

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

Plaintiff/Appellant,

vs.

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

Defendant/Respondent.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A000019-16-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.

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**REPLY BRIEF OF PLAINTIFF/APPELLANT  
CASINO REINVESTMENT DEVELOPMENT AUTHORITY**

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## PRELIMINARY STATEMENT

The condemnation by the Casino Reinvestment Development Authority (the "CRDA") of the Defendants' property should not be viewed in isolation nor subjected to changing constitutional standards as economic conditions in Atlantic City fluctuate. The subject property is part of the CRDA South Inlet Mixed Use Development Project (the "Project"). The Project is a significant part CRDA's response to the Legislature's statutory directive that CRDA facilitate non-gaming tourism development within the Atlantic City Tourism District. The Project will include a mix of tourism-oriented residential and commercial improvements that compliment other CRDA approved development projects and related investments near the Project area, including the Lighthouse Park and Greenway, Boraie's South Inlet Beach Development and the Steel Pier Project on the Boardwalk.

The Legislature's very purpose in creating and empowering independent development authorities like CRDA was to overcome the sort of challenges presented by New Jersey's stressed urban environments. Without CRDA, and the essential role it plays in both long term strategic development planning and the traversing of obstacles that prevent private investment, the South Inlet, and Atlantic City as a whole, will not meet the goals and objectives established by the Legislature. Without CRDA's



continued involvement, private capital investment in the South Inlet section of the City would be unlikely. Moreover, if the consequence of the trial court's ruling - that redevelopment is barred in times of economic and political uncertainty - was to stand, then urban redevelopment throughout the State would be undermined.

In acquiring the Property, CRDA strictly complied with all of the constitutional and statutory requirements imposed upon condemnors in New Jersey. The contours of the Project were presented and discussed in a public forum, voted on at a public meeting of the CRDA and detailed to the trial court on the return date of CRDA's original order to show cause.

The court found that the Project, as envisioned by CRDA, was sufficiently specific and expressly mandated by the Atlantic City Tourism District Act. The court also found that the Project served a public purpose - the promotion of tourism pursuant to the Atlantic City Tourism District Act.

Months after the Project was approved, the Defendants urged the trial court to reconsider these findings in light of a then new report published by the Governor's Atlantic City Task Force. Defendants alleged that the suggested policy changes set forth in the report would threaten CRDA's financial standing and thus undermine CRDA's ability to complete the Project. After a nearly

seven month delay, the trial court granted Defendants' motion and ordered CRDA to provide reasonable "assurances" that it was capable of moving forward with the Project despite the general economic woes and political uncertainties facing Atlantic City. The court imposed this unprecedented and extra-constitutional burden on CRDA despite the fact that CRDA was ready to move forward with the Project, but for the pending lawsuit.

Importantly, and contrary to the way in which Defendants couch this appeal, the trial court did not reverse its findings that the Project served a public purpose or that the Project was set forth with sufficient specificity. As when it issued the original order authorizing the condemnation, the trial court was well aware of the extremely limited role that courts play in weighing specificity or necessity once a public purpose is established. The trial court merely asked CRDA to prove it was capable of completing the Project and scheduled a hearing for CRDA to present such proof.

At that hearing, CRDA's Executive Director and its real estate team explained that the first phase of the Project involves the aggregation of a relatively small parcel of development-ready land in the South Inlet portion of the Tourism District and that CRDA had already acquired, at substantial expense, all of the other property necessary for the Project to

move forward. CRDA stressed that it was more than financially well equipped to complete the Project and, moreover, that it was this lawsuit, not any inaction by CRDA that was preventing CRDA from entering into a public-private partnership to advance the Project.

**ARGUMENT**

**I. CRDA'S ACTIONS ARE LEGISLATIVELY MANDATED AND NECESSARY TO THE CONTINUED REDEVELOPMENT OF ATLANTIC CITY**

CRDA seeks to acquire a piece of rental property<sup>1</sup> for purpose of fulfilling the Legislature's mandate that CRDA promote non-gaming tourism uses within the Atlantic City Tourism District. As explained at length in CRDA's opening brief, CRDA possesses uniquely broad condemnation powers within the City of Atlantic City. These broad powers were afforded to CRDA because Atlantic City, like many of New Jersey's urban environments, faces unique economic challenges that thwart or prohibit the investment of private capital.

In its continued recognition of this challenging environment, as well as new challenges posed by decreased casino revenues and

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<sup>1</sup> Defendants' reference to the Property as a "family home" is at best a distortion of the facts. The Birnbaums do not live in the building and have not for many years. Rather the "home" is an investment property containing rental units and an office for piano repairs. See Pa1062 102:15-103:19. Like many former Atlantic City residents, Mr. Birnbaum has long moved away and now takes advantage of the property as a source of income.

increased gaming competition in neighboring states, the Legislature passed the Atlantic City Tourism District Act. See New Jersey Governor's Message, 2011 S.B. 11/S.B. 12. The Act greatly expanded CRDA's powers within Atlantic City and specifically charged CRDA with promoting tourism by fostering the investment of private capital in tourism-focused development projects. N.J.S.A. 5:12-219(h)(1)

That is exactly what CRDA is doing with this Project. It is assembling a development-ready parcel that a private developer will be able to transform into a non-gaming tourism focused use that fulfills CRDA's Legislatively mandated long-term vision for the South Inlet area. Pa964a-Pa965a 23:8-25:10.

Developments of this type in the South Inlet area do not exist because, as CRDA has repeatedly explained in these proceedings, there is little appetite in the private market for the risk inherent in this type of project. Pa965-Pa966 25:5-26:2. Absent CRDA's assemblage and readying of the development parcel, the Legislature's goal of creating non-gaming tourism development will be impeded.

Rather than let CRDA proceed in this time-tested, legislatively mandated process, the trial court interrupted the Project mid-way due to the court's perception of minute-by-minute changing circumstances and economic realities within the

City. That is not how redevelopment works - CRDA's projects are meant to fulfill a long term strategic vision - in this case the vision set forth by the Legislature in the Tourism District Act and adopted by CRDA in the Tourism District Master Plan. Pa964-Pa966. If this Court was to adopt the trial court's micromanagement of the redevelopment process, then CRDA and other government redevelopment agencies would be severely thwarted in their ability to execute long term, strategic development projects. The trial court's near-sighted approach is simply not compatible with the type of complex, long term development initiatives required to redevelop urban centers such as Atlantic City. Circumstances on the ground will always be subject to change. For example, the Defendants and the trial court focused on the closing of the Revel Casino as grounds for disrupting the Project. The Revel, however, is now being re-opened as the TEN Resort by a new owner - does that occurrence suddenly justify an expansion of the Project? It does not - any more than the initial closing of the Revel justified disrupting the Project.

For nearly two years, the court delayed issuing a final ruling while it repeatedly evaluated and took judicial notice of unfolding political and economic circumstances - most of which have changed yet again. See, E.g., Opinion of the Court Dated

August 19, 2015, Pa842a-Pa843 (wherein the trial court takes judicial notice of pending legislation and the closure of the Revel and Showboat casinos). In fact, the State has now taken over Atlantic City in its entirety.

Ultimately, the court ordered that CRDA provide "reasonable" or "adequate" assurances that CRDA intended to move forward with the Project and was financially capable of doing so. As explained, below, what the trial court actually sought was an *absolute* assurance that the Project would move forward - a standard that no condemnor in this State could meet.

## **II. THE TRIAL COURT'S "REASONABLE" ASSURANCES REQUIREMENT CREATES AN IMPOSSIBLE TO MEET STANDARD FOR URBAN REDEVELOPMENT ENTITIES**

Defendants mischaracterize the issue that was before the trial court at the reasonable assurances hearing. The court did not re-evaluate the public nature, necessity or specificity of the Project. The court merely requested that CRDA, in light of changing circumstances, demonstrate that it was strategically and financially equipped to move forward with the Project.

Despite objecting to the trial court's imposition of this novel requirement - which has never been imposed on a State condemnor in New Jersey - CRDA, through the testimony of its executive staff, outlined the contours of the Project, the fact that CRDA had already earmarked sufficient funds for the Project

and the fact that CRDA retained sufficient set-asides and funding sources to fully implement the Project. The court rejected these assurances as "inadequate" because the court was seeking absolute proof that the Project would be completed in a particular time frame. The Appellate Division must reject this unprecedented requirement because it fails to recognize the realities of long term strategic redevelopment and the challenges and complexities that must be overcome to attract private developers to an area such as the South Inlet of Atlantic City.

To rule otherwise would be to impose a new and unworkable standard on condemnors statewide. What proofs would condemnors be required to show before exercising the power of eminent domain? A resolution declaring the property will be put to a public use? CRDA has already done that. Investment of sufficient capital to guarantee project completion? CRDA has already invested millions of dollars in this Project and its sister project, the Lighthouse District Park. A good faith representation that the property will in fact be put to a public use? CRDA has consistently made several such representations.

The Property is being taken for the valid and legislatively mandated public purpose of creating a non-gaming tourism-focused development through the investment of private capital. Can CRDA

absolutely guarantee that the Project will be a success? No. But neither is CRDA or any condemnor required to do so under the laws of this State.

Even, however, if the Court was to apply this unworkable standard - CRDA has met it. As set forth in CRDA's opening brief, CRDA is fully prepared, both financially and logistically, to move forward with the Project and its executive staff has made more than sufficient representations of CRDA's intent.

**III. THE TRIAL COURT'S ORIGINAL RULING ON THE ORDER THE SHOW CAUSE WAS CORRECT BECAUSE THE PROJECT IS SUFFICIENTLY SPECIFIC TO JUSTIFY CONDEMNATION.**

The Trial Court correctly found that CRDA is not required to produce plans identifying the specific buildings 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 then presented to developers for the creation of plans that conform to the Tourism District Master Plan and include specifics such as building locations. Id. CRDA's own enabling statute anticipates this exact arrangement. Indeed, the statute authorizes CRDA to acquire property by eminent domain "whether



for immediate use" or not. N.J.S.A. 5:12-182(b). CRDA's decision to proceed in this fashion could only be challenged 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.<sup>2</sup> The concept of plan specificity was, however, directly addressed 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 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

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<sup>2</sup> Most if not all State condemnation projects have a statutorily approved public purpose and 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").

town's lack of a detailed plan designating exactly what part of the defendants' land it needed for what purpose.

Id. The same reasoning was correctly applied by the Trial Court here. The creation of an entire Tourism District is a complex process that requires a degree of 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 the statutory purpose of assembling development-ready parcels of land that can 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).

Because no New Jersey law supports the Defendants' position, the Defendants point to extraneous foreign cases in an effort to confuse and mislead the Court. For example, the Defendants rely heavily on the decision of the Minnesota Court of Appeals in Regents of the University of Minnesota v. Chicago & North Western Transportation Co., 552 N.W.2d 578 (Minn. Ct. App. 1996). That decision has absolutely no bearing on the issues before this Court. Importantly, the putative condemnor in Regents had no plans, whatsoever, for the condemned property. The acquisition was never approved by the condemnor's governing

body, no master plan was developed, no resolutions were adopted and no adjoining lands had been acquired. Id. at 580. It was an unsubstantiated, unpurposed land grab of property that suffered from so much environmental contamination that the Court questioned whether it could be put to any use -- let alone a valid public use.

Unlike the Regents condemnor, the CRDA established a public purpose, and presented its conceptual plan for the Project area, in furtherance of its legislative mandate to advance the tourism district in Atlantic City

**IV. THE TRIAL COURT'S RULING ON THE ORDER TO SHOW CAUSE WAS CORRECT BECAUSE THE BLIGHTED AREAS CLAUSE DOES NOT APPLY.**

**A. The Existence Of Blight Does Not Preclude The Acquisition Of Property For A Valid Public Purpose Other Than "Redevelopment Of A Blighted Area."**

Like many urban communities, Atlantic City has blighted areas and, as such, almost any acquisition within the City for any public purpose is likely to include the acquisition of property that is blighted. That the remediation of blight could have been the purpose of a taking does not exclude other valid public purposes wholly unrelated to the existence of blight in that area. For example, multiple properties in Atlantic City were acquired for the creation of the Lighthouse District Park and also in connection with the widening of Massachusetts Avenue. The purpose of each taking was not redevelopment of a

blighted area, but the creation of a park and the widening of a street to allow for proper traffic flow -- both valid public purposes. Although the properties acquired for these projects very likely included properties that would fall within the constitutional meaning of "blighted," this circumstance did not magically turn the public purpose behind the taking into "redevelopment of a blighted area."

**B. This Project's Public Purpose Is The Promotion Of Tourism, Per The Legislature's Mandate, And Not Redevelopment Of A Blighted Area.**

CRDA, like all condemning authorities, is required to identify the specific public purpose for which it is acquiring property. While the subject property is admittedly located in an economically distressed area, CRDA is not acquiring the property because it is "blighted," but rather to comply with its legislative mandate under the Tourism District Act: creation of a Tourism District in order to promote and protect New Jersey's important tourism, gaming and entertainment industries. N.J. S. Comm. State. S.B. 11 (Nov. 15, 2010). That is the "public use" to which the property is being put; in fact, it was mandated by the New Jersey Legislature.

The Defendants have not challenged that public use, but instead focus on the completely unrelated issue of municipal takings in blighted areas. As the Trial Court correctly found,

that challenge missed the mark. It must be assumed that the Legislature was fully aware of redevelopment law in New Jersey when it drafted and enacted the Tourism District Act. L.A. v. New Jersey Div. of Youth & Family Servs., 217 N.J. 311, 327 (2014) (quoting Eckert v. N.J. Hwy. Dep't, 1 N.J. 474, 479 (1949)) ("In construing legislation we must assume the Legislature was thoroughly conversant with its own legislation and the judicial construction placed thereon."). If the Legislature intended the purpose of the Tourism District Act to be blight remediation, it would have said so. It did not. Accordingly, the Trial Court would have created a fiction if it compelled CRDA to acquire the Property for purposes of mere blight remediation.

**C. Even If The "Fiction" Of Blight Remediation Was Imposed, CRDA Is Not Subject To The LRHL.**

The Local Redevelopment and Housing Law, N.J.S.A. 40:12A-1, et seq. ("LRHL"), plainly does not apply to CRDA or any other State agency. The Defendants' contention that CRDA should have made a blight determination pursuant to the procedures set forth in the LRHL is wrong. It was an successful attempt to distract the Trial Court by conflating municipal government with a state agency. The LRHL is limited to municipalities and counties by its own express terms. See N.J.S.A. 40A:12A-2(d) (explaining that the intent of LRHL is "to codify, simplify and concentrate

prior enactments relative to local redevelopment" and defining the bodies to which the LRHL applies as "the body exercising general legislative powers in a **county or municipality**"). The Defendants' assertion that the holding in Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344 (2007), expands beyond the scope of condemnations governed by the LRHL is incorrect. Neither Gallenthin nor any other judicial opinion ever expanded the LRHL to apply to the State.

Moreover, an examination of legislative history demonstrates that the Legislature never intended to subject the State to the LRHL. The majority of bills proposed by the Legislature post-Gallenthin sought only to limit the municipal power of eminent domain. See, e.g., S.1969, 216th Leg. (N.J. 2014); S.1419 215th Leg. (N.J. 2012); A.574 213th Leg. (N.J. 2008). Two bills were proposed to limit the State's power of eminent domain, but these bills were defeated in Committees and, despite numerous reintroductions, never made it to a vote. See A.106 213th Leg. (N.J. 2008); A.2423 212th Leg. (N.J. 2006). Furthermore, the Legislature's enactment of two bills post-Gallenthin demonstrates the Legislature's intent that the LRHL apply solely to municipalities and not the State. First, in enacting the Atlantic City Tourism Act, the Legislature did not limit CRDA's already-existing power of eminent domain or

expressly make the CRDA subject to the LRHL. N.J.S.A. 5:12-161. Second, when the Legislature amended the LRHL to incorporate the holding of Gallenthin, application of the LRHL was not extended to the State. N.J.S.A. 40A:12A-6. The definition of "redevelopment entity" was not amended to include the State or a State agency. Moreover, the bill's fiscal statement only listed municipal agencies -- not State agencies -- among those that would be affected by the amendments. Legislative Fiscal Estimate, A.3615 216th Leg. (N.J. 2013) (emphasis added). Had the Legislature intended CRDA to be subject to the LRHL, it would have said so. It did not. Accordingly, CRDA, as a State authority, is not governed by the LRHL or the procedures for making blight determinations set forth therein.

**D. Even If The "Fiction" Of Blight Remediation Was Imposed, The Acquisition Still Passes Constitutional Muster.**

As already explained, CRDA is not acquiring the subject property to alleviate blight, but rather to promote and protect important tourism, gaming, and entertainment industries. CRDA, however, also has the concurrent authority to acquire the property under the Blighted Areas Clause of the New Jersey State Constitution.

Unlike municipal takings under the LRHL, there is no tidy set of enumerated reasons for making a blight determination by

the State. No statute sets forth the procedure for State takings of blighted properties.

There is also very limited discussion in New Jersey case law regarding State blight determinations. As noted by Former Chief Justice James R. Zazzali (author of Gallenthin), there exists a complete lack of case law addressing legislative blight determinations. See Hon. James R. Zazzali & 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 L.J. 451, 501, n. 23 (2009).

The only limitation on the State's own power to take blighted property is the Blighted Areas Clause itself. Because the Blighted Areas Clause is a constitutional provision, it falls to the Court to determine whether a State taking complies with this provision. Gallenthin, 191 N.J. at 358-59 ("[T]he Judiciary is the final arbiter of the institutional commissions articulated in the Constitution"). The Court makes this determination by considering whether the target property falls within the constitutional meaning of "blight." Id.

In Gallenthin, the Supreme Court set forth the historical meaning of "blight" as used in the New Jersey Constitution. Id. at 360-64. That history is summarized briefly below.



The Blighted Area Clause was made part of the 1947 State Constitution by amendment offered by Delegate Jane Barus. Id. at 361-62. In support of the Clause's inclusion, Delegate Barus testified that:

The older cities in the State . . . have been facing an increasingly difficult situation as the years advance. Certain sections of those cities have fallen in value, and have become what is known as "blighted" or "depressed" area. . . . Naturally, this slump in value is not confined to the original area affected. . . .

No one person, no house owner or landlord...can counteract this spread because no one can afford to sink money into a blighted area. . . .

We know that a great deal of money has been spent on slum clearance, but it has seemed . . . to the governing bodies, that this should be done, so far as possible, by means of private capital.

Proceedings of the New Jersey Constitutional Convention of 1947, Vol. I, at 742. Accordingly, the purpose behind the Blighted Areas Clause was to "facilitate investment in blighted areas," alleviate depressed conditions in sections of New Jersey's cities, encourage private investment in redevelopment projects, and enable municipalities to "intervene, stop further economic degradation, and provide incentives for private investment." Gallenthin, 191 N.J. at 361-62.

In Wilson v. City of Long Branch, 27 N.J. 360 (1958), the Supreme Court found the Blighted Areas Clause definition of blight to be constitutional:

A growing or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein and other conditions, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

Id. at 361. In Levin v. Twp. Comm. of Bridgewater, 57 N.J. 506, 511-16, 545 (1971), the Supreme Court extended the meaning of blight from solely urban to suburban and rural areas. Id. Despite its evolution, the Gallenthin Court noted that the essential characteristic of the term is "deterioration or stagnation that negatively affects surrounding properties." Id. at 363.

The subject property is blighted within the meaning of the New Jersey Constitution and could have been acquired by CRDA for the public purpose of blight remediation. The New Jersey State Legislature has repeatedly, consistently, and plainly found Atlantic City to be an "area in need of redevelopment" for the last thirty-five years.

In 1976, when the New Jersey Constitution was amended to legalize casino gambling, the Legislature found that the City was in "a genuine crisis." Statement of Assemblyman Steven P.

Perskie, Public Hearing Before the Assembly State Government and Federal Relations Committee on ACR-126, April 14, 1975 at \*2. Its economy was in shambles and casino-based development was deemed necessary "in order to provide a responsible economic structure for the community." Id. The leaders of the Atlantic City community found that it was "impossible" to attract investment capital for housing projects and other development. Id. Gambling was introduced in an effort to revitalize the degraded city.

In 1977, the Legislature adopted the Casino Control Act and declared that Atlantic City was in a state of degradation and that "the restoration of Atlantic City as the Playground of the World and the major hospitality center of the Eastern United States is found to be a program of critical importance to the inhabitants of the State of New Jersey." Casino Control Act, L. 1977, c.110, §1, et seq. (N.J.S.A. 5:12-1, et seq.).

In 1984, the State Legislature created the Casino Reinvestment Development Authority to, among other things, "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." N.J.S.A. 5:12-160.

In 2001, the Legislature again recognized the need to "facilitate the revitalization of Atlantic City" when it passed the CRDA Urban Revitalization Act. N.J.S.A. 5:12-173.1.

Most recently, in 2011, the Legislature found and declared that it was essential to create a Tourism District in which CRDA would be charged with, among other things, engaging in redevelopment projects in order to revitalize Atlantic City's ailing gaming and tourism industries. See N.J. Gov Msg., 2011 S.B. 11/S.B.12 214<sup>th</sup> Legislature.

The determination is clear. On five separate occasions over the last thirty-five years, the New Jersey State Legislature has looked at Atlantic City, found it to be in need of redevelopment and passed legislation authorizing its redevelopment. The Defendants' assertion that something more is required of the State or CRDA is an attempt by the Defendants to side-step the political process and rewrite the law through the courts.

**V. THE TRIAL COURT'S RULING ON THE ORDER TO SHOW CAUSE WAS CORRECT BECAUSE NECESSITY IS NOT REQUIRED**

CRDA is acquiring the subject property for a statutory purpose. As a result, the "necessity" of the subject property to the Project is beyond the Court's review.

In New Jersey, judicial inquiry into the necessity of the taking of a specific property is rare:

The cases and authorities are in agreement that in condemnation proceedings the quantity of land to be taken, its location and the time of taking are within the discretion of the body endowed by the Legislature with the right of eminent domain. . . . The amount and extent of the taking is left to the discretion of the legislative agent and it will not be interfered with by the courts when it is exercised in good faith.

Burnett v. Abbott, 14 N.J. 291, 294-95 (1954) (internal citations omitted); see also Kelo, 545 U.S. at 488-89 (quoting Berman, 348 U.S. at 35-36); Shoemaker v. United States, 147 U.S. 282, 298 (1893); 769 Assocs., L.L.C., 172 N.J. at 571; City of Newark v. New Jersey Tpk. Auth., 7 N.J. 377, 385 (1951); Mount Laurel Twp. v. Mipro Homes, L.L.C., 379 N.J. Super. 358, 377 (App. Div. 2005); aff'd 188 N.J. 531 (2006), cert. denied 552 U.S. 940 (2007); Borough of Essex Fells v. Kessler Inst. for Rehab., Inc., 289 N.J. Super. 329, 337 (Law Div. 1995); New Jersey Highway Auth. v. Currie, 35 N.J. Super. 525, 532-34 (App. Div. 1955). Accordingly,

[t]he court only interferes where there is a plain case of abuse of discretion in the exercise of the power of eminent domain in excess of the public use upon which it is bottomed in a particular instance.

Burnett, 14 N.J. at 294-95. Moreover, when a condemning agency acquires property for a statutory purpose, that acquisition cannot be held to be an abuse of discretion. Currie, 635 N.J. Super. at 532-33 ("[T]he acquisition of land for purposes

authorized by statute cannot be held to be an abuse of discretion.").

Here, CRDA is plainly acquiring the Property for a statutory purpose. The Legislature expressly directed CRDA to create a Tourism District. See N.J.S.A. 5:12-218 et seq. The Legislature set the boundaries of that district and the Legislature chose to include the subject Property within it. See N.J.S.A. 5:12-219. Accordingly, because CRDA is acquiring the subject Property for the purposes set forth in the Tourism District Act, the necessity of the Property to the Project is beyond the Court's review. To the extent the Defendants disagree with the New Jersey Legislature's determination that a Tourism District be created, the Defendants must either challenge the Tourism District Act on its face or proceed through normal political channels to change the law.

The Defendants make several attempts to distract the Court from this plain and unambiguous issue of law by mischaracterizing the holdings of relevant New Jersey case law. See Essex Cnty. v. Hindenlang, 35 N.J. Super. 479, 492 (App. Div. 1955) (rejecting the condemnees' argument that the condemnor was required to prove as "an essential element of its case" that the taking of the subject property for a parking space was "necessary"); Currie, 635 N.J. Super. at 533-34. In

Currie, the Court held that the inclusion of the word "necessary" in the Highway Authority's enabling statute endowed the Authority with the discretionary power "to acquire such property for projects as it deems necessary." Currie, 635 N.J. Super. at 533-34. The Defendants' argument is thus completely invalid and the Defendants' reliance on Hindenlang and Currie is misplaced.

The foreign cases relied upon by the Defendants are similarly inapplicable and mischaracterized by the Defendants. New Jersey has its own distinct law regarding necessity and there is therefore no need for the Court to look to the decisions of these foreign courts. Furthermore, these cases all arise under substantially different facts and hail from jurisdictions which employ laws and standards that are substantially different from New Jersey. Critically, New Jersey has not enacted legislation which specifically requires condemnors to demonstrate "necessity" in their initial pleadings.

**VI. THE TRIAL COURT'S RULING ON THE ORDER TO SHOW CAUSE WAS CORRECT BECAUSE THE PROJECT HAS A VALID PUBLIC PURPOSE**

The State of New Jersey, here acting through CRDA, inherently possesses broad power to exercise eminent domain. See Valentine v. Lamont, 25 N.J. Super. 342, 347 (App. Div. 1953) aff'd, 13 N.J. 569 (1953). The public purpose requirement

set forth in the State and Federal Constitutions is a limit on this broad sovereign power. See N.J. Const. art. I, ¶ 20; U.S. Const. Amend. V. Along with the due process and just compensation requirements, the public purpose requirement tempers what is otherwise an unlimited governmental power.<sup>3</sup> "Public purpose," however, is not restricted to a limited set of traditional public uses such as roadways, parks, schools, and airports.<sup>4</sup> Rather, a valid public purpose exists in any instance

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<sup>3</sup>Our founders drafted these constitutional provisions to curtail the unlimited power of eminent domain possessed by the King of England. See Valentine v. Lamont, 25 N.J. Super. 342, 347 (App. Div. 1953), aff'd, 13 N.J. 569 (1953) ("The power of eminent domain does not require recognition by constitutional provision; it is primarily an absolute and unlimited power, and theoretically exists in this form in the ultimate source of authority in every organized society. . . . Accordingly, positive assertion of limitations upon the power is required.").

<sup>4</sup>See Kelo v. City of New London, Conn., 545 U.S. 469, 480 (2005) ("Without exception, our cases have defined [the concept of 'public purpose'] broadly, reflecting our longstanding policy of deference to legislative judgments in this field; Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984) ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers."); Berman v. Parker, 348 U.S. 26, 32 (1954) ("An attempt to define [the police power's] reach or trace its outer limits is fruitless, for each case must turn on its own facts. . . . Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."); Twp. of W. Orange v. 769 Associates, L.L.C., 172 N.J. 564, 573 (2002) ("[A] 'public use' is anything that tends to enlarge resources, increase the industrial energies, and manifestly contributes to the general welfare and the prosperity of the whole community"); City of Trenton v. Lenzner, 16 N.J. 465, 470 (1954) ("What constitutes a proper use



in which the government seeks to fulfill a legitimate government undertaking.<sup>5</sup> For example, the following are among the nearly innumerable public purposes recognized in other jurisdictions:

CASE	VALID PUBLIC PURPOSE
<u>Esposito v. South Carolina Coastal Council,</u> 939 F.2d 165 (4 <sup>th</sup> Cir. 1991)	Promotion of tourism and the protection, preservation, restoration and enhancement of the beach/dune system is a valid public purpose.
<u>State v. Daytona Beach Racing &amp; Recreational Facilities Dist.,</u> 89 So. 2d 34 (Fla. 1956)	Promotion of tourism and entertainment and the provision of public recreational use is a valid public purpose justifying the construction of a racetrack and stadium.
<u>Town of Vidalia v. Unopened Succession of Ruffin,</u> 63 So. 2d 315 (La. App. 3 Cir. 1995)	Creation of a "Riverfront Development Project" was a permissible public use where the site was intended to be devoted to historical, educational, recreational, and other public uses and the Project would stimulate economic growth and contribute to the general welfare and prosperity of community.
<u>Kaufmann's Carousel, Inc. v. City of Syracuse Indus. Dev. Agency,</u> 750 N.Y.S.2d 212 (2002)	Promoting tourism, advancing job opportunities, advancing the general prosperity and public welfare of the People of the State of New York and the City of Syracuse, and advancing economic development are all valid purposes which justified the expansion of a mall.

will depend largely on the social needs of the times and may change from generation to generation.").

<sup>5</sup> Id.

<u>McQ's Enters. v. Phila. Parking Auth.,</u> CIV. A. 07-0067, 2007 WL 127728 (E.D. Pa. Jan. 11, 2007) (unreported)	Promotion of hospitality and tourism in Philadelphia was a valid public purpose justifying the requirement that taxi-drivers install a coordinated dispatch system in their cabs.
<u>Wes Outdoor Adver. Co. v. Goldberg,</u> 55 N.J. 347 (1970)	Restoration, preservation and enhancement of scenic beauty was a valid public use for the public welfare and accordingly justified the acquisition of lands for highway beautification.
<u>Ruckelshaus v. Monsanto Co.,</u> 467 U.S. 986 (1984)	Elimination of a significant barrier to entry in the pesticide market by sparing applicants the cost of time-consuming research and enhancement of competition in an industry are valid public purposes.
<u>Hawaii Housing Authority v. Midkiff,</u> 467 U.S. 229 (1984)	Elimination of the "social and economic evils of a land oligopoly" and the correction of market failures are valid public purposes.
<u>Dolan v. City of Tigard,</u> 512 U.S. 374 (1994)	Prevention of flooding and the reduction of traffic congestion in a crowded business district were deemed to be a valid public use.
<u>Old Dominion Land Co. v. United States,</u> 269 U.S. 55 (1925)	Preservation of military buildings is a valid public purpose.
<u>United States v. Gettysburg E.R. Co.,</u> 160 U.S. 668 (1896)	Preservation of the Gettysburg Battlefield as one of the nation's most historic battlefields for posterity was deemed to be beyond doubt a public use.
<u>Carole Media LLC v. New Jersey Transit Corp.,</u> 550 F.3d 302 (3d Cir. 2008)	Elimination of contracts that were believed to have been awarded as a result of corruption is a valid public purpose justifying New Jersey Transit's condemnation of billboard leases.

<u>Dahlen v. Shelter House</u> , 598 F.3d 1007 (8th Cir. 2010)	Building of a homeless center clearly served a valid public purpose.
<u>Casitas Mun. Water Dist. v. United States</u> , 543 F.3d 1276 (Fed Cir. 2008)	Preservation of the habitat of an endangered species (the West Coast Steelhead Trout) was a valid purpose justifying the diversion of water.
<u>Enclave Arlington Assocs. Ltd. P'ship v. City of Arlington</u> , 669 F. Supp. 2d 735 (N.D. Tex. 2009)	Regulation of pedestrian and vehicular traffic over public roads near the Dallas Cowboys' stadium on the day of an event was a valid public purpose.
<u>City of Oakland v. Oakland Raiders</u> , 183 Cal. Rptr. 673 (1982)	Promotion of recreation of the public is a valid public purpose justifying the City's condemnation of professional sports franchise (the Oakland Raiders) to prevent the team from moving.
<u>Finks v. Me. State Highway Com.</u> , 328 A.2d 791 (Me. 1974)	Preserving, restoring, and enhancing the scenic beauty adjacent to highways is a valid public use.
<u>Cascott, L.L.C. v. City of Arlington</u> , 278 S.W.3d 523, 529 (Tex. App. 2009)	Finding that the construction of and public ownership of a football stadium was a valid public purpose.

The public purpose at issue here is the support of New Jersey's ailing gaming and tourism industries through the creation of a tourism district that will foster those industries, along with the jobs and revenue that they bring into the State. See New Jersey Governor's Message, 2011 S.B. 11/S.B. 12 ("Governor Chris Christie signed into law sweeping

legislation to enact his reform plans to revitalize the ailing gaming and tourism industries in Atlantic City, and set the region on a new course for economic growth, job creation and prosperity. . . . The bills signed by Governor Christie today, will set the stage for Atlantic City to once again be a world-class destination resort and an engine of job creation and economic growth. S-11 authorizes the creation of a tourism district within Atlantic City, with the charge of improving public safety, public health, marketing and infrastructure projects and improvements; S-12 provides for the reform and modernization of New Jersey's casino regulatory structure.”)

As the Trial Court correctly found, this purpose is undoubtedly a legitimate public purpose. The State has an inherent interest, if not an absolute obligation, to protect revenues and job growth, particularly in an era of economic uncertainty and an environment where increased competition from New York and Pennsylvania casinos threatens the very existence of Atlantic City. See Esposito v. South Carolina Coastal Council, 939 F.2d 165, 169 (4th Cir. 1991); McQ's Enters. v. Phila. Parking Auth., A05-1239, 2006 WL 1229521, at \*6 (Minn. Ct. App. May 9, 2006) (unreported); State v. Daytona Beach Racing & Recreational Facilities Dist., 89 So. 2d 34, 37 (Fla. 1956); Kaufmann's Carousel, Inc. v. City of Syracuse Indus. Dev.

Agency, 750 N.Y.S.2d 212, 215 (App. Div. 4<sup>th</sup> Dept. 2002); Town of Vidalia v. Unopened Succession of Ruffin, 63 So. 2d 315, 319 (La. App. 3 Cir. 1995).

Moreover, courts generally defer to the Legislature's determination of what constitutes a valid public purpose and will interfere only where that determination is arbitrary, unreasonable or capricious. Kelo, 545 U.S. at 480 ("Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field."); Midkiff, 467 U.S. at 243 ("Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. State legislatures are as capable as Congress of making such determinations within their respective spheres of authority."); Berman, 348 U.S. at 32 ("[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . . The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."). Given this stringent standard, courts decline to question legislative determinations. "[I]t is the province of

the Legislature to shape the contours of the 'public use' requirement." Twp. of W. Orange v. 769 Assocs., LLC, 172 N.J. 564, 572 (2002) (citing and quoting Burnett v. Abbott, 14 N.J. 291, 294 (1954), and City of Trenton v. Lenzner, 16 N.J. 465, 473 (1954)). Once the Legislature has spoken, "the public interest has been declared in terms well-nigh conclusive. In such cases the Legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating . . . or the States legislating concerning local affairs. Berman v. Parker, 348 U.S. 26, 32 (1954), accord Kelo v. City of New London, 545 U.S. 469, 519 (2005).

The Legislature could not have spoken more clearly when it passed the Tourism District Act. In so doing, the Legislature determined that it was the public policy of the State of New Jersey to preserve and protect the Atlantic City tourism industry through the creation of a tourism district. The Legislature selected CRDA as the legislative agent responsible for carrying out this task.

Because CRDA is acting pursuant to this direct legislative mandate, the Trial Court correctly found that a valid public purpose exists. The Trial Court could have only found otherwise if it struck down CRDA's enabling statute and the Tourism Act as

unconstitutional -- a result which would have granted relief not sought by the Defendants and overturned decades of precedent upholding that power in hundreds of CRDA condemnation actions.

**VII. THE PROJECT SATISFIES THE PLANNING REQUIREMENTS SET FORTH IN KELO**

As explained by CRDA's executive director during the evidentiary hearing, CRDA retained planning consultants and employed its own planning team to outline the contours of the Project. CRDA also consulted with the Urban Land Institute and hired a private architectural firm to develop massing plans for the Project. More importantly, the Project is part of the overall planning process for the Tourism District that was established by the Legislature and adopted by CRDA in the Tourism District Master Plan. There is simply no factual support for Defendant's contention that the Project lacks planning.

**CONCLUSION**

The Court should uphold the trial court's November 17, 2014 judgment authorizing condemnation and reverse the trial court's August 5, 2016 judgment denying the right to condemn.

CRDA complied with all of the statutory and constitutional limitations imposed upon condemners in the State of New Jersey. It acted at all times within its express legislative mandate and did not engage in any of the fraud or abuse that would justify the exceptional remedy of judicial intervention.

The trial court's imposition of this novel "assurances" requirement creates an impossible-to-meet standard that fails to recognize the complexities of long term, strategic redevelopment in challenging urban environments.

Respectfully submitted,  
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