because the official rationale of blight alleviation was a pretext for "a scheme . . . to deprive the plaintiffs of their property . . . so a shopping-center developer could buy [it] at a lower price"); MHC Fin. Ltd. P'ship v. City of San

Rafael, No. C 00-3785VRW, 2006 WL 3507937, at *14; 2006 U.S. Dist. LEXIS 89195, at *43 (N.D. Cal. Dec. 5, 2006) (noting that Kelo requires "'careful and extensive inquiry into whether, in fact, the development plan is of primary benefit to the developer ... [and] only incidental benefit to the City.'" (quoting Kelo, 545 U.S. at 491 (Kennedy, J., concurring)); Aaron v. Target Corp., 269 F. Supp. 2d 1162, 1174-76 (E.D. Mo. 2003), rev'd on other grounds, 357 F.3d 768 (8th Cir. 2004) (holding that a property owner was likely to prevail on a claim that a taking ostensibly to alleviate blight was actually intended to serve the interests of the Target Corporation); Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) ("Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext."); 99 Cents Only Stores v. Lancaster Redev. Agency, 237 F. Supp.2d 1123, 1129 (C.D. Cal. 2001) ("No judicial deference is required . . . where the ostensible public use is demonstrably pretextual.")

The cases are clear: Where the facts demonstrate that a taking is meant to benefit a private party rather than the public at large, courts invalidate that taking. To decide how this case law applies to this condemnation, though, this Court will need a full factual record, presented after discovery. It should therefore convert this action to a plenary proceeding and stay the condemnations while the Birnbaums conduct reasonable discovery.

CONCLUSION

Based on all the available evidence, the Birnbaums have very good reason to believe that CRDA's attempt to take their longtime family home is unlawful (on several different grounds). Because CRDA disputes this and asserts its legal right to take the property, this case should be converted to a plenary proceeding and discovery should be permitted before any further steps are taken in the condemnation.

Dated: April 30, 2014

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